THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2015

EDITOR
RAKESH KAINTHLA
Director,
H.P. Judicial Academy,
Shimla.

ASSISTANT EDITOR
HANS RAJ
Joint Director,
H.P. Judicial Academy,
Shimla.

December, 2015

Vol. XLV (VI)

Pages: HC 482 TO 1362

Mode of Citation : I L R 2015 (VI) HP 1

Containing cases decided by the High Court of

Himachal Pradesh and by the Supreme Court of India

And

Acts, Rules and Notifications.

PUBLISHED UNDER THE AUTHORITY OF THE GOVERNMENT OF HIMACHAL PRADESH , BY THE CONTROLLER, PRINTING AND STATIONERY DEPARTMENT, HIMACHAL PRADESH, SHIMLA-5.

INDIAN LAW REPORTS

HIMACHAL SERIES

(December, 2015)

INDEX

Nominal table
I L R 2015 (VI) HP 1

****

SUBJECT INDEX

'A'

'C'

Code of Civil Procedure, 1908- Order 8 Rule 1- The defendant failed to file the written statement within 90 days of the service of the summons and the trial court closed the right to file the written statement- held that the defendant could not approach their Advocate due to heavy snowfall in Churah valley and the written statement could not be filed within the stipulated period- in these exceptional circumstances the time to file written statement could have been extended - petition allowed and the petitioners permitted to file written statement within three weeks. Title: Gandhru and others Vs. Hanifa Page-501

Code of Civil Procedure, 1908- Order 9 Rule 7- An eviction petition was filed before the Rent Controller – notice of the petition was served on the tenant but he did not appear, therefore, he was proceeded ex parte- tenant subsequently filed an application for setting aside the ex-parte order stating that he had gone to Jammu & Kashmir – notice was delivered to him and it was impossible for him to appear on the date fixed- he remained under bona fide belief that fresh summons will be sent, but when no fresh summons received, he made an inquiry and came to know that he was proceeded ex parte- name of his father was also wrongly mentioned in the notice- application was dismissed by the Court on the ground that explanation furnished by the tenant was false- held, that Courts have wide discretion in deciding the "sufficient cause" keeping in view the peculiar facts and circumstances of each case – when the defendant approaches the Court immediately, the discretion is normally to be exercised in his favour- the fact that application was moved immediately shows that intention of the tenant was not to prolong the proceedings- petition allowed subject to the payment of cost of Rs. 25,000/-. Title: Abdul Rasheed Paddar Vs. Pramod Sood Page-905

Code of Civil Procedure, 1908- Order 18- With the consent of the parties order passed by Rent Controller set aside and one opportunity granted to cross examine PW-5 subject to payment of cost. Title: Raman Jain Vs. Raj Kumar Mehra & another Page-597

Code of Civil Procedure, 1908- Order 21- A decree was passed that defendant will file an affidavit along with tatima showing the land which he is offering to the plaintiff and in case defendant failed to file the affidavit, suit of the plaintiff shall be deemed to have been decreed for possession- decree holder filed an execution petition which was dismissed- however, an opportunity was given to the defendant to comply with the decree- defendant did not comply with the decree on which an order was passed to issue warrant of possession- defendant pleaded that land which was being offered was under charge with the bank which was vacated on 20.1.2014- requests were made to the plaintiff to accept the land which was not accepted- held, that sufficient opportunities had been granted to the defendant for complying with the decree by offering the land which was not complied with- therefore, trial Court had rightly ordered the issuance of warrant of possession as per decree- petition dismissed. Title: Jagdish Singh & another Vs. Gurmeet Singh Page-654

Code of Civil Procedure, 1908- Order 21 Rule 11- Petitioner sought direction to the respondent to comply with the judgment- respondent had passed an order which shows that respondents have complied with the directions passed by the Court and had granted the work charge status to the petitioner since 1.1.1997- it was further mentioned in the order that services of the petitioner were regularized against the post of Forest Worker on and w.e.f. 14.7.1999- petitioner approached the Court for the first time in the year 2013 - the arrears can be restricted for three years prior to filing of the writ petition- thus, respondents have complied with the direction passed by the Court- petition dismissed. Title: Sita Ram Vs. State of H.P. and others (D.B.) Page-

Code of Civil Procedure, 1908- Order 22- Devta Trijugi Narain Ji was owning lands in Kothi Bhallan- father of the defendant was Kardar who had executed a permanent lease in favour of his sons- devta filed a suit through next friend challenging the lease deed- suit was decreed by the trial Court- an appeal was preferred against the decree- an application was filed in the appeal pleading that next friend had died and the suit had abated in its entirety – application was opposed on the ground that suit was filed by deity and the death of the representative will have no effect- application was dismissed on the ground that deity is a juristic person and the suit will not abate on failure to bring his LRs on record- held, that Devta is treated as a juristic person – suit instituted on behalf of juristic person will not abate on the death of the representative- Court had rightly dismissed the application. -7 to Title: Purshotam Ram & ors. Vs. Devta Trijugi Narain & ors. Page-793

Code of Civil Procedure, 1908- Order 23- Parties have entered into a lawful compromise-therefore; order passed by Rent Controller is modified as per compromise which shall form part of the order. Title: Anil Kumar & another Vs. Satpal Sharma Page-484

Code of Civil Procedure, 1908- Order 23 Rule 1- Parties had entered into a compromise-revision disposed of with the directions that orders of Rent Controller and Appellate Authority shall stand modified in accordance with the compromise entered between the parties. Title: Kanta Devi W/o late Sh. Jagat Ram & another Vs. Neelam Kashyap W/o late Sh. N.P. Kashyap & others Page-821

Code of Civil Procedure, 1908- Order 23- Section 151- Petitioner sought permission to withdraw the civil suit unconditionally- no objection was raised to this prayer- hence, civil suit was permitted to be withdrawn and was dismissed as withdrawn. Title: Nikhil Bhagra S/o Sh. Ravi Bhagra & another Vs. Rattan Chand S/o late Sh. Bhagat Ram Page-669

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff had filed a suit for possession- he filed an application for appointment of Local Commissioner to demarcate the land at the stage of argument- demarcation had already been carried out at the instance of the plaintiff and the report was exhibited on the record- held, that object of local investigation is not to collect evidence, but to obtain such material, which can be had only at the spot- application for appointment cannot be allowed merely on the ground that no prejudice would be caused to the other side or the expenses for the commissions are going to be borne by the plaintiff-in the present case, land was demarcated twice and plaintiff had relied upon the reports of those demarcation- submission of the defendant that appointment of local commissioner would amount to collection of evidence on behalf of the plaintiff and rewarding the plaintiff for negligence or inaction to prove the facts alleged in the plaint is sustainable- revision accepted and the application dismissed. Title: Mast Ram Vs. Nand Lal Page-660

Code of Civil Procedure, 1908- Order 41- A civil appeal restored to original position with the consent of the parties subject to the cost of Rs.1500/-. Title: Nirmla Devi & another Vs. Bhag Singh & others Page-482

Code of Criminal Procedure, 1973- Section 197- **Prevention of Corruption Act, 1988-** Section 19- The file was sent to the Governor for seeking prosecution sanction- Governor made observation that prosecution sanction was not required- subsequently, a representation was made by Ex Chief Minister on which the Governor denied prosecution sanction- held, that in the earlier order Governor had observed that prosecution sanction

was not required- however, subsequently, a specific decision declining the prosecution sanction was taken- the second order was not review of the first and it was in accordance with the law. Title: Prem Kumar Dhumal Vs. State of Himachal Pradesh Page-670

Code of Criminal Procedure, 1973- Section 378- Accused was apprehended by the police party while carrying a bag on his left shoulder -1.300 kilgrams of cannabis was found in the bag on search – accused was acquitted by the trial Court- in appeal held, that although official witnesses have spoken consistently yet PWs have failed to connect the case property with the case as the abstract of malkhana register regarding retrieval of case property from malkhana to Court and back was not proved and witnesses had also not stated categorically about this fact – appreciation of evidence by trial Court does not suffer from any infirmity- appeal dismissed. Title: State of H.P. Vs. Mohan Singh (D.B.) Page-986

Code of Criminal Procedure, 1973- Section 378- Deceased and two other women were walking on the road, when a Truck loaded with wooden plank arrived at the spot- a wooden plank flew from the truck and fell on the deceased who died during treatment- an FIR was registered against the accused for the commission of offences punishable under sections 279, 337 and 304-A of IPC – on trial accused was acquitted by the Magistrate- in appeal held that, the witnesses have deposed that the wooden plank fell on the deceased accidently and not due to rashness and negligence of the accused- acquittal by the Magistrate proper- appeal dismissed. Title: State of H.P. Vs. Kulbir Singh alias Billa Page-806

Code of Criminal Procedure, 1973- Section 378- **N.D.P.S. Act, 1985-** Sections 20 and 29- Police party intercepted a car- a search was conducted during which 1.5 kg. of charas was recovered- accused were acquitted after trial- independent witnesses were not examined- however, there was no evidence that police officials had hostile animus against accused- criminals dealing with NDPS are spoiling the career of youths for personal commercial benefit - meticulous examination of oral as well as documentary evidence is essential- hence, leave to appeal granted and notice issued to the accused. Title: State of Himachal Pradesh Vs. Mohammad Babu son of Shri Mohammad Sharif and another (D.B.) Page-983

Code of Criminal Procedure, 1973- Section 378- **N.D.P.S. Act, 1985-** Section 20- Police party conducted the search of the accused who was travelling in the bus- 1.150 kg. of charas was recovered from the bag being carried by him- he was acquitted on the ground that independent witnesses had not supported the prosecution version- two views had emerged relating to the recovery and when two views are available on record, the trial Court had rightly acquitted the accused- hence, leave to appeal refused. Title: State of Himachal Pradesh Vs. Kamaljeet son of Shri Jai Pal Singh (D.B.) Page-980

Code of Criminal Procedure, 1973- Section 378(3)- 500 grams charas was recovered from the vehicle of the accused- accused was acquitted by the trial Court on the ground that two views were possible- held, that where two views are appearing on the record, the one in favour of the accused has to be preferred- there were material improvements and contradictions due to which testimonies of police officials had become doubtful- thus, it would not be expedient to grant leave to appeal- application dismissed. Title: State of Himachal Pradesh Vs. Laiq Ram son of Shri Bhim Dutt & others (D.B.) Page-556

Code of Criminal Procedure, 1973- Section 379 and 410- **Drugs and Cosmetics Act, 1940-** Sections 18(a)(i) and 27(d)- Drug samples were taken which were not found to be of

standard quality – trial Court summoned the accused- petitioner filed the revision against the order passed by the trial Court- it was specifically mentioned in the complaint that co-accused No.1 to 12 are responsible for the functioning of the firm which had manufactured the drugs- this plea is sufficient to summon the accused- mere fact that licence was suspended will not absolve the firm of the criminal liability as suspension is an administrative act- at the time of summoning of the accused, Court is to see whether there are sufficient ground to proceed-the complicated questions of law and fact are to be decided by the Court during the trial- petition dismissed. Title: Jawahar Singh Vs. State of H.P. Page-1222

Code of Criminal Procedure, 1973- Section 401- Matter has been compromised- an amount of Rs.50,000/- paid to non-revisionist- hence, sentence of imprisonment imposed by the trial Court as affirmed by Appellate Court set aside. Title: Krishan Lal S/o Sadhu Ram Vs. Golf Link Finance and Resorts Pvt. Ltd. Page-566

Code of Criminal Procedure, 1973- Section 432 and 433- Petitioner was convicted of the commission of offences punishable under Sections 376 and 302 of IPC and was sentenced to undergo imprisonment for life- he has completed 27 years 9 months and 29 days in jail- he applied for remission, but his claim was rejected- held, that a person does not get right to be released after completion of 14 years of imprisonment- his case is to be considered by the State Government – petitioner had jumped the parole and had committed other penal misdemeanors inside and outside the Jail, which weighed with the State for rejection of his claim- held that the authorities had applied the mind to the relevant material and the rejection of the claim was proper- petition dismissed. Title: Ramesh Kumar Vs. State of H.P. and Ors. (D.B.) Page-

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 354 and 451 of IPC and Section 8 of Protection of Children from Sexual Offences Act, 2012 – accused had sexually assaulted minor prosecutrix- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- allegations against the petitioner are serious- Courts are under legal obligation to protect the interest of minor- assault upon minor girl is most hated crime and violates the right to life- petitioner would threaten the witnesses in case of release on bail- petition dismissed. Title: Sachin son of Shri Vinod Verma Vs. State of H.P. Page-576

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 395, 307, 323, 324, 326 read with Section 34 Indian Penal Code-petitioner is facing trial for more than two years and is still in judicial custody- previous application for bail was rejected with the direction to the trial Court to conclude the trial on or before 30th September, 2015- the direction was not complied by the trial Court and in comments being called, the reason disclosed was that the defence Counsel had not agreed to the dates suggested by the trial Court- held, that petitioner is in custody for more than two years and though, he is a resident of Punjab State yet can be released on bail on imposing certain conditions- petition allowed. Title: Gulshan Kumar vs. State of H.P. Page-725

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 302 read with Section 34 of Indian Penal Code, 1860- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- there is a special provision in case of women, minors and infirm persons even in heinous criminal offences- trial will conclude in due course of time- therefore, petitioner ordered to be released on bail in the sum of Rs.1 lac with two sureties. Title: Nirmala Devi widow of Sh. Bhag Singh Vs. State of H.P. Page-1010

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 302 and 498A read with Section 34 IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- women and children are entitled to special treatment while considering the bail application- since applicant is a woman, hence bail application allowed and applicant ordered to be released on bail on furnishing personal bond in the sum of Rs. 1,00,000/- with two sureties in the like amount. Title: Maya Devi wife of Sh Karam Chand Vs. State of Himachal Pradesh Page-1311

Code of Criminal Procedure, 1973- Section 439- Learned Counsel submits that petition be disposed of with the direction to the trial Court to dispose of the trial expeditiously- held, that accused has a right to expeditious disposal of his case especially when accused is in custody since 25.10.2014- hence, direction issued to dispose of the case within 3 months. Title: Ramesh Kumar @ Rangil Singh Vs. State of H.P. Page-483

Code of Criminal Procedure, 1973- Section 439- Petition dismissed as withdrawn with a direction to complete the trial within four months, keeping in view the fact that accused is in judicial custody since 27.9.2015. Title: Anil Khan, son of Sh. Manir Khan Vs. State of H.P. Page-961

Code of Criminal Procedure, 1973- Section 439- Petitioner is in judicial custody since 2014- statements of prosecution witnesses except investigating officer have been recorded - case is pending since 2014 and the accused is in judicial custody- therefore, direction issued to the trial Court to dispose of the case within four weeks. Title: Hukam Singh alias Hukma Vs. State of H.P. Page-482

Code of Criminal Procedure, 1973- Section 482- A was working as DIG who sought voluntary retirement from the service by submitting an application w.e.f. 21.12.2007- he sent communication to Principal Secretary (Home) on 18.10.2007 for waiving off compulsory period of 3 months to 2 months and sought retirement from 21.11.2007- he filed an application on 20.11.2007 withdrawing his prayer for voluntary retirement- he was voluntarily retired w.e.f. 21.11.1007- he filed original application before Central Administrative Tribunal who directed the parties to maintain status quo- he filed fresh representation for review of the earlier order, on which C.M. made the remarks “His withdrawal which appears to be in order, may be accepted, as it fulfills the statutory

requirements" – A was also afforded personal hearing- ultimately, A was permitted to withdraw his prayer for voluntary retirement and he retired on 30.11.2011 on attaining the age of superannuation – subsequently, FIR was registered against the C.M., Chief Secretary, Principal Secretary (Home) and A for the commission of offences punishable under Sections 420 and 120-B of IPC and Section 13(2) of Prevention of Corruption Act- held, that a member of the service can retire from the service after the completion of 30 years or attaining 50 years of age by giving three months previous notice in writing- he can withdraw the notice after it has been accepted by State Government only with the approval of the State Government provided that withdrawal is made before the expiry of the period of notice- in the present case, the notice was withdrawn prior of date of retirement - Principal Secretary (Home), Chief Secretary, Chief Minister had acted in accordance with rules- no pecuniary advantage was derived by them- no case for the commission of any offence was made out- hence, FIR ordered to be quashed. Title: Prem Kumar Dhumal Vs. State of Himachal Pradesh Page-670

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition for quashing of FIR under Sections 307, 392, 506, 323, 325 and 34 of Indian Penal Code pleading that parties have entered into a compromise and, matter be settled to keep harmonious relations between the parties - held, that FIR discloses commission of heinous offences- mere settlement between the parties will not be a ground to quash the proceedings- further held, that the jurisdiction under Section 482 of Cr.P.C should not be exercised to stifle a legitimate prosecution. Title: Sanjay Kalyani son of Shri Naresh Kumar & another Vs. State of H.P. and another Page-801

Constitution of India, 1950- Article 226- petitioner appeared in interview for the post of Jal Rakshak and was recommended for appointment- corrigendum was issued on the ground that there was clerical mistake in the date of birth of the petitioner- respondent No.4 who was next in the merit was ordered to be appointed in place of the petitioner- petitioner challenged the order by filing writ petition- held, that petitioner had not challenged the selection criteria- he has also not contested the fact regarding the mistake of his age- petitioner would get less marks than the respondent No. 4 on correction of date of birth- therefore, his appointment was rightly cancelled. Title: Vijay Kumar Vs. State of Himachal Pradesh and others Page-723

Constitution of India, 1950- Article 226- Appellant was transferred from one station to another station by the Department but he proceeded on medical leave and thereafter on earned leave and did not join- subsequently Government cancelled the transfer- appellant had to return to the station from where he was transferred- appellant joined the station but did not hand over the charge as required under Service Rules- he handed over the charge after a huge delay- ACR of the appellant contained the remarks 'lazy and delays' which were communicated to the appellant-feeling aggrieved, appellant filed Writ Petition, which was dismissed by the Writ Court- in appeal held, that since appellant had not handed over the charge for considerable long period- therefore, remarks 'lazy and delays' were rightly recorded in his ACRs- further held, that Court cannot sit as Court of appeal to reassess the ACRs recorded by Officer concerned- Writ Court had rightly recorded the findings- appeal dismissed. Title: Tulsi Ram Bhatia Vs. State of H.P. and others (D.B.) Page-766

Constitution of India, 1950- Article 226- Appellants challenged the order of the writ court whereby the services of the respondent were ordered to be regularized as he fulfilled all the conditions-held that the respondent has worked for 240 days in a year for 8 years and the

right to be considered for the regularization had accrued to him and the writ Court has rightly rendered the directions for the regularization of the respondent- Appeal dismissed. Title: State of H.P. & Ors. Vs. Gian Singh Page-598

Constitution of India, 1950- Article 226- Central Administrative Tribunal had directed the Examiner to re-look into the attempted Question No. 2(b)- the examiner to examine the matter independently and take whatever view he wanted in the contest of the grievance raised by the applicant- Tribunal had refused to quantify the marks awardable for the attempted answer- held, that order is legal and speaking order and does not suffer from any infirmity- petition dismissed. Title: Union of India & others Vs. Roshan Lal (D.B.) Page-995

Constitution of India, 1950- Article 226- Father of the petitioner was working as Junior Engineer in HPPWD- he died while in service- petitioner filed an application for appointment on compassionate ground, which was rejected on the ground that family income of the petitioner exceeds the ceiling fixed by Government- held, that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate grounds- there is no maximum income slab provided in the scheme- therefore, claim for compassionate appointment cannot be rejected on that ground- petition allowed- respondent directed to examine the case of the petitioner and to pass an appropriate order within six weeks. Title: Naresh Kumar Vs. State of H.P. and others (D.B.) Page-1006

Constitution of India, 1950- Article 226- Father of the petitioner was an ex serviceman - he expired on 11.5.1982- a truck registered in the name of mother of the petitioner was attached by non-petitioner Corporation as per HP Ex-servicemen Corporation Act 1979- mother of petitioner expired and permission was granted to transfer truck in the name of petitioner- however, this permission was cancelled subsequently- respondent pleaded that they had acted in accordance with the direction issued by Division Bench of High Court of H.P.- High Court had issued 15 directions to ensure that bye-laws and rules of Corporation are amended as per order of Division Bench High Court of HP- it was specifically held that after the death of widow, the slot was to be given on the basis of seniority – right was not given to the major children of Ex-serviceman- no appeal was preferred- order had attained finality - in view of order of Hon'ble High Court of H.P. direction cannot be issued to the respondent to ply truck with H.P. Ex-serviceman Corporation. Title: Chamel Singh S/o Late Garja Ram Vs. State of H.P and others Page- 1307

Constitution of India, 1950- Article 226- **H.P. Judicial Services Rules, 2004-** Rules 14 and 15- Writ petitioner was retired compulsorily on attaining the age of 58 years, whereas, his date of retirement is shown to be 60 years in the gradation list- he filed a writ petition which was allowed- an appeal was preferred against the order of the writ Court- High Court had considered the service record of the petitioner and had decided not to grant him extension after 58 years- the benefit of increase in the retirement age to 60 years shall not be available automatically to all judicial officers and will depend upon their continued utility to the judicial system in case of their continuation- order was rightly passed by the High Court. Title: High Court of Himachal Pradesh Vs. P.D. Goel (D.B.) Page-1334

Constitution of India, 1950- Article 226- **Industrial Dispute Act, 1947-** Section 10- Petitioner sought a reference regarding his retrenchment from the service after the delay of 16 years- Joint Labour Commissioner refused to make a reference on the ground of delay-

held, that although no limitation has been provided for making reference to labour court but where the reference is made after inordinate delay, the Authorized Officer can decline to make the reference on the ground of delay, when there is no explanation for the same- workman had not given any satisfactory explanation for the delay, therefore, competent authority had rightly declined to make the reference on the ground of delay- writ petition dismissed. Title: Amin Chand Vs. State of H.P. and Ors. Page- 485

Constitution of India, 1950- Article 226- Matter qua the encroachments made on the National Highway right from Kalka to Shimla and raising of the construction on both sides of the National Highway, particularly in and around Barog including the Bye pass- Deputy Commissioners, Shimla and Solan, directed to provide all requisite information and documents to the concerned respondents enabling them to submit report- status reports to be filed by all concerned respondents on next date. Title: Court on its own motion Vs. State of H.P. & others CWPIL No. 15 of 2014 (D.B.) Page-758

Constitution of India, 1950- Article 226- NHPC entered into an agreement with State of Himachal Pradesh for execution of Hydro Electric Project on river Parbati- a scheme for resettlement and rehabilitation of project affected families was notified by Financial Commissioner-cum-Secretary Revenue- a list of eligible land oustees for providing employment in NHPC under Resettlement and Rehabilitation Plan Scheme was drawn in which name of petitioner was also included- however, no employment was provided to the petitioner- respondent pleaded that there is no recruitment in the category of skilled/semi-skilled/unskilled workmen and the employment would be provided as and when fresh recruitment would be undertaken- it was further pleaded that compensation for acquisition of the land has already been paid- an additional amount of Rs. 54,000/- was paid to the petitioner for falling in the category of landless person- the scheme specifically provided that employment would be provided in the category of skilled/semi-skilled/unskilled workmen subject to requisite qualification as and when any fresh recruitment is conducted- hence, General Manager, Parbati Hydro Electric Project directed to give first chance to the petitioner for appointment in the category of skilled/semi-skilled/unskilled workmen, as and when any fresh recruitment would be conducted. Title: Hari Dass son of Shri Fateh Chand Vs. State of H.P. through Chief Secretary & others Page-591

Constitution of India, 1950- Article 226- One of the followers made out a grievance of misconduct against the sitting Kardar of the temple - an inquiry was conducted by SDO (Civil) Kullu who found the allegation of misappropriation of property to be well founded- District Collector-cum-Deputy Commissioner Kullu removed him as the Kardar and directed initiation of process for the selection of new Kardar- an appeal was preferred- Divisional Commissioner Mandi revised the order – held, that order was not passed under the H.P. Land Revenue Act and no appeal was maintainable against the same- order passed by Divisional Commissioner set aside and State directed to initiate steps for appointing a new Kardar in accordance with law. Title: Mandir Committee (Adhoc),Mata Bhuvneshwari Jagannathi Temple Bekhali Vs. Chain Sukh & others Page-1209

Constitution of India, 1950- Article 226- Petitioner deals in marketing apple - respondent No. 3 has marketing yards at different places – one such yard was located in Rohru, space is being provided to the traders on their applications – petitioner applied for registration as a commission agent- registration was refused as the petitioner had refused to furnish the security of Rs. 25 lacs- petitioner filed a writ petition seeking the quashing of decision taken by Board in regarding the affixation of registration fees of licence- respondent stated that the

provision of furnishing security was made with a view of protect the interest of the farmer and growers- Section 39(2) of Himachal Pradesh Agricultural and Horticultural Produce Marketing (Development and Regulation) Act 2005 provides for obtaining security- the object of such provision is to protect the interest of the farmers and fruit growers- however, security has to be taken according to the capacity of the buyer – Board of Management had imposed the security of Rs. 25,000/- at flat rate upon all the traders- hence, direction issued to take into consideration to the capacity of the person applying for his registration as traders/commission agent. Title: Dinesh Kumar Vs. State of H.P and others Page-782

Constitution of India, 1950- Article 226- Petitioner filed a writ petition seeking mandamus directing the respondent to include his name in the electronic roll and to accept the nomination of the petitioner for Member Block Development committee- Rule 23 of the Himachal Pradesh Panchayati Raj (Election) Rules, 1994 provides that petitioner has to seek his remedy, not later than nine days, before the last date fixed for filing of nomination papers- since, petitioner had failed to do so- hence, Writ Petition dismissed. Title: Dhani Ram Vs. State of H.P and others D.B. Page-962

Constitution of India, 1950- Article 226- Petitioner had constructed a house at Kachighati- a large number of roadside denting and painting workshops have mushroomed in and around the house of the petitioner making it difficult for him and his family members to live peacefully- workshops emit noxious, toxic and hazardous substance - they generate noise pollution and cause nuisance – however, no action was being taken against them- held, that citizens have a fundamental right to a wholesome, clean and decent environment - right to life includes the right to a clean environment - citizens have a right to enjoy the property unfettered by interference except in accordance with law- the authorities had not taken action in accordance with regulatory provisions - workshops were registered under H.P. Shops and Commercial Establishments Act, 1969, when they could not have been registered- no action for causing pollution was taken- hence, direction issued to the respondents No.1 to 8 to ensure that no vehicle was parked near the premises of the petitioner – respondents further directed to regularly monitor the quality of air and noise levels- MC directed to take follow up action within a period of 6 months. Title: Deepak Gupta Vs. State of H.P. and others (D.B.) Page-1316

Constitution of India, 1950- Article 226- Petitioner had purchased a bus and was regularly plying the same- he could not ply it due to unhealthy competition and domestic problems – the bus remained parked and the petitioner was not in position to renew the documents and to pay the tax - penalty was imposed upon him- held, that allegation made by the petitioner that bus remained parked due to compelling circumstances was not denied specifically and is deemed to have been admitted- Competent Authority directed to consider the case of the petitioner in the light of the averments made by him. Title: Madan Mohan Sharma Vs. State of Himachal Pradesh and others (D.B.) Page-1353

Constitution of India, 1950- Article 226- Petitioner is a duly elected Mayor of M.C. Shimla- he has a locus standi to assail the order ignoring Shimla City and including Dharamshala City in the list of potential Smart Cities- he was also not invited in the meeting which finalized the list of Smart City- therefore, he has a personal interest as well- he had highlighted the question of great public interest and has filed the petition for the welfare of the people - the petition is genuine and is maintainable. Title: Sanjay Chauhan Vs. Union of India and others (D.B.) Page-1013

Constitution of India, 1950- Article 226- Petitioner is a registered company- show cause notice was issued to it as to why the Cenvat Credit be not recovered from it along with interest and Penal action under Cenvat Credit Rules, 2002 should not be taken against it- petitioner filed a reply but it was rejected and demand was confirmed- an appeal was preferred against this order - a settlement application was filed by the company in which an interim order was pronounced directing the company to furnish a revised application- company failed to file revised application on which a rejection order was passed- appeal was dismissed and the order was confirmed - company contended that Commissioner (Appeal) had no jurisdiction as the Settlement Commission was seized of a settlement application- order passed by Settlement Commission was wrong - held, that company had failed to comply with the order passed by Settlement Commission – Company had not acted with due diligence- there was no error on the part of Commission to reject the application- dispute was not alive before the Settlement Commissioner due to non-cooperation of the petitioner- therefore, Commissioner(Appeals) had jurisdiction to decide the appeal preferred before it- appeal dismissed. Title: M/s Valley Iron & Steel Company Ltd. Vs. Union of India & others (D.B.) Page-512

Constitution of India, 1950- Article 226- Petitioner No.1 had sold his truck to co-respondent No. 1 in the year 2010- however, society had not granted fresh token to respondent No. 1 – reference was made by him to Assistant Registrar Cooperative Societies which was allowed- it was held that society had not adopted proper procedure for expulsion of respondent No.1 – it was further held that society had adopted method of pick and choose while allotting new tokens to some members- society was directed to allot new token to respondent No.1- appeal and revision preferred by the society were dismissed- writ petition was filed in which Special Secretary (Cooperation) was directed to decide the case on merits who upheld the order of Assistant Registrar Cooperative Society- bye-laws of the society do not provide that member would be deemed to be expelled automatically after sale of vehicle- an amendment was carried out subsequently to this effect but amendment was not approved by 2/3rd members of the society – amendment was also not registered under H.P. Cooperative Societies Act and therefore, will have no effect – petition dismissed. Title: Solan District Truck Operators Transport Cooperative Society Vs. Harjinder Singh son of Shri Ram Rattan & others Page-582

Constitution of India, 1950- Article 226- Petitioner obtained Government employment on the basis that he belonged to IRDP family- a complaint was made against him on which his services were terminated- the termination order was made without hearing the petitioner- petitioner obtained documents under Right to Information Act showing that he belongs to IRDP family- Writ petition allowed and the termination order set aside. Title: Nand Lal Bhardwaj Vs. State of H.P. and others (D.B.) Page-1177

Constitution of India, 1950- Article 226- Petitioner retired from All India Radio, Shimla on 26.09.1992- he falls in the area not covered under the Central Government Health Scheme – he was given Rs. 100/- per month as fixed medical allowance- he remained under treatment from IGMC, Shimla and was advised to undergo surgical procedure for Coronary Artery Bypass Grafting (CABG)- he was referred to Prime Heart and Vascular Institute, Mohali- he remained admitted in the hospital for 15 days and incurred Rs. 1,79,559/- for his treatment and Rs. 20,000/- towards post operation treatment- he submitted claim for medical reimbursement, which was rejected- he approached Central Administrative Tribunal who allowed the application and directed the Union of India to consider the claim of the applicant

for the reimbursement of medical expenditure incurred by him at the rate fixed by Central Government- Central Government preferred an appeal pleading that the matter is covered by the judgment of Hon'ble Supreme Court- Central Government had taken a conscious decision to grant fixed medical allowance to Central Government pensioners/family pensioners residing in areas not covered by Central Government Health Scheme- the decision was taken by the Government of India pursuant to the recommendation made by 5th Pay Commission of the Central Government- pensioners were required to give one time option at the time of their retirement for medical coverage under CGHS facilities or to get themselves registered in the nearest CGHS city for availing the hospitalization facilities- held, that decision taken by the Government was a final order- the appellant and similarly situated persons had changed their position by getting themselves treated from various institutes legitimately expecting that they are covered under CS(MA) Rules- no material was placed on record to show that memorandum was withdrawn, rescinded, superseded or any corrigendum was issued- the Central Government must act like a model employer – the O.M., dated 05.06.1998 supplements the CS (MA) Rules by extending the scope of health coverage to retired Government Officials as well – all the Government officials who have retired from the Central Government constitute homogenous class- no reason has been assigned as to why applicant and similarly situated persons had been left out of the applicability of CGHS or CS(MA) Rules, 1944- this is a case of discrimination on account of residence of the person- Court must give such interpretation as will promote the march and progress towards a Socialistic Democratic State – right to health care and medical care is a fundamental right of worker under Article 221 read with Articles 39 (e), 41, 43, 48-A and all related articles – appellant cannot contend that O.M. dated 05.60.1998 was superseded- Union of India should take a common sense view to address the serious issue of welfare of retired employees- a retired employee needs more medical care vis-à-vis young employee- his medical issues are required to be dealt with more sensitivity, compassion and sympathy- Union of India directed to seek the option from the respondent and similarly situated retired employees residing in non-CGHS areas for medical coverage either under CGHS Scheme or under CS(MA) Rules, 1994- Union of India directed to release a sum of Rs. 1,79,559/- for his treatment and Rs. 20,000/- incurred towards post operation failing which petitioner will be entitled to interest @12% per annum. Title: Union of India and another Vs. Shankar Lal Sharma (D.B.) Page-1250

Constitution of India, 1950- Article 226- Petitioner sought directions to the respondent to conduct the recruitment tests through Institute of Banking Personnel Selection and not through Himachal Board of School Education, Dharamshala-held that, the writ petitioner is just a candidate and has to sit in examination and it is for the concerned employer to decide the agency through which the tests are to be conducted- It cannot lie in the mouth of the petitioner before sitting in the examination that the test should be conducted through some particular agency-further held that, even otherwise, no breach of Act, Rules or Regulations has been alleged- the Bank is meant primarily for business and cannot be said to be performing the public duties or public functions or functions akin to which are performed by the Government- writ petition dismissed. Title: Raj Kumar Vs. The State of H.P. and others (D.B.) Page-1179

Constitution of India, 1950- Article 226- Petitioner submitted that Writ Petition was disposed of with the direction to the respondent not to impose the Model Code of Conduct in the area(s) where Panchayat Elections will not be held- respondents submitted that Model Code of Conduct is operative only in those areas where the Panchayat Elections are notified from the date of the notification till the elections are held- hence, petition disposed of in view

of statement of respondents. Title: Sushant Kumar Vs. State Election Commission, Himachal Pradesh and others (D.B.) Page-994

Constitution of India, 1950- Article 226- Petitioner wanted to submit his tender for the works advertised by the respondent but he was denied the tender document in view of condition No.1-(C) providing that the tender forms will not be issued to those contractors/firms who have delayed the already awarded works more than 50% time of the contractual obligation- petitioner complained that the work could not be completed by him on account of acts attributable to the respondent and for reasons beyond the control of the petitioner- respondent claimed that petitioner had failed to complete the previous work within the stipulated time- held, that Government and their undertaking must have a free hand in settling terms of tender- Court cannot interfere with the tender, merely because it feels that some other terms in the tender would have been fairer, wiser or logical- Clause 1(C) is reasonable because it shows that a person delaying the contract does not have capability or capacity to execute the work- petitioner was aware of vagaries of the weather and cannot take the same as an excuse for not executing the works within the stipulated period- petition dismissed. Title: Shyam Lal Vs. HIMUDA and anr. (D.B.) Page-578

Constitution of India, 1950- Article 226- Petitioner was appointed as a Constable who was dismissed from the service after conducting an inquiry- he approached the Director General of Police for granting compassionate allowance which was granted w.e.f. 24th March, 1994- petitioner made a reference that he was entitled to allowance from 30.10.1982 which was rejected- held, that compassionate allowance is one of the kind of pensions specified in CCS (Pension) Rules, 1972- pension is payable from the date when an employee ceases to be in the employment and not from any other date- order of dismissal/removal will be effective from the date of removal or dismissal from the service; hence, compassionate allowance will be payable from the date of dismissal- therefore, writ Court had rightly held that writ petitioner is entitled to compassionate allowance with effect from the date of the dismissal- petition dismissed. Title: State of H.P. and others Vs. Naresh Lal (D.B.) Page-552

Constitution of India, 1950- Article 226- Petitioner, an elected Mayor of Municipal Corporation, Shimla has filed the petition assailing the decision whereby town of Dharamshala was included and city of Shimla was excluded from the list of potential Smart Cities- State of Himachal Pradesh has been allocated one city to be developed as a Smart City- M.C. Shimla had claimed 85 points out of a total of 100 points – petitioner alleged that respondent No. 4 acted under the influence of Minister and had wrongly included Dharamshala- respondent claimed that Dharmshala had qualified as a Smart City according to proper procedure- State Level High Power Committee consisting of eight members was constituted by the State Government- State Mission Director had not evaluated the proposal sent by Urban Local Body- the meeting of high power committee was convened on 29.7.2015 in which three members had participated- earlier a note was prepared that it was not possible to convene meeting due to the shortage of time- quoram was not complete - Court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is arbitrary - where the Government action runs counter to good faith, is not supported by reason and law, the same is to be set aside- Members of High Power Committee had not applied their mind as per the letter and spirit of the guidelines- State Mission Director had acted mechanically without satisfying himself, whether criteria laid down under Rule had been followed or not- decision was taken in non-transparent, opaque and tainted manner - there was procedural impropriety- writ petition allowed and the decision taken by High Power Committee set aside with the direction to redo the

exercise for selecting the Smart City. Title: Sanjay Chauhan Vs. Union of India and others (D.B.) Page-1013

Constitution of India, 1950- Article 226- Petitioner, respondent No.5 and other candidates had applied for the post of teacher Political Science- they were interviewed by Selection Committee- petitioner contended that she was more meritorious from academic point of view and was entitled to be selected against the post in question- however, respondent No. 5 was selected on extraneous considerations to defeat the claim of petitioner- respondent contended that marks were awarded on the basis of criteria laid down in Recruitment and Promotion Rules- merit was not sole criteria for appointment- record shows that petitioner is more meritorious than respondent No. 5- her ranking was higher as compared to respondent No. 5 as far as the educational qualification is concerned- she was adjudged equally by two members of the Board- one Member had given 10 marks to respondent No. 5 while 2 marks were awarded to the petitioner- awarding 10 marks has vitiated the selection - the possibility of awarding the marks on extraneous considerations cannot be ruled out- further, the member awarding the highest marks was only middle pass and was not competent to assess the ability and fitness of candidates having post graduate qualification for the post of Graduate Teacher – petition allowed and direction issued to advertise the post afresh and to make selection thereafter. Title: Indra Devi Vs. State of H.P. & ors. Page-564

Constitution of India, 1950- Article 226- Petitioners are engaged in different capacity – their grievance is that their services should not be dispensed with- respondents be restrained from out sourcing services against which they appointed – respondents pleaded that appointment of the petitioners was not in accordance with the Law and they were appointed as casual worker on fixed wages as per requirement for three months and were re-engaged after breaks- record shows that requirement of issuing advertisement following selection process and observance of the reservation policy at the time of initial appointment of the petitioners was not followed- mere continuous in service was extending period of appointment will not confer any right to perpetuate the illegality- no person can be appointed even on a temporary or adhoc basis without inviting applications from all eligible candidates- a person employed in violation of these provisions is not entitled to any relief including salary- a person appointed through the back door must also leave from the same- further decision to outsource of service is matter of the policy, which cannot be inferred in the writ petition- writ petition dismissed. Title: Santosh Kumari Rana Vs. Union of India and others Page-538

Constitution of India, 1950- Article 226- Petitioners have been appointed on contract basis- they were given fictional breaks at the end of each session and were re-engaged – their services were not regularized- respondents pleaded that posts of the petitioners are to be filled up through direct recruitment- earlier petitions filed by the petitioner were dismissed- record shows that writ petition was disposed of with a direction to create regular posts and to fill them in accordance with Law- direction was issued in another Writ Petition that petitioners would apply for relaxation of age limit and if such representation is made then appropriate authority would decide the same expeditiously- instead of approaching respondents, petitioners approach the High Court by filing writ petition, which was dismissed – again a fresh writ petition was filed - held, that present writ petition is barred by principles of res-judicata- petition dismissed with the direction to dispose of the application for relaxation of the age limit, if any, pending. Title: Rakesh Kashyap S/o Sh. Hari Dass & others Vs. State of H.P. & others Page-594

Constitution of India, 1950- Article 226- Petitioners were appointed on various posts on short term arrangement basis- Executive Council revised their salaries but their services were not regularised - they sought a direction for regularization of the services- respondent pleaded that the petitioner No. 1 had participated in the selection process for regular post but could not qualify- petitioners No. 2 and 3 had also applied for appointment on regular post but the Selection Committee had not been constituted- the appointment order specifically provided that short term arrangement shall not entitle the petitioners for appointment on regular basis- petitioners had also participated in the selection process but had failed to make the grade- held, that a person who was appointed for a fixed tenure cannot claim the regularization- petition dismissed. Title: Vijay Sood Vs. Central University of HP, Dharamshala (D.B.) Page-1195

Constitution of India, 1950- Article 226- Respondent conveyed its sanction for the introduction of a scheme for the health care of all ex-servicemen and their dependants in receipt of pension including disability and family pension –Scheme was made effective from 1.4.2003- an advertisement was issued for recruitment of staff in various capacities for the manning of polyclinics- petitioner applied for being considered for selection and appointment in the respective capacities- a clarification was issued stating that employees who have completed five years on contractual employment should not be considered for the polyclinic again and ESM should be considered in the reserve category quota of 60%- the services of the petitioner were dispensed with in accordance with notification- a fresh advertisement was issued inviting applications from all eligible aspirants for being considered for selection and appointment on a contractual basis- respondent pleaded that posts against which they stood appointed on a contractual basis no longer subsisted – Clause-2 of the agreement specifically debarred staking of claim beyond the period of two years at the maximum- subsequently, another communication was issued stating that contractual staff appointed on yearly basis with a clear gap of two days between each successive employment be appointed- further, a letter dated May, 2011 was issued which provided in Clause-4 that polyclinics in and around large cities and military stations, where adequate number of retired officers are available, normal tenure of three years is extendable up to five years maximum- there was no restriction on tenure in OIC polyclinics at locations away from large cities/military stations- no restriction was provided regarding medical specialists, gynecologists and dental surgeons- held, that various sub clauses of clause 4 carve out arbitrary and discriminatory classifications regarding the appointments of staff made at polyclinics located away from large cities/military stations- there is discrimination regarding medical specialists, gynecologists and dental officers- writ petition allowed- the orders set aside- respondent directed to execute a fresh contract of services in accordance with Clause 2 of letter dated May, 2011. Title: Govind Ram and others Vs. Union of India and others Page-963

Constitution of India, 1950- Article 226- Respondent issued a circular for conducting competitive examination for promotion to the post of JTO under 35% quota and 15% quota for the vacancies up to 31.03.2012 in Himachal Pradesh- writ petitioner participated in the Competitive Examination under 35% quota - provisional answer key was uploaded- objections were filed- representations were examined, some mistakes were found which were rectified- the result was declared – however, names of the petitioners were not figuring in the list of selected candidates- they filed representations which were rejected- petitioners filed original application before Central Administrative Tribunal which dismissed the application- held, that the expert opinion has been sought- the application was rightly dismissed by the

Central Administrative Tribunal- petition dismissed. Title: Kavita Gupta and another Vs. Bharat Sanchar Nigam Limited and another(D.B.) Page-949

Constitution of India, 1950- Article 226- Respondent No. 2 offered for sale property mortgaged with it- buyer was required to deposit 10% of the offer as earnest money- value of the property was assessed as Rs. 252.18 lacs - petitioner company gave bid for Rs. 150.00 lacs and deposited Rs.15.00 lacs towards earnest money- negotiations were carried out and the petitioner was declared successful being the highest offeree of Rs.307.00 lacs- amount deposited by the petitioner was forfeited- writ petition was filed challenging the order of respondent No. 2- respondent No. 2 stated that the offer of petitioner was conditional - petitioner had failed to deposit the difference of the balance amount- hence, amount deposited by him was forfeited- Clause-2 of the proceedings of the negotiation specifically provided that remaining amount was to be deposited by 3:00 P.M, failing which the earnest money would be forfeited- held, that respondent No. 2 had pleaded that offer of petitioner was conditional which was not acceptable to the respondent No. 2, therefore, there was no question of forfeiture of earnest money- earnest money could have been forfeited only, if offer had been unconditionally accepted by respondent No.2- writ petition allowed and respondent No. 2 directed to refund the earnest money along with interest @ 12% per annum from the date of deposit. Title: Green View Apartments vs. State of H.P. and others Page-1218

Constitution of India, 1950- Article 226- Respondent No. 2 placed an order with respondent No. 3 for procurement of Mobile Soil Testing Lab (MSTL) – petitioner informed respondent No. 2 that it was manufacturing MSTL and could offer the same at comparatively less price- however, order was supplied to the petitioner- held, that power of judicial review will apply only in case the process adopted or decision making process is wrong and in order to prevent arbitrariness or favouritism- the award of contract by the State is commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decisions- no person has a right to insist that State Government must enter into a contract with him- respondent No. 3 is a 100% government undertaking and the funds would be going from one pocket of the Government to another pocket of the Government- the process alone is not a determinative factor- however, past record of the tenders, the quality of goods or services assessing such quality on the basis of past performance, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded- past experience of respondent No. 2 with the petitioner was far from good- respondent No. 3 had supplied two mobile soil testing labs which are working satisfactorily- hence, in these circumstances, the decision to award contract to respondent No. 3 cannot be faulted- petition dismissed. Title: ELICO Ltd.Vs. State of Himachal Pradesh and others (D.B.) Page-1328

Constitution of India, 1950- Article 226- Respondent No. 3 was appointed as Anganwari Worker- her appointment was assailed before Deputy Commissioner who held that factum of separation of the respondent No. 3 from the family of her father-in-law was not preceded by any valid order of the Competent Authority- an appeal was preferred before Divisional Commissioner which was dismissed- held, that Deputy Commissioner and Divisional Commissioner had not taken into consideration the relevant material and had arrived at a wrong decision regarding the separation of respondent No. 3 from her father-in-law- consequently, order passed by them set aside and matter remanded to Deputy Commissioner with a direction to take into consideration the relevant material. Title: Roshani Devi Vs. State of Himachal Pradesh and others Page-903

Constitution of India, 1950- Article 226- Respondent No. 3 had refused to admit the minor son of the petitioner in +1 class Non-Medical Stream, on account of his performance in the matriculation examination- petitioner pleaded that his son was studying in School from K.G. Class- therefore, he was entitled to be admitted in +1 class automatically - respondent No. 3 stated that as per norms laid down by it children should have scored 80% in science and mathematics and 70% in commerce stream- held, that school may give the stream/course that may appear to be most suitable to child on the basis of the prescribed cut-off marks- hence, school had not committed any error in declining admission to minor son of the petitioner. Title: Nisha Kanwar Vs. State of Himachal Pradesh and others (D.B.) Page-567

Constitution of India, 1950- Article 226- The grievance of the writ petitioner was redressed during the pendency of the LPA- however, an apprehension was expressed on behalf of the writ petitioner that financial benefit may not be granted to the writ petitioner and liberty may be reserved to seek appropriate remedy by resorting to appropriate proceedings- in view of this LPA disposed of as settled, with liberty to seek appropriate remedy at appropriate stage. Title: Dr.(Ms.) Monica Sharma Vs. Dr.Y.S. Parmar University and others (D.B.) Page-1326

Constitution of India, 1950- Article 226- Writ Court had allowed the writ petition but had not granted the back wages for a period of three years- held, that arrears can be restricted only for three years prior to filing of writ petition- petitioner had approached the Court for redressal of his grievances in the year 1989, though, right had accrued to him in the year 1978 – therefore, arrears were rightly restricted for a period of three years by Writ Court. Title: Suresh Chander Chauhan Vs. Himachal Pradesh State Electricity Board (D.B.) Page-559

Constitution of India, 1950- Article 226- Writ petition was filed by respondent no. 2 Zila Solan Bhootpurav Sainik Parivahan Co-operative Society Ltd. stating that it was not getting its due share of transportation work from the petitioner- respondent No. 2 also demanded separate quota and sought quashing of order passed by petitioner on 21.4.2010 affixing the quota of 30 trucks for the ex-servicemen of Shimla, Solan and Kullu- writ petition was disposed of with a direction to apply to the District Magistrate for allotting work in accordance with law- an order was passed by District Magistrate reducing the allotment of the petitioner in so far as it only relates to the work of lifting of cement from Rauri Unit of Ambuja Cement from existing 10% to 7½% and the reduced quota of 2½% quota was allotted to respondent No. 2- petitioner filed the present writ petition challenging the order passed by the District Magistrate- held, that power of judicial review is not directed against the decision but is confined to the decision making process- petitioner is claiming a monopoly in the distribution and allocation of work in favour of those trucks which were initially attached by the petitioner with the respondent No. 3- petitioner is a statutory body constituted for the welfare of ex-servicemen and it cannot be permitted to act arbitrarily or in a discriminatory manner thereby discriminating between one ex-serviceman and the other- District Magistrate had passed the order because ex-servicemen of district Solan were not given their due share in the transportation work despite the fact that plant of respondent No. 3 was situated in district Solan- order passed by the High Court was also taken into consideration- petitioner did not state that it was not associated or given an opportunity to put forth its case before passing of the order- respondent No. 2 has 145 members and petitioner has 227 trucks- therefore, reduction of quota of the petitioner and allotment in favour of the respondent No. 2 is not illegal- writ petition dismissed. Title:

Himachal Pradesh Ex-Servicemen Corporation Vs. District Magistrate, Solan and others Page-946

Constitution of India, 1950- Article 226- Writ petitioner is a diploma holder in Computer Science Engineering of the batch of the year 1997- respondent No. 2 is a diploma holder in Electrical Engineering of the batch of the year 1990- he had also obtained degree in Computer Science Engineering, in the year 1993- applications were invited for filling up six posts of Junior Engineering in Computer Science- writ petitioner and respondent No. 2 applied for the post and respondent No. 2 was selected- held, that respondent No. 2 had higher qualification and was rightly appointed- writ Court had rightly dismissed the writ. Title: Kranti Katoch Vs. Himachal Pradesh State Electricity Board & another (D.B.) Page-1004

Constitution of India, 1950- Article 226- Writ petitioner was engaged as a conductor- bus was inspected by the Inspector, and it was found that four passengers were travelling without tickets, although, fare was collected by the petitioner - un-punched tickets were also recovered from the bag of the petitioner - inquiry was conducted against the petitioner for misconduct- Inquiry Officer concluded that charge stood proved- Disciplinary Authority imposed penalty of stoppage of two increment without cumulative effect- appeals preferred against this order were rejected- Writ Petition was also dismissed- appeal was preferred against the order passed by the writ Court- held, that Inquiry Officer had afforded sufficient opportunities to the petitioner to lead evidence and defend himself – principles of natural justice were complied with- Writ Court cannot re-appraise the evidence and cannot sit in appeal over the decision passed by the Disciplinary Authority and Inquiry Officer- Appeal dismissed. Title: Nain Sukh Vs. HRTC & others (D.B.) Page-532

Constitution of India, 1950- Article 226- Writ petitions filed by the petitioners were allowed and the respondents were directed to pay the pay scale as per annexure appended with the writ petitions- a letter was issued by the State, whereby higher pay scale was granted to some senior-most Assistant Librarians- the remaining Assistant Librarians challenged the action of the State on the ground of discrimination pleading that petitioners and senior-most Assistant Librarians who were given higher pay scale formed one class and they were discharging same and similar duties- writ petitions were transferred to the Administrative Tribunal who allowed the same and issued a direction to revise the pay scale of petitioners and the similarly placed Assistant Librarians working in the Education Department- this decision was never challenged but was also not implemented in its letter and spirit- Department issued a letter granting the higher pay scale only to Senior Assistant Librarians- Assistant Librarian filed an application which was transferred to High Court and was allowed- State filed LPA which was dismissed- subsequently, U.G.C. Scale was granted to only 20 senior Assistant Librarians- a writ petition was filed and a direction was issued to extend the benefit to all- held, that once it was held by the Tribunal, writ Court and the Appellate Court that all the Assistant Librarians constituted one homogenous class, which was upheld by Apex Court, it is not permissible for the State to question the foundation of the reasoning in subsequent writ petition as well- petition dismissed. Title: State of H.P. and another Vs. V.D. Saraswati and others (D.B.) Page-1186

Constitution of India, 1950- Article 227- CMP was filed before the Court in the month of June, 2015 which has not been disposed of- hence, direction issued to dispose of the same on or before 4.1.2016 in accordance with law. Title: Thakur Singh S/o Sh. Keshwanand & others Vs. Prem Sharma S/o Sh. Deep Ram& others Page-718

Constitution of India, 1950- Articles 226 and 227- In a reference, Industrial Tribunal-cum-Labour Court finding that juniors of the workmen/respondents were retained while dispensing with their services in violation of Section 25(G) of the Industrial Disputes Act, partly allowed the reference- feeling aggrieved the State approached the high Court- held that, under Articles 226 and 227 of the Constitution of India findings of the facts recorded by the Tribunal on appreciation of evidence cannot be substituted, unless the Labour Court has made a patent mistake in admitting evidence illegally or has made grave errors in law- in this case, Tribunal has properly appreciated the evidence, hence, no interference is required- writ petition dismissed. Title: The State of Himachal Pradesh and another Vs. Santosh Kumar and another (D.B.) Page-1302

Constitution of India, 1950- Article 226 and 235- An entry was recorded in the ACR of the petitioner that he did not enjoy good general reputation and the net result was average- it was held by the writ Court that remarks were subjective and had no basis- the representation against the remarks could not have been rejected without communicating any reason- held, that Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer at any point of time to discipline the black sheep or to weed out the dead wood, while considering the case of an officer as to whether he should be continued in service or not- his entire service record has to be taken into account- mere fact that after an adverse entry officer was promoted or was given selection grade will not preclude the authority from considering the earlier entry- if the general reputation of the employee was not effective, he may be compulsorily retired, even if there is no tangible material against him- ordinarily, exercise undertaken by the full Court is not amenable to judicial review except under the extra ordinary circumstances- it is not necessary to give specific instances of shortfalls, supported by evidence – the record of officer is to be seen individually, therefore, even if ACRs of another Officer were far interior to the Officer under consideration that may have relevance to grant of extension to the Officer without conferring any right of entitlement to him- the grant of selection grade is a single instance and will not wipe out the entire carrier of the Officer- Governor alone has the power to pass an order of dismissal, removal or termination on the recommendations of the High Court – the order was passed by the High Court which is not competent but the same is ordered to be treated as recommendations to the State Government- petition dismissed. Title: High Court of Himachal Pradesh Vs. P.D. Goel (D.B.) Page-1334

Constitution of India, 1950- Articles 243(O) and 226- Petitioners have called in question the constitution, re-constitution, de-limitation, reservation of the respective Panchayat areas, merger of Panchayats with Municipal areas and vice versa, change of headquarters of Gram Panchayats, amalgamation and alteration of respective Panchayat areas on the ground that such action has been taken by the respondents in violation of the Himachal Pradesh Panchayati Raj Act, 1994, Himachal Pradesh Panchayati Raj (Election) Rules, 1994, and Himachal Pradesh Municipal Act, 1968- a preliminary objection was raised by the respondent regarding the maintainability of the petition- bar laid down in Article 243(O) is very wide and pervasive- any challenge to the election or any election dispute can be adjudicated in the first instance only by an authority constituted by or under any law made by the State Legislature and not otherwise- the High Court cannot entertain a writ petition directly under Article 226- power of judicial review is postponed in the matters involving challenge to delimitation of constituencies, allotment of seats or election to Panchayats until after completion of the process of election – the word 'election' in Article 243(O) embraces and includes all the aspects from the date of the notification by the Competent Authority-

Article debars all Courts from entertaining any challenge to delimitation of constituencies or allotment of seat- the challenge to the delimitation may be entertained in exceptional cases where no objections were invited and no hearing was given before issuing the notification for holding election- the bar would operate immediately after the publication of notification of delimitation and will continue till the adjudication of election dispute by an Adjudicatory Forum created by or under any law made by the statute- however, there is no bar to challenge the constitutionality of statutory provision. Title: Bal Krishan and others Vs. State of H.P. and others (D.B.) Page-914

Contempt of Courts Act, 1971- Section 2- Court had issued direction to the third respondent to take steps to dispose of the property and settle the dues to the retired and serving employees- a CMP was filed which was allowed and interest @ 10% p.a. was granted to the petitioner filing the CMP - no such direction was granted in favour of other petitioners- held, that Executing Court cannot pass any direction which is not contained in the judgment- interest @ 7% p.a. originally granted in the judgment has already been paid- respondent has complied with the direction issued by the Court. Title: Sushil Sharma Vs. J.S. Rana (D.B.) Page-1175

Contempt of Courts Act, 1971- Sections 10 and 12- Parties settled their dispute before the mediator and moved a joint application for passing a decree- consent decree was passed after recording the statements of parties- respondent did not comply with the consent decree on which a contempt petition was filed before the Court- respondents contended that the decree was executable and the contempt petition was not maintainable- held, that a compromise decree is a decree passed on the basis of consent which is approved by the Court- parties giving an undertaking to the Court render themselves liable for violation of the undertaking- respondents had compromised the matter and had not adhered to the undertaking- they had deceived the Court which amounts to contempt of Court- hence, the plea of the respondents that contempt petition is not maintainable cannot be accepted- respondents directed to comply with the undertaking given by them. Title: M/S Indo Farm Tractors and Motors Ltd. Vs. R.K.Saini and another (D.B.) Page- 790

Contempt of Courts Act, 1971- Section 12- Court had issued direction to Chief Secretary to ensure that no vehicle attached to the Hon'ble Judges is unnecessarily stopped or challaned - no vehicle except the vehicle of His Excellency Governor of Himachal Pradesh, Hon'ble Chief Minister and Hon'ble Chief Justice and public utility vehicles shall ply between Shimla Club to Lift and between Railway Board Building to C.T.O.- permits/passes issued to ply the vehicles between Shimla Club to Lift and between Railway Board Building to C.T.O shall remain suspended- neither Additional District Magistrate nor Public Relation Officer, Shimla shall issue any permit to ply the vehicles either on sealed road or restricted road- a news item appeared in which it was misquoted that the Judges/Chief Minister and Governor were entitled to use the sealed roads- again a news item was published misquoting that judges were permitted to use the sealed road- a show cause notice to the local correspondent issued who appeared and filed an affidavit extending unconditional and unqualified apology- held, that press must take necessary precautions especially while reporting the court proceedings**-** oral observations made by the Advocate and Hon'ble Judges may not be carried in the news papers- inaccurate and incorrect news item is bound to prejudice the parties- the proceedings in the Court must be reported by the correspondents with legal background to avoid misquoting of court proceedings- judiciary cannot be immune from criticism, but when the criticism is based on obvious distortion or gross mis-statement and is made in a manner designed to lower respect for the judiciary and destroy

public confidence, it cannot be ignored- judiciary can protect itself by invoking the power to punish for its contempt to secure public confidence and respect in the judicial process- Media should ensure that there should not be any trial by Media and the individual should be free to defend itself- Court will not use its power of contempt to silence any criticism of judicial institution- judiciary must be magnanimous in accepting an apology when filed through an affidavit duly sworn- role of the court is to maintain the majesty of law and to permit reasonable criticism- un-conditional apology accepted with the warning that the respondent should be more careful and responsible by providing fair, accurate and impartial information- suggestions given to the State to prepare welfare scheme to improve the service conditions of the journalists and to create a corpus to pay pensionary benefits to those journalists, who had spent at least 30 years in journalism. Title: Court on its own motion Vs. Kuldeep Chauhan (D.B.) Page-611

'H'

H.P. Panchayati Raj Act, 1994- Section 12- Order was passed by Panchayat on 23.7.2011- appeal was filed on 3.10.2011 - appeal can be filed within 30 days according to Act - application for condonation of delay was not disposed of – however, appeal was decided and the case was remanded to Panchayat- held, that without disposing of the application for condonation of delay, appeal could not have been disposed of - order passed by SDO set aside and the matter remanded to SDO with the direction to decide the application for condonation of delay and thereafter to dispose of the appeal in accordance with law. Title: Desh Raj, S/o Sh. Om Parkash Vs. Rattan Chand S/o Ghapu Ram& others Page-645

H.P. Urban Rent Control Act, 1987- Section 14- Landlady filed an eviction petition against the tenants on the ground that tenants had not paid or tendered the rent due from revisionists w.e.f. 1.12.1980- demised premises is required bonafide by landlady for the purpose of rebuilding which could not be carried out without eviction of the tenants- petition was allowed by the Rent Controller partly- an appeal was preferred which was dismissed by the Appellate Court- held, that landlady had a legal right to increase the economic value of the demised premises – the demised premises is required bonafide by landlady for the purpose of rebuilding or making substantial addition or alteration to increase economic utility of demised premises – she had got the construction plan approved by the Competent Authority- however, approval of construction plan is not sine qua non for passing eviction order on ground of bonafide requirement for reconstruction- orders passed by Rent Controller and the Appellate Authority affirmed- revision dismissed. Title: Pardeep Kumar Ohari son of Smt. Ram Dulari & another Vs. Purna Devi wife of Kishori Lal & others Page-1354

H.P. Urban Rent Control Act, 1987- Section 24- Rent Controller passed a decree for eviction which was affirmed by the Appellate Authority- tenant prayed for the stay of eviction order and the landlord prayed for awarding use and occupation charges- held, that the order of eviction can be stayed subject to the payment of the use and occupation charges by the tenant from the date of passing of order of eviction- area of the similar premises was 500 sq. feet and the amount was payable @ Rs.40250/- equivalent to Rs. 80.50 per sq. feet- area of the premises occupied by tenant is 5600 square feet- thus, amount of Rs.1,35,240/- would be reasonable qua the premises in occupation of the tenant- eviction stayed subject to the deposit of use and occupation charges by 15 days of every month. Title: Renu Baljee & Ors. Vs. Shiv Charan and others Page-735

Hindu Marriage Act, 1955- Section 13- Appellant sought dissolution of marriage on the grounds of cruelty and desertion alleging that respondent had been compelling him to hand over his entire salary to her and to live separately from his parents- he further alleged that respondent used to shut herself in a room to deny access to the appellant- respondent had also lodged false FIR under Section 498-A of IPC in which appellant was acquitted by the Court- respondent denied the allegations of the appellant and alleged that appellant and his family members use to harass her for bringing insufficient dowry- appellant left her in her parental house in June, 2003 and did not come when she gave birth to still birth twins and even at their burial- trial Court dismissed the petition holding that the appellant had deserted the respondent- in appeal held, that allegations levelled by appellant against the respondent are sketchy and vague- Appellant had not even joined the respondent when twins were being buried despite information- mere request by the respondent to live separately from the parents of appellant will not amount to cruelty- further held, that appellant had not examined any of his family members or the neighbours to substantiate the allegations of cruelty levelled by him against the respondent- petition was rightly dismissed by the trial Court- appeal dismissed. Title: Kapil Sharma Vs. Babita Sharma Page-727

'I'

Indian Forest Act, 1927- Sections 41 and 42- Accused was intercepted while transporting 105 logs of Khair Tree in a truck without permit – accused was acquitted by the trial Court- in appeal against acquittal held, that since police team was holding nakka, when the truck was allegedly intercepted, independent witnesses should have been associated at the time of search and seizure- further held, that logs produced in the Court did not find any identification marks therefore, identity of case property was not established- official witnesses have not remained consistent – trial Court has rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Bagga Ram and others Page-857

Indian Penal Code, 1860- Section 302- Deceased and accused were engaged as labourers- deceased was found dead- complainant suspected that deceased was murdered by the accused as accused had been picking up quarrels with the deceased- accused was arrested and he got recovered a shovel- PW-15 was declared hostile- the version of the prosecution that accused was intoxicated was corroborated by medical evidence- no motive was attributed to the accused – PW-14 subsequently stated that no quarrels had taken place in his presence which falsifies the version of the prosecution that accused used to have quarrels with the deceased- held, that in these circumstances, prosecution version is not proved- accused acquitted. Title: Sunil Kumar Vs. State of Himachal Pradesh (D.B.) Page-1162

Indian Penal Code, 1860- Section 302**- Indian Arms Act-** Section 27- The accused armed with a gun started abusing the deceased who was nearby- the deceased requested the accused not to do so-Accused threatened the deceased and then fired at the deceased who collapsed at the spot - incident was witnessed by PW1 and PW2 - they informed the family members of the deceased-the accused was convicted and sentenced by the trial court-in appeal held that, both the eye witnesses had categorically supported the prosecution case - gun is proved to be in working order - barrel of firearm bore the evidence of recent firing- there is no reason to interfere with the well reasoned judgment by the trial court- appeal dismissed. Title: Harbhajan Singh Vs. State of H.P. (D.B.) Page-505

Indian Penal Code, 1860- Section 302 read with Section 34- Accused came to Kirtan and threatened to stop it- he returned after five minutes and had altercation with the deceased- co-accused came with the knife and stabbed the deceased on the chest due to which deceased fell down- accused were convicted by the trial Court- one of the accused was acquitted by the High Court- a specific finding was recorded in the criminal appeal that testimonies of eye witnesses were not satisfactory- there were contradictions in the testimonies of eye witnesses- their testimonies are incredible and unnatural- no person intervened in the scuffle which makes the prosecution version highly doubtful- none of the witnesses deposed that accused was holding a knife , therefore, prosecution version was not proved beyond reasonable doubt- accused acquitted. Title: Man Singh Vs. State of H.P. (D.B.) Page-1129

Indian Penal Code, 1860- Section 302, 120-B and 201- The deceased had gone to his duty but had not returned- a missing report was lodged with the police- deceased had told his son that he would not return and would be going with accused 'R'- accused 'R' had illicit relation with the wife of the deceased- accused 'R' had got a bottle of liquor- deceased was made to consume alcohol and was subsequently pushed into the lake after tying stone to his feet with nylon rope- prosecution version regarding the illicit relation between the wife of the deceased and the accused 'R' was not proved satisfactorily- dead body could not be recovered- PW-5 who deposed about the accused and the deceased having been seen together admitted that his eye sight was slightly feeble, it was dark and he had seen the deceased from a distance of 20-25 meters- held that a person cannot recognize someone in the moon light beyond the distance of 17 yards- therefore, his testimony that he had seen the deceased and the accused together is not acceptable- extra judicial confession stated to have been made by the accused was not reliable- PW-17 stated that deceased had visited his shop and was drunk at that time- the disclosure statement was not proved satisfactorily- there was delay in recording the FIR which was not satisfactorily explained- call detail record was not proved in accordance with the Section 65(b) of Indian Evidence Act- the motive was not proved- chain of circumstances was not complete- in these circumstances, prosecution had failed to prove his case against the accused beyond reasonable doubt- accused acquitted. Title: Rajiv Sharma & another Vs. State of Himachal Pradesh (D.B.) Page-876

Indian Penal Code, 1860- Section 302, 325 and 34- Husband of the complainant, deceased and his brother were sitting in their house - the accused came and started abusing them in a state of intoxication – husband of the complainant and PW-2 had also consumed alcohol - when husband of the complainant asked the accused not to abuse them, accused started beating him - co-accused also came at the spot and started beating the husband of the complainant- accused took a wooden plank and hit the head of the deceased – the co-accused gave beating with a stick- when PW-2 tried to intervene, he was also beaten- complainant called PW-3 who saved the complainant and her family members from the accused- deceased died in the incident- complainant turned hostile - PW-2 also did not support prosecution version- there were contradictions in the testimony of complainant regarding the time of the incident and the manner in which the incident had taken place- held, that in these circumstances, prosecution case is not proved beyond reasonable doubt and the accused was rightly acquitted. Title: State of H.P. Vs. Mahipal & anr. (D.B.) Page-1144

Indian Penal Code, 1860- Section 320, 376 read with Sec.511- Accused attempted to commit rape upon the prosecutrix and thereafter murdered her- he was convicted by the

trial Court for the commission of offences punishable under Sections 302, 376 read with Section 511 of IPC- PW-1 had categorically stated that prosecutrix was lying dead and her body was half naked- he had identified the accused- PW-2 stated that accused had dragged the prosecutrix and thereafter had run away- she had also seen the prosecutrix half naked- merely because, they are relatives of the deceased is no reason to disbelieve their testimonies- accused had made a disclosure statement leading to the recovery of blood stained stone- 18 ante mortem injuries were found on the person of the deceased- minor contradictions in the testimonies of the witnesses when they were deposing after a gap of considerable time is not sufficient to discard their testimonies- testimonies of the prosecution witnesses are duly corroborated by the documentary evidence- DNA profile of pant and T-shirt of accused and stone matched completely with DNA profile obtained from the blood sample of the deceased, which also corroborates the prosecution version- chemical analyst report showed that struggle marks were observed upon the shirt of the deceased and drag marks were observed upon the salwar of the deceased- held, that in these circumstances, prosecution case was duly proved beyond reasonable doubt- accused was rightly convicted. Title: Shah Jahan Ali son of Mohammad Sanaula Vs. State of H.P. (D.B.) Page-843

Indian Penal Code, 1860- Section 323, 115, 324 and 307- Complainant and his brother were stabbed by the accused with a knife- accused were acquitted by the trial Court- complainant died subsequently and did not appear in the witness box- eye witness resiled from his previous statement- he admitted that his shop is located at the place from where the place of incident was not visible- hence, his testimony is not reliable- shopkeepers were not cited as witnesses- recovery was also not established- held, that in these circumstances, prosecution case was not proved and the accused was rightly acquitted by the trial Court. Title: State of Himachal Pradesh Vs. Vinod Kumar and another (D.B.) Page-990

Indian Penal Code, 1860- Section 363, 366 and 376- Minor prosecutrix was kidnapped by the accused and was raped first in orchard, then in a hotel near bus stand and thereafter in the house of the accused- birth certificate and school leaving certificate show that prosecutrix was minor on the date of incident- the consent of minor is immaterial in case of rape- prosecution version was duly supported by the minor prosecutrix and was corroborated by the recovery- testimony of prosecutrix is satisfactory - minor contradictions can arise due to lapse of time and cannot be used for discarding the prosecution version – held, that trial Court had rightly convicted the accused- appeal dismissed. Title: Sanjeev Kumar son of Shri Hardayal Vs.State of H.P. (D.B.) Page-1238

Indian Penal Code, 1860- Section 363, 366, 506, 376, 201 read with Section 34- Prosecutrix was asked by PW-2 to check his brother who was sleeping in a room- she did not return – search was conducted but she could not be found- she was subsequently recovered on a road at Narkanda- it was found during investigation that accused had kidnapped the prosecutrix in a car and had raped her- accused was convicted by the trial Court- prosecutrix deposed that she was called by the accused and was asked to sit inside the car- she was taken to Rampur by the accused- she admitted in her cross examination that she had not disclosed the incident to 'J' in whose house she had stayed- she had also not stated this fact in the police Station- held that the conviction can be recorded on the sole testimony of prosecutrix but where the testimony is not satisfactory the same cannot be relied upon to record the conviction – in these circumstances, prosecution case is not proved beyond the reasonable doubt- accused acquitted. Title: Sanjay Kumar Vs. State of Himachal Pradesh Page-1227

Indian Penal Code, 1860- Section 376 read with Sec. 34- Prosecutrix carrying a bamboo stick, shivering and wet due to rain came to the house of the complainant-complainant noticed prosecutrix wearing salwar inside out and on making enquiries, it was learnt that two unknown persons after entering in the house of the prosecutrix had raped her and had caused injuries on various parts of her body- a purse carrying photographs of the accused and other material was found in the room of the prosecutrix under the bed during search made by the son of the prosecutrix- Appellant along with co-accused was held guilty of the commission of offence by the trial court- prosecutrix could not depose about the occurrence before the court on account of her death- PW1 & PW8 deposed that prosecutrix had not disclosed the name of the accused to them-statement u/s 164 Cr.P.C proved on the record by the Magistrate is not a substantive piece of evidence – there were contradictions regarding the place of recovery of the purse from the house of the prosecutrix- evidence of FSL is also not conclusive to connect the accused with the guilt-Trial court had not appreciated the evidence in the proper manner- appeal allowed. Title: Vikas alias Viku Vs. State of Himachal Pradesh (D.B.) Page-605

Indian Penal Code, 1860- Section 376 read with Section 511- Prosecutrix aged about 8 years, complained of pain in her private part to her mother- in the meanwhile another girl, aged about 10 years, came to the mother of the prosecutrix and disclosed that on 02.10.2008 when they were returning from the school, the accused had lifted prosecutrix, taken her to cowshed and prosecutrix had later on told her that accused had attempted to rape her - accused on trial was acquitted by the court- in appeal against acquittal, held that there was contradiction in the date of incident as the prosecutrix had stated the date of incident as 02/10/2007 whereas in investigation the date is shown as 29/09/2007-The prosecutrix had also admitted in her cross-examination that she had made the statement in the Court at the behest of her mother-prosecution has thus failed to prove the allegations-appeal dismissed. Title: State of H.P. Vs. Sunil Kumar (D.B.) Page-491

Indian Penal Code, 1860- Section 435 and 436- PW-1 had left to Village 'S'- his wife informed him telephonically that fire had broken out in the house - he noticed that his house was burnt- civil litigation was pending with the accused- a case was filed against the accused- trial Court acquitted the accused- PW-1 and PW-2 admitted that FIR was lodged against them- PW-1 to PW-4 had not seen the accused putting the house on fire- PW-5, an eye witness had not deposed before the police that he had seen accused putting the house on fire- hence, his testimony cannot be accepted- held, that in these circumstances, trial Court had rightly acquitted the accused. Title: State of H.P Vs. Raj Kumar (D.B.) Page-1159

Indian Succession Act, 1925- Section 63- 'T' was owner of the suit property- she executed a Will in favour of defendants- plaintiffs assailed the Will pleading that 'T' was not in a sound disposing state of mind- Will was outcome of fraud, misrepresentation and deceit- - Will was got prepared by the husband of the defendant who had prevailed upon 'T' by exercising undue influence and allurement – suit was dismissed by the trial Court- an appeal was preferred which was also dismissed- held, that there was litigation between the husband of plaintiff No. 1 and the deceased – the execution of the Will was duly proved-plaintiff admitted that deceased was an intelligent lady – mere execution of the Will in favour one of his sons excluding all other children itself was not a suspicious circumstance- appeal dismissed. Title: Chiri Devi and another Vs. Drompti Devi (deceased) through LR's Labh Singh and another Page-779

Industrial Disputes Act, 1947- Section 25- Deceased was appointed as Beldar and was holding the charge of pump operator on the date of his termination- his termination was made without conducting any inquiry- he filed a Reference Petition before the Labour Court which was partly allowed- respondent filed a Writ Petition against the award of the Tribunal- workman was arrested in FIR no. 220 of 1990 and was convicted of the commission of offence punishable under Section 324 of IPC- this was the foundation for his termination- held, that termination could not have been ordered without conducting any inquiry- the workman had completed 240 days and was entitled to an inquiry- further, Writ Petition does not lie against the findings of fact recorded by learned Trial Court. Title: Gurcharan Singh (deceased) through his LRs. Vs. State of Himachal Pradesh and others (D.B.) Page-938

Industrial Disputes Act, 1947- Section 25- Respondent claimed himself to be a casual worker working with the petitioner department- he further pleaded that petitioner department is an industry within the meaning of Industrial Disputes Act- a specific issue was framed, whether petitioner is an industry or not- labour court held that the petitioner is an industry- order was challenged on the ground that petitioner does not fall within definition of industry- held, that Supreme Court had held that an employee working in the canteen stores department does not fall within definition of a government servant- further, respondent was engaged for limited purpose of loading or unloading arms during the war- therefore, he will not fall within definition of workman- petition accepted and the award set aside. Title: The Officer Commanding Central Ration Stand Vs. Mohan Singh Page- 756

Industrial Disputes Act, 1947- Section 25- Services of one 'J' were terminated- he raised a dispute which was referred to the Labour Court- Labour Court held that workman was entitled to the relief and passed the award- award passed by Labour Court is based on the facts- Writ Court cannot sit as an Appellate Court and set aside the award made by the Labour Court, which is based on evidence and facts- the findings can only be questioned, if it is shown that the Tribunal/Court had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which had influenced the findings- writ petitioner had not pleaded that inadmissible evidence was recorded which was made the foundation of the award or the award was passed without any evidence- petition dismissed. Title: State of H.P. and another Vs. Gagan Singh (D.B.) Page-978

Industrial Disputes Act, 1947- Section 25- Workmen claimed that they were working as Turbine Operators and were entitled to be designated as such- Tribunal answered the reference in favour of the workmen and this decision was set aside in writ – held, that Tribunal had visited the plant of the employer and had found that workmen were working as Turbine operators which corroborated the evidence led by workmen- further, Writ Court cannot set aside the decision arrived at on facts and cannot substitute an opinion for the opinion of the Industrial Tribunal- Writ Court had wrongly set aside the award of the Tribunal- appeal allowed and the award of the Tribunal affirmed. Title: Hydro Project Workers Union Vs. Punjab State Electricity Board & Ors (D.B.) Page-996

'L'

Land Acquisition Act, 1894- Section 18- Lands of the petitioner were acquired for the construction of Mandi-Kanwal road- Land Acquisition Collector assessed the compensation but his award was challenged by making a reference- Additional District Judge enhanced the compensation- the State feeling aggrieved from the said judgment filed an appeal- it was contended in appeal that Reference Court had wrongly relied upon the average price of land in Mohals Manyana and Saniyardi considering the distance between these Mohals and

Mandi town- record shows that even Land Acquisition Collector had concluded that five years average price of land of Mohal Chanwari was inadequate for determination of the compensation- therefore, Additional District Judge had correctly taken into consideration the one year of average price of land situated in other mohals- appeal dismissed. Title: State of H.P. and others Vs. Kesar Singh and others Page-1141

'M'

Motor Vehicles Act, 1988- Section 141- Insurer contended that there was collusion between owner, claimant, driver and the owner had committed willful breach of the terms and conditions of the policy- respondents No.1 and 2 had accepted that deceased was working with them as helper/labourer/conductor- held, that mere admission is not sufficient to infer collusion- the insurer had not led any evidence to establish the same- further, no evidence was led to establish the breach of the terms and conditions of the policy- appeal dismissed. Title: Oriental Insurance Co. Ltd. Vs. Giano Devi and others Page-1102

Motor Vehicles Act, 1988- Section 149- Claimant has not questioned the award on the ground of inadequacy of compensation- appeal was preferred on the ground that Tribunal had wrongly discharged the insurer- held, that concern of the claimant is to get compensation either from the owner or the insurer- the claimant having been awarded compensation cannot be stated to be an aggrieved person and only owner can prefer the appeal- appeal dismissed. Title: Sandeep Thakur Vs. Khema Sharma and others Page-716

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased was walking alongside the road- tractor loaded with sugarcane turned turtle and sugarcane fell on the deceased as a result of which he sustained injuries- respondent denied the contents of the claim petition evasively- Insurance Company admitted that deceased died because of negligence while crossing the road – it amended its reply and pleaded that deceased was travelling on the tractor as a gratuitous passenger- claimants led the evidence to prove that deceased was walking on the road- respondent examined Investigator who had concluded that deceased was sitting on the tractor at the time of accident after conducting investigations - Investigator also admitted that he had arrived at this conclusion on the basis of the statement of PW-3, when PW-3 had specifically stated on oath that deceased was walking on the roadside, the conclusion of Investigator cannot be relied upon- Tribunals have to decide the compensation case on the basis of preponderance of the probabilities and not on the basis of proof beyond reasonable doubt- held, that in these circumstance, Insurance Company was rightly held liable to pay compensation. Title: Jasbir Singh Vs. Satwant Kaur and others Page-1076

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the ground that accident was outcome of contributory negligence of driver of the scooter and Alto car- Rs.75,000/- were reimbursed and an amount of Rs.75,000/- was wrongly awarded under the head "medical expenses" – interest awarded @ 12% p.a. was not in accordance with law- held, that it was prima facie proved that respondent No.2 was driving the vehicle in a rash and negligent manner- no evidence was led by the Insurer /owner and driver to dislodge the same- hence, the plea that accident was outcome of contributory negligence cannot be accepted- further held, that amount of Rs.75,000/- was wrongly awarded under the head 'medical expenses' and the Tribunal had erred in awarding interest @ 12% p.a.- amount of Rs.75,000/- deducted from the award and the interest reduced to 7.5% p.a. from the date of Claim Petition. Title: National Insurance Co. Ltd. Vs. Jamna Devi and others Page-1096

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the ground that owner had committed willful breach of the policy- held that, no evidence was led by the insurer to prove this plea - appeal dismissed. Title: United India Insurance Co. Ltd. Vs. Daulat Ram and others Page-860

Motor Vehicles Act, 1988- Section 149- Insurer contended that policy taken by the owner was an Act Policy and it was wrongly saddled with liability – preliminary objection was taken by the owner to this effect in the reply but no issue was framed by the Tribunal- therefore, case remanded to the Tribunal to determine whether the policy was an 'Act Policy,' whether the risk of the deceased was covered and who is liable to satisfy the award. Title: National Insurance Company Limited Vs. Kaveeta Shreshta and another Page-666

Motor Vehicles Act, 1988- Section 149- Insurer questioned the award on the ground of adequacy of compensation- this plea is not available to the insurer- however, record shows that deceased was aged 26 years old- multiplier of '16' was applicable- Tribunal had erred in applying the multiplier of '15'- deceased was working as Executive Officer with M/s Karvy Stock Broking Ltd. Akurdi- her salary was Rs.7694/- per month, or say Rs.7,700/- per month- 1/3rd of the amount was to be deducted from the income of the deceased towards her personal expenses – thus, the claimants had lost source of income to the extent of Rs. 5200/- per month and are entitled to Rs.9,98,400/- (5200 x 12 x 16), Rs.10,000/- each under the heads of 'love and affection', 'loss of estate' and 'funeral expenses', Rs.5,000/- under the head 'medical expenses' and Rs.20,000/- under the head 'loss of foetus'- thus, total compensation of Rs.10,53,400/- awarded. Title: New India Assurance Co. Ltd. Vs. Rajesh Sharma and others Page-824

Motor Vehicles Act, 1988- Section 149- Tribunal saddled the owner with liability- award was challenged on the ground that 'K' was driving the vehicle and not 'R'- claimants had specifically pleaded that vehicle was being driven by 'R'- Tribunal had also found that vehicle was being driven by 'R'- 'R' had not questioned the finding recorded by the Tribunal- finding of the Tribunal that 'R' was driving the vehicle at the relevant time upheld. Title: Kamlesh Kumari Vs. Sudhanshu and others Page-1084

Motor Vehicles Act, 1988- Section 163-A- Deceased was running an auto electrician shop- he was travelling in a newly purchased Maruti Van being driven by 'S'- driver and deceased were murdered and their dead bodies were thrown in Nalla – a claim petition was filed pleading that accident had arisen out of use of the vehicle – a preliminary objection was raised that accident was not out of use of the vehicle, but was the result of crime- police filed a final report disclosing that driver, deceased and accused were travelling in the vehicle- accused had killed the driver due to enmity and had also killed the deceased- held, that offence was committed inside the vehicle and is out of use of the motor vehicle- the negligence is not required to be proved in a petition under Section 163-A of M.V. Act, therefore, petition was fully maintainable. Title: United India Insurance Company Ltd. Vs. Talaru Ram and others Page-1109

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 25 years which was duly established by matriculation certificate- Tribunal had erred in applying the multiplier of '14', whereas, multiplier of '16' is applicable- claimants are entitled to compensation of Rs.

2000x12x16= Rs.3,84,000/- towards loss of dependency. Title: Champa and others Vs. Vinod Kumar Sharma and others Page-1069

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 38 years – respective ages of the claimants were 33 years, 11 years and 8 years- Tribunal had applied multiplier of '14', whereas, multiplier of '16' was applicable- income of the deceased was pleaded to be Rs.10,000/- per month – by guess work income of the deceased cannot be less than Rs.6,000/- per month- 1/3rd amount is to be deducted towards personal expenses and thus, claimants have lost dependency to the extent of Rs.4,000/- per month- hence, compensation of Rs. 4,000/- x 12 x 16= Rs. 7,68,000/- awarded under the head 'loss of dependency' and sum of Rs.10,000/- each awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'- total compensation of Rs. 8,08,000/- awarded along with interest. Title: Babita Devi & others Vs. Roop Chand & others Page-609

Motor Vehicles Act, 1988- Section 166- Appellant challenged the award as being excessive and cross-objector challenged it as being inadequate- held that, the Tribunal has correctly appreciated the evidence including the statement of the medical Officer- the award is neither excessive nor inadequate, hence appeal and cross-objections dismissed. Title: Bharat Sanchar Nigam Limited and another Vs. Sham Lal and others Page-813

Motor Vehicles Act, 1988- Section 166- Claimant had filed a claim petition pleading that accident was outcome of rash and negligent driving of the driver of Tata Indica- insurer pleaded that accident was result of negligence of the claimant himself- pillion rider had also deposed that accident had taken place due to the negligence of the driver of Tata Indica- strict proof is not required in the proceedings before Motor Accident Claims Tribunal- claimant has to prove prima facie case- in the present case, claimant has prima facie proved that driver of Tata Indica had driven the vehicle in a rash and negligent manner due to which claimant had sustained injuries- appeal dismissed. Title: United India Insurance Company Ltd. Vs. Naveen Gupta & others Page-867

Motor Vehicles Act, 1988- Section 166- Claimant No.1 was aged 50 years and claimant No. 2 was aged 55 years at the time of accident- multiplier of '11' would be applicable- deceased was working as a labourer and his income can be taken as Rs.4500/- per month by guess work- 50% amount was to be deducted towards his personal expenses- thus, loss of dependency will be Rs. 2550/- per month and the claimants would be entitled to Rs.2,97,000/- (Rs.2250x12x11) with interest. Title: Shakuntla Devi and another Vs. M/s Lime Chemical Factory and others Page-717

Motor Vehicles Act, 1988- Section 166- Claimant-injured challenged award on the ground of adequacy of compensation-the victim suffered 88% permanent disability in the accident which was outcome of contributory negligence- victim was 17 years of age at the time of accident- his income can be taken as Rs.3000/- per month and multiplier of 14 applied- apart from it, claimant held entitled to Rs.50,000/- under the head 'medical expenses incurred', Rs.50,000/- under the head 'future medical expenses', Rs.20,000/- under the head 'attendant charges', Rs.50,000/- under the head 'pain and sufferings undergone- the claimant further held entitled to Rs.50,000/- under the head 'loss of amenities of life' for the reason that he will not be in a position to get a proper match, rather, will not be able to have marital life- insurers of both the vehicles saddled with liability- award modified. Title: Manohar Singh Vs. Pawan Kumar and others Page-1093

Motor Vehicles Act, 1988- Section 166- Claimants are the parents of the deceased and the legal representatives of the deceased- thus, they are entitled to file the petition- further, Motor Accident Claims Tribunal can treat the repot of the accident forwarded as an application for compensation- therefore, the plea that petition is bad for non-joinder of necessary parties cannot be accepted. Title: Oriental Insurance Company Ltd. Vs. Lachman Singh & others Page-862

Motor Vehicles Act, 1988- Section 166- Claimants challenged the award on the ground of adequacy of compensation- held that, the age of the deceased was 21 years, and the Tribunal has wrongly applied the multiplier of 7; whereas it should have been 15 as per settled law- tribunal had taken the income of the deceased as Rs. 3000/- whereas it was to be taken as Rs. 4000/- in view of the pleadings and evidence- further held that the Tribunal fell into an error by not awarding compensation under the head 'funeral expenses', loss of estate' and 'loss of love and affection' in favour of the claimants- a sum of Rs. 30,000/- awarded under these heads- award modified accordingly. Title: Vidya Devi & another Vs. Kamla Gandhi & others Page-1127

Motor Vehicles Act, 1988- Section 166- Claimants challenged the award on the ground of adequacy of compensation- held that, the age of the deceased was 55 years, and therefore, multiplier of 8 was rightly applied; however the Tribunal had fallen into error by awarding Rs. 20,000/- in various heads and Rs. 10,000/- each was awardable under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate', and 'funeral expenses- further held, Tribunal erred in exonerating the insurer on the ground that the deceased was a gratuitous passenger - at best the right of recovery was to be granted- award modified. Title: Satya Parkash Sharma & others Vs. Vinod Kumar & others Page- 1105

Motor Vehicles Act, 1988- Section 166- Deceased aged about 6 years died in a bus accident- the claimants, who are father and sisters of the deceased challenged the award on the ground of adequacy of the compensation-held that, the Tribunal has rightly awarded Rs. 2,40,000/- as compensation under various heads, which, by no stretch of imagination, can be said to be inadequate. Appeal dismissed. Title: Satya Narayan Vs. Gauri Dutt and others Page-841

Motor Vehicles Act, 1988- Section 166- Deceased died in a bus accident-the Tribunal committed an error in holding that the claimants had lost source of dependency of Rs.1500/- per month- deceased was a house wife and can be presumed to be earning not less than Rs. 3000/- per month-after deducting 1/3rd amount toward the personal expenses the loss of source of dependency comes to Rs.2,000/- per month- applying the multiplier of 16, total compensation computed comes to Rs. 4,24000/- (Rs. 2000x12x16) appeal allowed. Title: Satya Narayan Vs. Gauri Dutt and others Page-841

Motor Vehicles Act, 1988- Section 166- Deceased was 52 years of age at the time of accident- he was a government employee- his income was Rs.3,000/- per month- 1/3rd of the amount is to be deducted towards his personal expenses- keeping in view his age, multiplier of '13' is applicable – thus, claimant is entitled to Rs.2000 x 12 x 13= Rs.3,12,000/- towards loss of dependency. Title: Kumari Sunita Vs. The State of H.P. & others Page-822

Motor Vehicles Act, 1988- Section 166- Deceased was 60 years of age- Tribunal had applied multiplier of '5', whereas, multiplier of '6' is applicable- deceased was a sculptor by profession- no satisfactory evidence was led to prove his income by guess work- it can be held that deceased was earning Rs.4,500/- per month- after deducting 1/3rd of the income towards personal expenses, loss of dependency is Rs.3,000/- per month- claimants are entitled to Rs.3,000/- x 12 x 6 = Rs.2,16,000/- under the head loss of source of dependency- in addition, Rs.10,000/- each awarded under the heads 'loss of estate', 'loss of love and affection' and 'funeral expenses'- thus, total compensation of Rs.2,46,000/- is awarded along with interest. Title: Jasbir Singh Vs. Satwant Kaur and others Page- 1076

Motor Vehicles Act, 1988- Section 166- Deceased was working as a Junior Basic Teacher on contract basis- her salary was Rs. 4351/-, which can be taken as Rs.4,500/- per month- after deducting 1/3rd towards the personal expenses, loss of dependency will be Rs.3,000/- per month- she was aged 33 years at the time of accident- multiplier of '16' will be applicable- therefore, claimant is held entitled to compensation of Rs.3,000/- x 12 x 16 = Rs.5,76,000/- under the head loss of source of dependency - a sum of Rs.10,000/- each awarded under the heads 'loss of estate', 'loss of love and affection' and funeral expenses - thus, total compensation of Rs.6,06,000/-, awarded along with interest @ 7.5% per annum from the date of filing of the petition. Title: Kumari Vishav Bharti Vs. Oriental Insurance Co. Ltd. Page-1085

Motor Vehicles Act, 1988- Section 166- In an accident all passengers including the driver died-claim petition by the claimants, who lost their son dismissed by the Tribunal holding that the rashness and negligence of the offending driver not established-held that, Granting of compensation is a welfare legislation and the hyper technicalities, mystic maybes, procedural wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions and the social purpose of granting compensation-FIR u/s 279 & 304-A lodged against the offending driver has been proved on the record-apart from it, specific allegations qua rashness and negligence leveled against the offending driver have not been denied-evidence led fully establishes the rash and negligent driving being the cause of the accident- the income of the deceased assessed to be Rs.5000/-; 50% deducted toward personal expenses of the deceased and claimants held entitled to Rs.4,80,000/- as compensation- appeal allowed. Title: Rattan Chand alias Ratto and another Vs. Neelam Devi and others Page-830

Motor Vehicles Act, 1988- Section 166- Income of the deceased was taken as Rs.3,000/- per month- 1/5th of the amount was to be deducted towards loss of dependency and claimants are entitled to Rs.2,400/- under the head 'loss of dependency'- Tribunal had applied the multiplier of '12'- the age of deceased was 43 years at the time of accident, thus, multiplier of '14' will be applicable- thus, claimants will be entitled to Rs.2400 x 12 x 14= Rs. 4,03,200/-- they will be entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'- total compensation of Rs. 4,43,200/- awarded along with interest. Title: Himachal Road Transport Corporation vs. Sushma Devi & others Page-652

Motor Vehicles Act, 1988- Section 166- Insurance company challenged the award on the ground that excessive amount was awarded by the tribunal- held that, the owner has led cogent and convincing evidence to show that a damage of Rs.1,02000/- was caused to his bus in the accident by the rash and negligent driving of the respondent No.2- award is based

upon proper appreciation of evidence- appeal dismissed. Title: United India Insurance Co. Ltd. Vs. Managing Director, HRTC and others Page-865

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the ground that the insured has committed willful breach of the terms and conditions of the policy and on other grounds- held that, the insurer has not sought the permission as required under section 170 of Motor Vehicle Act, hence he cannot challenge the award on other grounds- further held that vehicle involved in the accident was L.M.V as per its gross weight and endorsement of PSV was not required on the driving licence-the driver proved to be having L.M.V Licence and the appellant had failed to prove breach of the policy by the insured- the Tribunal, however erred in granted interest @ 9% per annum- It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, hence it should have been 7.5% per annum- award modified. Title: The New India Assurance Company Vs. Rakesh Kumar & another Page-1097

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the grounds that FIR of the accident was not lodged; accident resulted due to contributory negligence and petition was bad for non-joinder and mis-joinder of the parties- held that, findings qua rashness and negligence of the driver were never challenged by the owner of the offending vehicle- no evidence was led by the owner/insured to show as to how the petition was bad for mis-joinder and non-joinder of the parties- further held that Motor Vehicles Act, 1988 has gone a sea change and Claims Tribunal can treat report of accident forwarded to it under Section 158 (6) of the Act as an application for compensation- the Tribunal has also rightly assessed the compensation- appeal and cross-objections dismissed. Title: United India Insurance Company Ltd. Vs. Sanjay Kumar & others Page-1107

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the ground of adequacy of compensation- held that, although this ground was not available to the appellant yet it becomes clear that the tribunal has wrongly applied the multiplier of 15; whereas it should have been 16- further held that, 1/3rd share of the income was to be deducted toward the personal expense of the deceased and Rs.10,000/- each awarded to the claimant under the head loss of love and affection, loss of estate and funeral expenses- award accordingly modified. Title: New India Assurance Co. Ltd. Vs. Rajesh Sharma and others Page-824

Motor Vehicles Act, 1988- Section 166- Insurer has questioned the award on the ground that there was breach of condition by the owner/insured-held that, the appellant has not led any evidence to prove that the offending driver was not possessing valid driving licence- breach of the condition not proved- appeal dismissed. Title: United India Insurance Company Ltd. Vs. Udham Singh (since deceased) through LRs and others Page-1126

Motor Vehicles Act, 1988- Section 166- Insurer questioned the award on the ground that the compensation awarded by the Tribunal is excessive- held that, careful perusal of the award shows that the amount awarded, in no way, is excessive or on the higher side, rather the compensation granted appears to be inadequate- appeal dismissed. Title: National Insurance Company Vs. Kuldeep Singh and others Page- 823

Motor Vehicles Act, 1988- Section 166- Owner-insured and the driver challenged the award on the ground that insurer has been wrongly exonerated- held that, claimants have

specifically pleaded that the deceased had hired the offending vehicle to transport potato crop to Chandigarh and to carry back the edible material in the same-owner/insured and driver have admitted this plea- the insurer has evasively denied it- insurer led no evidence to prove that owner-insured has committed willful breach-a person, who had hired the vehicle for transporting goods, was returning in the same vehicle cannot be said to be an unauthorised/gratuitous passenger- thus the Tribunal committed an error in holding the deceased as gratuitous passenger- appeal allowed. Title: M/S Vishal Enterprises and another Vs. Lajja Devi and others Page-1089

Motor Vehicles Act, 1988- Section 166- Owner-insured challenged the award on the ground that the right of recovery to the insurer was wrongly given- the Alto car having gross weight of 1165 kg had met with an accident and the offending driver had licence to drive light motor vehicle-held that, the offending vehicle fell in the category of light motor vehicle hence endorsement of PSV on the licence of the offending driver was not required- further held that, since the offending driver had valid licence to drive the offending vehicle and owner-insured has not committed willful breach- the Tribunal erred in granting right to recovery to the insurer- appeal allowed. Title: Des Raj and another Vs. Vijay Jamwal and others Page-1071

Motor Vehicles Act, 1988- Section 166- The claimant, who had sustained the injuries in the accident challenged the award on the ground of adequacy of the compensation-held that, the amount awarded under the heads 'pain and suffering and loss of amenities of life', is too meager and in view of settled law amount is enhanced to 50,000/- above the already awarded amount- appeal allowed. Title: Satya Narayan Vs. Gauri Dutt and others Page-841

Motor Vehicles Act, 1988- Section 166- The owner/insured and the driver of the offending vehicle have challenged the award on the plea that owner-insured has wrongfully been saddled with the liability-held that, the averments made by the owner/insured in reply that the tractor was being driven by the deceased by taking the key fraudulently not established being contrary to the contents of the FIR; not challenged by the appellant- further held that even if the owner-insured pleads that the person, who was driving the vehicle without having a valid and effective driving licence at the relevant point of time, had taken the keys fraudulently, is breach on the part of the owner-insured- the order of the Tribunal is well reasoned; hence appeal dismissed. Title: Padam Dass and another Vs. Man Kumari and others Page-827

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded lower compensation- held, that it is the duty of the Courts to award proper compensation and Appellate Court is within its power to enhance the compensation, even if, no appeal has been preferred on this ground- therefore, compensation enhanced. Title: United India Insurance Company Ltd. Vs. Talaru Ram and others Page-1109

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded Rs. 74,000/- as compensation- petitioner had suffered 25% permanent disability relating to left lower limb-injury was on the knee- petitioner will suffer pain throughout his life- he may develop osteoarthritis and may require replacement at a later stage- petitioner will not be in a position to work in the fields in a routine manner- an amount of Rs.50,000/- awarded under the head 'pain and suffering', Rs.25,000/- awarded under the head 'loss of amenities of life' , Rs.1 lac awarded under the head 'loss of earnings' and the petitioner held entitled to a sum

of Rs.1,89,000/- along with interest @ 7.5% per annum. Title: Jasvir Singh Vs. Amer Singh and another Page-658

Motor Vehicles Act, 1988- Section 166- Tribunal had deducted 1/3rd of the income of the deceased towards his personal expenses- 50% of the income was to be deducted- loss of dependency would be Rs. 1500/- per month and the claimants would be entitled to Rs. 1500x12x17=Rs. 3,06,000/-towards loss of dependency- Rs. 20,000/- awarded under the head 'loss of expectancy of love and affection' and Rs.10,000/- under the head 'funeral & conveyance' upheld- thus, total compensation of Rs.3,06,000 + 20,000 + 10,000 = Rs.3,36,000/- awarded along with interest. Title: The New India Assurance Company Vs. Kanta Devi & others Page-668

Motor Vehicles Act, 1988- Section 166- Tribunal had dismissed the petition on the ground that claimants had failed to prove that driver was driving the vehicle in a rash and negligent manner on the date of accident- challan was presented against the driver before the Court which resulted in the conviction of the driver- therefore, it can be safely concluded that driver was driving the vehicle in a rash and negligent manner- deceased was 60 years of the age at the time of accident and was earning Rs.5,000/- per month from Karyana shop- it can be said by guess work that even a labourer would be earning Rs.150 per day - therefore, income of the deceased can be taken as Rs.4,500/- per month- 1/3rd is to be deducted towards personal expenses- loss of dependency would be Rs.3,000/- per month- multiplier of '5' would be applicable and the claimant would be entitled for compensation of Rs. 3,000 x 12 x 5 = Rs.1,80,000/- along with interest @ 7.5% per annum. Title: Roshan Lal and others Vs. Ashwani Kumar and another Page-714

Motor Vehicles Act, 1988- Section 166- Tribunal had held that deceased was earning Rs.2300/- per month- 1/3rd amount was to be deducted towards personal expenses- loss of dependency will be Rs. 1533 per month- deceased was aged 20 years at the time of accident and multiplier of 16 will be applicable- Tribunal had fallen in error in applying multiplier of '5', - thus claimant will be entitled to Rs.1533 x 12 x 16 = Rs.2,94,336/- along with interest @ 7.5 % per annum. Title: Rattni Devi Vs. Asha Rani and others Page-712

Motor Vehicles Act, 1988- Section 1988- Tribunal had held that accident had taken place due to contributory negligence of the drivers of the bus and truck- drivers had appeared in the witness box but they were not able to rebut the evidence of the claimant regarding negligence- held, that the tribunal had rightly held that accident was the result of contributory negligence of the drivers of the bus and truck and had rightly directed the payment of compensation in equal shares. Title: Himachal Road Transport Corporation and another Vs. Nisha Devi and others Page-649

'N'

N.D.P.S. Act, 1985- Section 18 and 20- Accused was found carrying a black bag- search of the bag was conducted during which 1850 grams charas and 50 grams opium were recovered from the bag- accused was told of his right to be searched before nearest Magistrate or Gazetted Officer- however, his search was conducted by the Police Officer- this requirement is mandatory- police had also not associated any independent witness despite the fact that recovery was effected in the Bus stand- no entry was made in the malkhana register regarding the production of the property before the trial Court- held, that in these

circumstances, prosecution case is not proved- accused acquitted. Title: Maan Chand Vs. State of H.P. Page-516

N.D.P.S. Act, 1985- Section 18 and 20- Accused was found in possession of 2.5 kg. of charas and 500 grams of opium- I.O had given an option to the accused to be searched in the presence of Gazetted Officer, Magistrate or the Police- accused consented to be searched by the police- option given by the I.O. to be searched by the police is not in accordance with law- further, no vehicle was stopped to associate any independent person- there was contradiction in the testimonies of the witnesses regarding the police official who had gone to fetch independent person- police official who brought the case property from Malkhana to Court was not examined- no entry was made in the Malkhana register regarding the production of the case property in the Court for the deposit of the same in the Malkhana- hence, case property produced in the Court is not connected to the case property recovered at the spot- held that, in these circumstances, prosecution case is not proved- accused acquitted. Title: Vinay Kumar Vs. State of Himachal Pradesh (D.B.) Page-808

N.D.P.S. Act, 1985- Section 18 and 20- Accused was found in possession of 1.500 kilograms of cannabis and 5 grams of opium- he was acquitted by the trial Court- accused was not given option to be searched before Magistrate or gazetted Officer- no independent witness was associated despite the fact that witnesses were available- the person who carried rukka to police Station was also not examined- held, that in these circumstances, prosecution version was not established and the accused was rightly acquitted by the Court. Title: State of H.P. Vs. Hardev Singh alias Bhola (D.B.) Page-1212

N.D.P.S. Act, 1985- Section 18- Search of cowshed of accused was conducted during which 15 kg of poppy husk was recovered- DW-1 Panchayat Sahayak has proved the copy of Parivar Register which shows that family of the accused comprises of six members - house was in possession of the family members- prosecution has failed to prove the exclusive possession of the accused- hence, he cannot be convicted of the possession of 15 kg. of poppy husk. Title: State of Himachal Pradesh Vs. Tarsem Singh (D.B.) Page-753

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police party- his bag was searched during which 600 grams charas was recovered- accused was given option to be searched before Magistrate, Gazetted Officer or police party present at the post- held, that option to be searched before Gazetted Officer or Magistrate had to be given to the accused and any third option is contrary to law- there was violation of Section 50 of N.D.P.S. Act- in these circumstances, accused was rightly acquitted. Title: State of Himachal Pradesh Vs. Ronu Chauhan (D.B.) Page-1147

N.D.P.S. Act, 1985- Section 20- Accused was apprehended by the police nakka team and 1.450 kilograms cannabis was recovered from a black coloured bag being carried by him- accused was convicted by trial court- in appeal held that the place of interception of accused was not isolated or secluded - prosecution witnesses have referred that many vehicles were passing from the spot and abadi was also nearby- failure to associate independent/local witnesses by the Investigating Officer creates doubt about the genesis of the incident- PW-2 had admitted that personal search of the accused was also conducted- once personal search was conducted compliance of Section 50 of N.D.P.S. Act was must which was not made by the police- entries in the malkhana register were also not made when the case property was produced in the Court and was taken back- no DDR was also recorded, thus, there is doubt

about the fact that case property remained intact with the police- all these facts show that guilt of the accused was not established- appeal accepted. Title: Kishori Lal Vs. State of H.P. (D.B.) Page-786

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 175 grams of charas- he was acquitted by the trial Court- prosecution witnesses did not support the prosecution version regarding giving of option- therefore, claim of trial Court that provision of Section 50 of N.D.P.S. Act was not complied with cannot be faulted- accused acquitted. Title: State of H.P. Vs. Hem Raj alias Raju (D.B.) Page-1314

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.620 kilograms of charas- accused had given his consent to search his bag- however, Investigating Officer had conducted the personal search of the accused- further, entry regarding the production of the case property in the Court was not made in the register due to which the case property produced in the Court is not linked to the case property recovered at the spot- held, that in these circumstances, prosecution case is not proved- accused acquitted. Title: Suresh Kumar Vs. State of H.P (D.B.) Page-600

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2 kg. of charas- independent witnesses had not supported the prosecution version- case property produced in the Court is not connected to the case property recovered at the spot as entry in the malkhana register was not produced- held, that in these circumstances, prosecution version is not proved- accused acquitted. Title: Mohinder Singh Vs. State of H.P (D.B.) Page-662

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 300 grams of charas- he was given option to be searched before Magistrate, Gazetted Officer or by the police party- held, that only two options are available to the accused either to be searched before Gazetted Officer or Magistrate and giving third option is contrary to Section 50 of N.D.P.S. Act- in these circumstances, accused was rightly acquitted by the trial Court. Title: State of Himachal Pradesh Vs. Ashok Kumar (D.B.) Page-1138

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 248 grams of charas- independent witnesses have not supported the prosecution version- he was acquitted by the trial Court- there were contradictions in the testimonies of the police officials- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt- accused acquitted. Title: State of Himachal Pradesh Vs. Puran Chand (D.B.) Page-1157

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 400 grams of charas- she was acquitted by the trial Court- independent witnesses did not support the prosecution version- it was proved on record that family members of the accused were residing with her- therefore, exclusive possession of the accused was not proved- held, that accused was rightly acquitted by the trial Court. Title: State of Himachal Pradesh Vs. Sunita Devi (D.B.) Page-1153

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 320 grams of charas- she was acquitted by the trial Court- it was specifically stated in the consent memo that police had a prior information regarding the possession- however, police had not complied with provision of Section 42- testimonies of police officials were not satisfactory – held, that

acquittal of the accused by trial Court was justified and proper- appeal dismissed. Title: State of Himachal Pradesh Vs. Rupali Chauhan (D.B.) Page-1150

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4 kg. of charas- he was acquitted after trial – it was admitted by PW-1 that place was heavily populated- there were many shops and many people were residing in the vicinity– however, no independent witness was associated- rukka was prepared at 11:30 P.M but was sent at 12:30 P.M- delay was not explained- samples were not taken homogenously- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt- accused was rightly acquitted by the trial Court. Title: State of Himachal Pradesh Vs. Sohan Singh (D.B.) Page- 1191

N.D.P.S. Act, 1985- Section 20- Accused was intercepted by the police while he was coming from footpath with yellow coloured bag – on search, 910 grams of charas was recovered- accused was acquitted by the trial Court- in appeal against the acquittal held, that despite of availability of independent witnesses, none was associated by the Investigating Officer- further, witnesses have given contradictory versions- when two versions are available on record; one that accused was seen coming from the footpath and second that he was travelling in HRTC Bus, accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of H.P. Vs. Hitender Kumar (D.B.) Page-803

N.D.P.S. Act, 1985- Section 20 and 29- Accused were found in possession of 1.537 kg. and 1.501 kg. of charas- PW-1 stated that person carrying rukka did not return with the case file- however, PW-8 stated that a person carrying rukka returned with the case file- PW-1 stated that case property was packed and sealed before sending rukka to the Police Station- PW-8 stated that case property was sealed after the return of the case file – there are major contradictions regarding the place where accused were apprehended- the manner in which accused were intercepted and search, sealing and sampling procedure were completed at the spot- held, that accused were rightly acquitted by the trial Court- appeal dismissed. Title: State of H.P. Vs. Ranjit Singh & another (D.B.) Page-751

N.D.P.S. Act, 1985- Section 20 and 55- Accused was apprehended while travelling on a motorcycle with a bag carrying 1.980 kgs. charas by the police team during nakka- accused convicted by the trial Court- in appeal held, that compliance of Section 55 of N.D.P.S. Act was not made as SHO concerned had not re-sealed the case property deposited with him- further held, that although, compliance of section 55 of the Act is directory yet, the same is required to be followed scrupulously taking into account the stringent sentence under the Act – omission on the part of SHO creates doubt regarding the genuineness of the case property- further police official who had brought the case property from malkhana to Court and back, was not examined and entry in malkhana register with respect to taking of case property to the Court was not proved- the alleged independent witnesses (PW-7) not supported the prosecution case and admitted in cross examination to be a witness in number of similar cases- failure to associate independent witness by Investigating Officer also creates doubt in the prosecution story- acquittal of accused not established- appeal accepted. Title: Kamaljeet @ Kamal Vs. State of Himachal Pradesh (D.B.) Page-872

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 800 grams of charas- he was acquitted by the trial Court- it was specifically stated in the consent memo that police had information regarding the narcotic drugs- provision of Section 42(2) was not

complied with- an option to be searched before the Gazetted Officer, Magistrate or the police party was given, which was not in accordance with the Section 50 of N.D.P.S. Act as option to be searched before magistrate or gazette officer has to be given- independent witnesses were not associated- hence, in these circumstances, accused was rightly acquitted- appeal dismissed. Title: State of H.P. Vs. Pappu son of Sh. Rasala Ram (D.B.) Page-1214

N.D.P.S. Act, 1985- Section 20- Police party found a vehicle parked on the road- accused was found sitting in the vehicle on the driver seat- he told on inquiry that the vehicle had heated up and it was parked on the road side due to this reason- accused was asked to produce Driving Licence but he could not produce the same- Registration Certificate was produced which was in the name of one 'R'- search of the vehicle was conducted by the police on which one POP bag with two strings was recovered from underneath the seat of the driver- it was found to be containing 2 kg. 240 grams of charas- accused was convicted by the trial Court- recovery was effected during the night, therefore, the non-association of independent person will not affect the prosecution case- personal search of the accused was conducted by the police prior to the recovery of the charas- however, police officials had not complied with the requirement of Section 50 of N.D.P.S. Act and had not apprised the accused of his right to be searched before the Magistrate or Gazetted Officer- further, abstract of Malkhana register was not produced before the Court to connect the case property produced in the court with the property recovered from the spot- held, that in these circumstances, prosecution case was not proved- appeal accepted- accused acquitted. Title: Yash Pal Vs. State of H.P. (D.B.) Page-495

'P'

Payment of Wages Act, 1936- Section 15- Petitioner alleged that respondent had engaged him for completion of the work awarded to him by I & PH Department- petitioner employed 40 labourers - he was paid only Rs. 2,63,859/- out of Rs. 3,46,880/- by respondent, whereas, remaining amount of Rs.83,021/- was never paid- respondent denied the award of contract to him and the fact that petitioner was engaged by him to complete the assignment- Trial Court directed respondent to pay Rs.83,021/- with interest- Appellate court accepted the appeal and set aside the decision of trial court - held, that Appellate Court had failed to appreciate the fact that respondent had admitted in reply to the notice served upon him by the petitioner that the work was awarded to him- the denial of this fact by respondent in reply to the petition and in evidence is, thus, inconsequential- further held, that Appellate court had not read the statement of AW-3 Jiwan Chand in totality and had further wrongly disbelieved the witnesses examined by the petitioner to support his case- the appellate court had also failed to notice the fact that respondent had not even appeared in the witness box to support his case nor had he examined any witnesses- claim of the petitioner is duly proved- appeal allowed and judgment of trial Court restored. Title: Rattan Lal Vs. R.K. Seth Page-838

'R'

Right of Children to Free and Compulsory Education Act, 2009- Section 13- Petitioner approached respondent No.4 for admitting his younger child in class 3, but the admission was declined on the ground that the child had not made the grade and could not be selected- petitioner claimed that school is situated at the distance of 75 meters and the child has an unfettered right to be admitted in the school- school pleaded that son of the petitioner had competed with other children but had failed to make the grade and, therefore, could not be granted admission- held, that every child of the age of 6 to 14 years shall have right to free and compulsory education in a neighborhood school till the completion of elementary education- however, this does not give any right to child of the parents to pick

and choose a particular school- private aided recognized school has a right to autonomy- petition dismissed. Title: Nisha Kanwar Vs. State of Himachal Pradesh and others (D.B.) Page-567

Right to Information Act, 2005- Section 19- Petitioner sought information from Public Information Officer – incomplete information was supplied to him on which an appeal was preferred by the petitioner- Appellate Authority directed to supply the complete information- however, no costs were imposed for supplying incomplete information- petitioner preferred a further appeal- the State Information Commission imposed a cost of Rs.250/- for the delay- petitioner preferred a writ petition against this order- held, that period spent in appeal is to be excluded while calculating the delay – the precise nature of the information sought was not specified- therefore, respondent cannot be penalized for the delay- writ petition dismissed. Title: Dinesh Kumar Vs. State Information Commission & Ors. (D.B.) Page-588

'S'

Specific Relief Act, 1963- Section 5- Nautor land was granted to 'S'- mutation was attested in her favour- suit land was inherited by plaintiff on her death- plaintiffs claimed that defendants had got themselves recorded non-occupancy tenants, although, they had not paid any rent- defendants claimed that 'S' had admitted them as tenants- in the alternative, they claimed that they had acquired title by virtue of agreement to sell executed by 'S'- defendants also took up the plea of adverse possession - suit was dismissed by the trial Court- an appeal was preferred which was allowed- it was not disputed that nautor was allotted to 'S'- defendants pleaded adverse possession but no evidence was led to prove this fact- DW-2 admitted that Patwari had not visited the spot- defendants did not claim that they were inducted as tenants but pleaded that they were put in possession- the agreement was against the public policy- it was not proved that possession was taken in pursuance of the agreement to sell or that the defendants were ready and willing to perform their part of contract- in these circumstances, Appellate Court had rightly set aside the decree passed by trial court and had allowed the appeal. Title: Ram Prakash and others Vs. Jamil Akhtar & ors. (D.B.) Page-796

Specific Relief Act, 1963- Section 20- Defendant agreed to sell his share to the plaintiff for Rs.1,15,000/- - he agreed to execute the sale deed on the receipt of balance amount of Rs.5,000/- from the plaintiff- defendant denied the agreement or the receipt of the sale consideration- suit was decreed by the trial Court- an appeal was preferred which was dismissed- the record shows that plaintiff remained ready and willing to perform his part of the agreement- notice was issued to the defendant to execute sale deed- a sum of Rs.5,000/- was deposited in the court- plaintiff also appeared before Sub Registrar but defendant did not execute the sale deed- held, that execution of the agreement was proved and the suit was rightly decreed by the trial Court. Title: Ganga Ram Vs. Luharu Ram Page-760

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he was the only legal heir of M and R, who had died issueless and that the defendants had got mutation attested wrongly claiming themselves to be the legal heirs- suit was dismissed by the trial Court- appeal was allowed- held, in regular second appeal that no inquiry was conducted at the time of attestation of mutation- trial Court had wrongly relied upon the certificate issued by the Gram Panchyat without examining the Panchyat Official- Appellate Court had correctly appreciated the oral and documentary evidence- appeal dismissed. (Para-12) Title: Shyam Lal & anr. Vs. Mohan Lal Page-509

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration pleading that he is owner in possession of the suit land- mutation No. 191 is illegal and defendant started interfering with the possession of the plaintiff on the basis of mutation- plaintiff claimed that suit land was originally owned by 'K' who was widow- plaintiff was tenant at Will and had become the owner- defendant shown to be owner on the basis of mutation of inheritance- trial Court dismissed the suit- an appeal was preferred which was accepted- held, that all the tenants other than the occupancy tenants were conferred proprietary right- limited protection was granted to the owner- the conferment was automatic in favour of other tenants- widow succeeding to the property of her husband is entitled to retain the property during her life time and no right to resumption has been given to her- there can be no succession of her right. Title: Kulbhushan Vs. Prem Singh (deceased) through his LRs. Smt. Kaushalya Devi and others Page-955

Specific Relief Act, 1963- Section 34- Plaintiffs sought declaration and injunction challenging the Will allegedly executed by one 'T' in favour of defendant on the plea that Will was outcome of fraud, mis-representation and that 'T' was not in sound disposing state of mind- defendant supported the Will as a genuine document- trial Court dismissed the suit and the First Appellate Court dismissed the appeal – in second appeal held, that suit property originally belonged to one 'B' from whom it was inherited by 'T'- plea of plaintiffs that property was looked after by the husband of plaintiff No.1 and deceased was also maintained by him stand falsified from the fact that there was litigation between 'T' and the husband of the plaintiff No.1- defendant further proved that 'T' was rather looked after by the defendant –appeal dismissed. Title: Chiri Devi and another Vs. Drompti Devi (deceased) through LR's Labh Singh and another Page-779

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit claiming that he is owner in possession of the suit land which is recorded as gair mumkin rasta- he had affixed a gate to prevent the access of cattle- defendant denied to remove the gate- a fresh notice was issued to defendant for removal of the gate- defendant claimed that there was a passage over the suit land which was being used by habitants of the area- suit was dismissed by the trial Court- an appeal was preferred which was allowed- plaintiff is recorded to be owner in possession in the revenue record- defendant had never applied for the change of entry- there is not material on record to show that path was made pucca by Municipal Corporation from its own funds- defendant had no right to interfere with the suit land and suit was rightly decreed by Appellate Court – appeal dismissed. Title: The Executive Officer, Municipal Council, Nahan & another Vs. Prem Chand Page-770

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- defendant started interfering with the same without any right to do so- PW-1 specifically admitted in his examination-in-chief as well as in cross-examination that defendants are co-sharers- plaintiff and defendants are recorded as co-sharers in Khasra girdawari and jamabandi- therefore, plaintiff should have filed suit for partition and not for injunction- appeal dismissed. Title: Dhani Ram Vs. Chet Ram and another Page-646

Specific Relief Act, 1963- Section 38- Plaintiffs claimed that they are owners in possession of the suit land- HPPWD started construction of the road and carried out alignment of the road through the suit land- defendants denied that road was passing through the suit land and claimed that road was passing through the Government land- the suit was decreed by the trial Court and appeal was dismissed- held, that the State had taken a specific plea that road was not being constructed through the suit land- ownership and possession of the

plaintiffs were not denied- the State cannot use the land without acquiring the same- Court had correctly appreciated the oral and documentary evidence on record- appellants who were not party to the case, had filed an application before First Appellate Court- same was allowed by First Appellate Court- appellants should have filed separate suit for redressal of their grievances instead of filing the application. Title: Kr. Uday Singh and others Vs. Kali Ram and ors. Page-764

Specific Relief Act, 1963- Section 38- Suit land was allotted as Nautor to 'R'- it was succeeded by his legal heirs on his death- legal heirs sold the suit land to the plaintiffs who were recorded owner in possession- the defendant started interfering in possession of the plaintiffs on which they filed a suit for permanent prohibitory injunction- defendant claimed that he is in possession of the suit land since 1952 and has become owner by way of adverse possession- suit was dismissed by the trial Court- additional issues were framed by the Appellate Court and the case was remanded to trial Court- trial Court discarded the plea of the adverse possession and decreed the suit for possession- appeal was dismissed by the Appellate Court- it was duly proved on record that land was allotted to 'R'- it was succeeded by his legal heirs on his death- legal heirs had sold the suit land to the plaintiff- this was duly recorded in the revenue record- as well the increase in the area of the suit land had occurred during the settlement operation- it is negligible and will not render the identity of the suit land doubtful- defendant has not led any evidence to prove that house was constructed by him in the year - he admitted that suit land is vacant on the spot- mere long possession is not equivalent to adverse possession- hence, Court had rightly negated the plea of adverse possession- appeal dismissed. Title: Sonam Angroop Vs. Khub Ram and others Page-744

TABLE OF CASES CITED

'A'

A.L. Gupta vs. M.M.Suri, AIR 1973 SC 207
A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213
Abbas Ahmad Choudhary Vs. State of Assam, 2010 (12) SCC 115
Abhay Singh Chautala Vs. CBI, 2011(7) SCC 141
Ahmed vrs. State of Gujarat, (2000) 7 SCC 477
AIR India Statutory Corporation and others Vs. United Labour Union and others (1997) 9 Supreme Court Cases 377
Ajay Aggarwal vs. Narinder Kumar and others Latest HLJ 2014 (HP) 742
Ajay Singh vrs. State of Maharashtra, (2007) 12 SCC 341
Ajaypal Singh versus Haryana Warehousing Corporation, (2015) 6 Supreme Court Cases 321
Ajit Singh and another vs. Jit Ram and another, (2008)9 SCC 699
Ajit Singh Harnam Singh Gujral vrs. State of Maharashtra, (2011) 14 SCC 401
All India Judges' Association and others vs. Union of India and others (1993) 4 SCC 288
All India Judges' Association vs. Union of India and others (1992) 1 SCC 119
All India Railway Recruitment Board v. K. Shyam Kumar (2010) 6 SCC 614
Amit Kapoor vrs. Ramesh Chander and another, (2012) 9 SCC 460
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Amrit Bhanu Shali and others versus National Insurance Company Limited and others (2012) 11 SCC 738
Angdui Norbu & others Vs. State of Himachal Pradesh & others AIR 2012 HP 36,
Anil Kumar vs. State of U.P. 2005 SCC (Cri) 178
Anil Ratan Sarkar v. Hirak Ghosh (2002) 4 SCC 21
Anirudh Kumar vs. Municipal Corporation of Delhi and others (2015) 7 SCC 779
Anugrah Narain Singh & another Vs. State of Uttar Pradesh & others (1996) 6 SCC 303
Anvar P.V. vrs. P.K. Basheer and others, r (2014) 10 SCC 473
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085
Asger Ibrahm Amin vs. Life Insurance Corporation of India, JT 2015 (9) SC 329
Ashok Kumar Sahu vrs. Union of India and others, (2006) 6 SCC 704
Ashok Kumar Sharma vrs. State of Rajasthan, (2013) 2 SCC 67
Ashok Kumar versus Hardyal and others, 1995(1) Sim.L.C 79.
Association of Residents of Mhow (Rom) Vs. Delimitation Commission of India (2009) 5 SCC 404
Atam Prakash Vs. State of Haryana and others (1986) 2 Supreme Court Cases 249
Atma Ram Properties (P) Ltd. Versus Federal Motors (P) Ltd., (2005) 1 SCC 705
Attorney General v. Times Newspaper Ltd., (1973) 3 All ER 54

'B'

B.S. Joshi and others vs. State of Haryana and another, JT 2003(3) SC 277
Bachan Singh v. Swaran Singh, AIR 2001 Punjab & Haryana 112

Badri Prakash versus Krishan Gopal 2004(Suppl.) Current Law Journal (HP) 399
Baldev Singh and others vrs. Manohar Singh and another, (2006) 6 SCC 498
Balram Gupta vrs. Union of India and another, 1987 (Supp.) SCC 228
Balwant Rai vs. Surjit Singh and others, 1996(2) SLC 275
Bangalore Water Supply and Sewerage Board Vs. A. Rajappa & ors, (1978) 2 SCC 213 SCC 213
Bank of Baroda versus Sadruddin Hasan Daya and another, AIR 2004 SC 942
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753
Bhe Ram Vs. State of Haryana, AIR 1980 S.C.957
Bhupendra Nath Hazarika and Anr. v. State of Assam and Ors., 2013 AIR SCW 401
Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157
Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298
Binod Kumar and others vrs. State of Bihar and another, (2014) 10 SCC 663
Biswanath Prasad Singh vs. State of Bihar (2001) 2 SCC 305
Bodhisattwa Gautam vs. Miss Subhra Chakraborty, AIR 1996 SC 922

'C'

C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
C.K. Jaffer Sharief Versus State (Through CBI), (2013) 1 SCC 205,
Central Bureau of Investigation vs. Ravi Shankar Srivastava, AIR 2006 SC 2872
Cf. Walker vs. Birmingham, (1967) 388 US 307, U.S.
Chandrika Jha versus State of Bihar and others (1984) 2 SCC 41
Chattar Singh & another vrs. State of Haryana, AIR 2009 SC 378
Chhaganbhai Norsinbhai vs Soni Chandubhai Gordhanbhai and others, AIR 1976 SC 1909
Choudhury Parveen Sultana vrs. State of West Bengal and another, (2009) 3 SCC 398,
Commissioner of Income Tax, Bangalore Vs. Vasudeo V. Dempo, 1993 Supp (1) Supreme Court Cases 612
Commissioner of Police, Bombay versus Gordhandas Bhanji AIR 1952 SC 16,
Common Cause v. Union of India (2014) 6 SCC 552
Consumer Education & Research Centre and others Vs. Union of India and others (1995) 3 Supreme Court Cases 42
Conway vs. Johan, 331 US 367

'D'

D.S. Nakara and others Vs. Union of India, AIR 1983 Supreme Court 130
D.V. Kapoor Vs. Union of India and others, AIR 1990 Supreme Court 1923
Dalip Kaur and others vrs. Jagnar Singh and another, (2009) 14 SCC 696
Dandu Jaggaraju vrs. State of Andhra Pradesh, (2011) 14 SCC 674
Dattaraj Nathuji Thaware v. State of Maharashtra (2005)1 SCC 590
Deepak Kumar vs. State of H.P. 2015(1) Him.L.R.(DB) 381
Delhi Airtech Services (P) Ltd. v. State of U.P. (2011) 9 SCC 354
Devi Singh vrs. Municipal Corporation, Hyderabad, AIR 1972 SC 2510
Dinesh Jaiswal Vs. State of MP, (2010) 3 SCC 323
Dipak Babaria v. State of Gujarat (2014) 3 SCC 502

Director General of Posts and others Vs. B. Ravindran and another (1997) 1 Supreme Court Cases 641

Drugs Inspector Palace Road Bangalore Vs. Dr.B.K.Krishnaiah and another, 1981 (2) SCC 454

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646.

Duni Chand vs. State Latest HLJ 2015 HC 118

'E'

East Coast Railway v. Mahadev Appa Rao (2010) 7 SCC 678

Election Commission of India Vs. Ashok Kumar and others AIR 2000 SC 2977

Esher Singh vrs. State of A.P, (2004) 11 SCC 585

Excel Wear Vs. Union of India and others, AIR 1979 Supreme Court 25

Express Newspapers (P) Ltd. v. Union of India, (1986) 1 SCC 133

'F'

Fakhruddin Ahmad vrs. State of Uttranchal and another, (2008) 17 SCC 157,

Farhd K. Wadia vs. Union of India and others (2009) 2 SCC 442

Federal Bank Ltd. versus Sagar Thomas and others, (2003) 10 Supreme Court Cases 733

'G'

G.B. Pant University of Agriculture and Technology Vs. State of U.P., AIR 2000 Supreme Court 2695

Gajinder Singh and others versus Narotam Singh and others, 1996(1) S.L.J 428

Ganesh Bank of Kurundwad Ltd. v. Union of India (2006) 10 SCC 645

Gayatri De versus Mousmi Co-operative Housing Society Ltd. & Ors., (2004) 5 SCC 90

General Manager (Operations) State Bank of India and another Vs. R. Periyasamy (2015) 3 Supreme Court Cases 101

Gian Singh vs. State of Punjab and another, JT 2012(9) SC 426

Global Energy Ltd. and another versus Adani Exports Ltd. and others (2005) 4 SCC 435.

Government of Andhra Pradesh and others vs. P. Laxmi Devi, (2008) 4 SCC 720

Govindbhai Premjibhai Chovatia vs. Chief General Manager, Gujarat Telecom Circle, Ahmedabad and others, AIR 1996 Gujarat 153

Gowardhandas Rathi vrs. Corporation of Calcutta and another, AIR 1970 Calcutta 539

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179

Guruvayoor Devaswom Managing Committee v. C.K. Rajan, (2003) 7 SCC 546

'H'

Hari Chand vs. State of Delhi AIR 1996 SC 1477.

Hari Ram vs. State of Rajasthan 2000 Cr.LJ 2312 (SC).

Harpal Singh and another vs. State of H.P., AIR 1981 SC 361

Harshendra Kumar D. vrs. Rebatilata Koley and others, (2011) 3 SCC 351

Haryana Financial Corpn. V. Jagdamba Oil Mills (2002) 3 SCC 496

High Court of Judicature of Patna, through Registrar General vs. Shyam Deo Singh and others (2014) 4 SCC 773

High Court of Judicature, Patna vs. Shiveshwar Narayan and another (2011) 15 SCC 317

'I'

Inder Dass versus State of Himachal Pradesh 1995(1) S.L.J 699
Indirect Tax Practitioners" Association vs. R.K. Jain, (2010) 8 SCC 281
Institute of Management Development, U.P. versus Smt. Pushpa Srivastava AIR 1992 SC 2070
Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr., 2014 AIR SCW 3298

'J'

Jagat Pal Dhawan vs. Kahan Singh (dead) through LRs. and others, (2003)1 SCC 191
Jagdish Prasad v. State of Rajasthan (2011) 7 SCC 789
Jai Dev Gupta versus State of Himachal Pradesh and another AIR 1998 SC 2819
Jaipur Shahar Hindu Vikas Samiti v. State of Rajasthan (2014) 5 SCC 530
Jasbir Hussain Nasir Ahmed Boga Vs. State of Gujarat & others, AIR 2006 Gujarat 53
Jasmer Singh vs. State of Haryana and another, (2015) 4 SCC 458
Jaspal Singh Arora Vs. State of M.P. and others (1998) 9 SCC 594
Jatya Pal Singh and Ors. versus Union of India and Ors., r 2013 AIR SCW 2545
Jayrajbhai Jayantibhai Patel v. Anilbhai Nathubhai Patel (2006) 8 SCC 200
Joseph Salvaraja vrs. State of Gujarat and others, (2011) 7 SCC 59

'K'

K.R.Purushothaman vrs. State of Kerala, (2005) 12 SCC 631
Kailash Nath Associates Vs. Delhi Development Authority and another (2015) 4 SCC 136
Kailash vrs. Nankhu and others, (2005) 4 SCC 480
Kalidas Dhanjibhai vs. The State of Bombay AIR 1955 SC 62
Kalpanaraj & others versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Kansingh Kalusingh Thakore v. Rabari Maganbhai Vashrambhai (2006) 12 SCC 360
Karan Singh and another vs. State of H.P. Latest HLJ 2007 (HP) 547
Karnataka Board of Wakf versus Government of India and others 2004(4) Scale, 856
Kavita versus Deepak and others, 2012 AIR SCW 4771
Kerala Hotel and Restaurant Association and others Vs. State of Kerala and others (1990) 2 Supreme Court Cases 502
Kesari Devi versus Anil Kumar Mastana & others, I L R 2014 (VI) HP 1142
Kewal Singh vs. Lajwanti, AIR 1980 SC 161
Khekh Ram vs. Yub Raj, 1998(2) Shim. L.C. 472
Kishan Singh vrs. Gurpal Singh and others, (2010) 8 SCC 775
Kranti Associates (P) Ltd. v. Masood Ahmed Khan (2010) 9 SCC 496
Krishan Singh Vs. Mathura Ahir & ors, AIR 1980 SC 707
Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110
Kuriya and another vs. State of Rajasthan, (2012)10 SCC

'L'

L.S. Thakur vs. Punjab National Bank & Ors., 2011(2) Him L.R. 647

Lachoo Ram and others versus Himachal Road Transport Corporation, (2014) 13 Supreme Court Cases 254

Lal Chand Vs. State of Haryana, AIR 1999 P&H 1

Lal Mandi v. State of W.B., (1995) 3 SCC 603

Lal Singh versus H.P. State Co-operative Milk Producers Federation Limited, I L R 2015 (VI) HP 353 (D.B.)

Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94

Laxmi Narain & ors. versus Kuldeep Singh & ors., I L R 2014 (IX) HP 149

'M'

M. C. Mehta vs. Union of India (2004) 12 SCC 118,

M. Nagaraj and others Vs. Union of India and others (2006) 8 Supreme Court cases 212

M.P. Lohia vs State of W.B. and another, (2005) 2 SCC 686

M.T. Choti vs. State , AIR 1957 Rajasthan page 10

M/S Super Steels, Ahmedabad vrs. Ahmedabad Municipal Corporation, Astodia, AIR 1981 Gujarat 230

M/s. Delux Enterprises vs H.P. State Electricity Board Ltd. & others, I L R 2014 (V) HP 970

Maa Binda Express Carrier and another versus North-East Frontier Railway and others, (2014) 3 SCC 760

Mackinnon Machenzie and Company Limited vs Mackinnon employees Union, (2015) 4 Supreme Court Cases 544

Madan Gopal Kakkad versus Naval Dubey and another, (1992)3 SCC 204

Madhya Pradesh Rajya Sahakari Bank Maryadit versus State of M.P. & Ors., 2007 AIR SCW 1533

Maharashtra Land Development Corpn. v. State of Maharashtra (2011) 15 SCC 616

Mahinder Dutt Sharma vs. Union of India and others, (2014) 11 Supreme Court Cases 684

Majenderan Langeswaran vrs. State (NCT of Delhi) and another, (2013) 7 SCC 192

Makhani Devi Banka vs. Union of India, AIR 1981 Orissa 11

Malikarjuna G. Hiremath versus Oriental Insurance Co. Ltd. & Anr., II (2009) ACC 738 (SC

Maneka Gandhi vs. Union of India, (1978) 1 SCC 248

Manisha Tyagi vs. Deepak Kumar, 2010(1) Divorce & Matrimonial Cases 451

Manohar Joshi v. State of Maharashtra (2012) 3 SCC 619

Mansukhlal Vithaldas Chauhan Versus State of Gujarat, (1997) 7 SCC 622

Master Aarav Goswami (Minor) Vs. State of Himachal Pradesh and another, 2015 (1) Him.L.R. 499

McLeod vs. Aubyin, (1899) AC 549

Meghraj Kothari Vs. Delimitation Commission and others AIR 1967 SC 669

Mg. Dir., Bangalore Metroloplitan Tpt. Corpn. Vs Sarojamma & Anr. 2008 AIR SCW 5480.

Michigan Rubber (India) Ltd Vs. State of Karnataka & ors (2012) 8 SCC 216

Minerva Mills Ltd. and others Vs. Union of India and others, AIR 1980 Supreme Court 1789

Mohammad Rafik vs. State of H.P., 2014(3) Him.L.R. (DB) 1391

Mohd. Aslam alias Bhure versus Union of India, AIR 1995 SC 548,

Mohinder Kaur and others vs Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 SCC 434

Mohinder Singh Gill Vs. The Chief Election Commissioner, (1978) 1 SCC 405

Motilal Jain vs Smt. Ramdasi Devi and others, AIR 2000 SC 2408

Mulak Raj vs. State of Haryana, SLJ 1996(2) 890 Apex Court

Munesh vrs. State of U.P., 2004 Cr. L.J. 1529

Municipal Corporation of Delhi Vs. Female Workers (Muster Roll) and another (2000) 3 Supreme Court Cases 224

Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

Murugan alias Settu vs. State of Tamilnadu, AIR 2011 SC 1691

'N'

N.C.Das vs. Gauhati High Court through Registrar and others (2012) 2 SCC 321

N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354

N.P. Ponnuswami Vs. Returning Officer, AIR 1952 SC 64

N.S.S. Narayana Sarma & Ors. Vs. M/s Goldstone Exports (P.) Ltd. and others, AIR 2002 SC 251

Naga People's Movement of Human Rights Vs. Union of India (1998) 2 Supreme Court Cases 109

Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674

Nagendra Chandra etc. etc vs. State of Jharkhand and Ors., 2007 AIR SCW 7666

Nandi Infrastructure Corridor Enterprises Limited and others Vs. Election Commission of India and another (2010) 13 Supreme Court Cases 334

Nandkishore Ganesh Joshi v. Commr. Municipal Corpn. of Kalyan & Dombivali, (2004) 11 SCC 417

Nanha vs. State of H.P. Latest HLJ (HP) 1195

Nanhoo Mal Vs. Hira Mal, AIR 1975 SC 2140

Narayanamma vs. State of Karnataka, (1994) SCC 728

Narendra Kumar Maheshwari Vs. Union of India and others, 1990 (Supp) Supreme Court Cases 440

Naresh Verma vs The New India Assurance Company Ltd. & others, I L R 2014 (V) HP 482

Narinder Singh vs. State of Punjab AIR 2000 SC 2212

Narinder Singh vs. State of Punjab, JT 2014(4) SC 573

Narmada Bachao Andolan vs. Union of India (1999) 8 SCC 308

Narsing Dass vrs. State of H.P. and others, AIR 1977 HP 84

Nathu Singh vs. State of M.P, AIR 1972 SC 2783

National Insurance Co. Ltd. vs Swaran Singh and others, AIR 2004 Supreme Court 1531

National Insurance Co. Ltd. versus Cholleti Bharatamma, 2008 ACJ 268 (SC)

National Insurance Co. Ltd. versus Kamla and others, 2011 ACJ 1550

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Court 1531

National Insurance Company Ltd. vs Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

National Insurance Company versus Smt. Sundri Devi and another, I L R 2015 (IV) HP 290

Neelam Kumari vs. Yogender Singh and others, 2015 (3) Him. L.R.1895

NHPC versus Smt. Sharda Devi & others, I L R 2014 (V) HP 844

Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 491

Nirmal Singh Pehlwan alias Nimma vrs. Inspector, Customs, Customs House, Punjab,

Nirmal Yadav vrs. Central Bureau of Investigation and anr., 2011(4) R.C.R. (Criminal) 809

Noise Pollution (V), in Re: Forum, Prevention of Environmental and Sound Pollution vs. Union of India and another (2005) 5 SCC 733,

'O'

Om Parkash versus Kulbhushan and others, 2002(2) S.L.J. 1806

Om Prakash and others vrs. State of Jharkhand through the Secretary, Department of Home, Ranchi 1 and another, with connected matter, (2012) 12 SCC 72

Oriental Insurance Co. vs Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81

Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717

Oriental Insurance Company Limited versus Premlata Shukla & others, 2007 AIR SCW 3591

Oriental Insurance Company versus Smt. Indiro and others, I L R 2015 (III) HP 1149

'P'

P. Lal vrs. Union of India and others, reported in (2003) 3 SCC 393

P.A. Inamdar & others Vs. State of Maharashtra & others (2005) 6 SCC 537

Parkash Singh Badal Vs. State of Punjab, 2007(1) SCC 1

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

Pradeep Kumar Biswas vs Indian Institute of Chemical Biology & Ors., (2002) 5 SCC 111

Pramati Educational and Cultural Trust (Registered) and others Vs. Union of India and others (2014) 8 SCC 1

Prem Chand @ Prem Nath vs. Shanta Prabhakar, (1998)1 SCC 274

Principal, Kendriya Vidyalaya and others versus Saurabh Chaudhary and others (2009) 1 SCC 794

Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588

Prithvi Raj Vs. State Election Commission, AIR 2007 PH 178

Punjab Dairy Development Corporation Ltd. and another vs. Kala Singh and others, (1997) 6 Supreme Court Cases 159

Punjab SEB Ltd. v. Zora Singh (2005) 6 SCC 776

'R'

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755

R.R. Pillai (Dead) through L.Rs Vs. Commanding Officer, Headquarters Southern AIR Command (U) and ors (2009) 13 SCC 311

R.S.Nayak Vrs. A.R.Antulay and another, (1986) 2 SCC 716

R.S.Nayak Vs. A.R.Antulay, 1984(2) SCC 183

Radha Mohan Lal vs. Rajasthan High Court (Jaipur Bench), (2003) 3 SCC 427

Radhey Shyam and another versus Chhabi Nath and others with Jagdish Prasad versus Iqbal Kaur and others, 2015 AIR SCW 1849,

Radhu Vs. State of Madhya Pradesh, 2007 Cri. LJ 4704

Rai Sandeep @ Deepu Vs. State of NCT of Delhi (2012(8 SCC 21

Rai Singh Vs. The State of Haryana, AIR 1971 S.C. 2505

Raja Rajinder Chand vs. Mst. Sukhi & others, AIR 1957 SC 286

Rajendra Sail vs. M.P. High Court Bar Association, (2005) 6 SCC 109

Rajendra Singh Verma vs. Lt. Governor (NCT of Delhi) and others (2011) 10 SCC 1 (in paras 80, 81 & 82)

Rajesh Kumar Aggarwal and others vrs. K.K.Modi and others, (2006) 4 SCC 385

Rajeshwar Tiwari and others vrs. Nanda Kishore Roy, (2010) 8 SCC 442

Rajinder Vs. State of Himachal Pradesh, (2009) 16 SCC 69

Rajiv Thapar and others vrs. Madan Lal Kapoor, (2013) 2 SCC 330

Rajoo Vs. State of Madhya Pradesh (2008) 15 SCC 133

Ram Gulam Chaudhary and others vrs. State of Bihar, (2001) 8 SCC 311

Rama Nand and others vrs. Stae of Himachal Pradesh, (1981) 1 SCC 511

Rama Narang versus Ramesh Narang and another (2006) 11 SCC 114

Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787

Ramesh Chandra Acharya vs. Registrar, High Court of Orissa (2000) 6 SCC 332

Ramlila Maidan Incident, in Re: (2012) 5 SCC 1

Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544

Rattanlal and others etc. etc. versus State of Haryana and others AIR 1987 SCC 478

Raunaq International Ltd. versus I.V.R. Construction Ltd. and others, (1999) 1 SCC 492

Ravi Kumar vs. Julumidevi, (2010) 4 SCC 476

Ravinder Kaur Vs. Ashok Kumar (2003) 8 SCC 289

Ravinder Singh @ Laddi and others vs. State of U.P. and anr, Latest HLJ 2014 H.P. 1248

Registrar (Admn.) High Court of Orissa, Cuttack vs. Sisir Kanta Satapathy (dead) by LRs and another (1999) 7 SCC 725

Registrar General, Patna HighCourt vs. Pandey Gajendra Prasad and others AIR 2012 SC 2319

Renu and others versus District and Sessions Judge, Tis Hazari Courts, Delhi and another (2014) 14 SCC 50

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

Rishipal vrs. State of Uttarakhand, (2013) 12 SCC 551

Rita Devi (Smt) and others versus New India Assurance Co. Ltd. and another, (2000) 5 Supreme Court Cases 113

Ritesh Chakarvati vs. State of Madhya Pradesh 2006(4) Recent Criminal Reports (Criminal) 480

Romesh Thappar vs. State of Madras, AIR 1950 SC 124

Rosnan Sam Boyce versus B.R. Cotton Mills Ltd. and others, (1990) 2 SCC 636

'S'

S. Rangarajan vs. P. Jagjivan Ram, (1989) 2 SCC 574 hav

S.D. Singh vs. Jharkhand High Court through Registrar General and others (2005) 13 SCC 737

S.P. Gupta Vs. President of India and others , AIR 1982 Supreme Court 149

S.R. Tewari v. Union of India (2013) 6 SCC 602

S.S. Rana versus Registrar, Co-operative Societies & Anr., 2006 AIR SCW 3723

Sadhu Singh and others v. Pritam Singh and another, AIR 1976 Punjab & Haryana 38

Sahara India Real Estate Corporation Limited and others vs. Securities and Exchange Board of India and another, (2012) 10 SCC 603

Saiyad Mohd. Saiyad Umar Saiyad and others vrs. State of Gujarat, (1995) 3 SCC 610
Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511
Samatha Vs. State of A.P. and others (1997) 8 Supreme Court Cases 191
Sanchit Bansal v. Joint Admission Board (2012) 1 SCC 157
Sandeep Bhardwaj Vs.State of HP & ors, AIR 2015 HP 117
Sanjay Chandra vs. Central Bureau of Investigation (Apex Court), 2012 Criminal Law Journal 702
Sanjeev Coke Manufacturing Company Vs. M/s. Bharat Coking Coal Ltd. And another, AIR 1983 Supreme Court 239
Sanjoy Narayan, Editor-in-Chief, Hindustan Times and others vs. High Court of Allahabad, (2011) 13 SCC 155
Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800
Sant Lal Gupta and others vrs. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336
Sant Ram Sharma Vs. State of Rajasthan and others, AIR 1967 Supreme Court 1910
Sarla Ahuja vs. United India Insurance Company Ltd., (1998)8 SCC 119
Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104
Sate of Haryana & Ors. vs. Shakuntla Devi 2008 AIR SCW 8180.
Sathya Narayan vrs. State rep. by Inspector of Police, (2012) 12 SCC 627
Satosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Satyawati Vs. Rajinder Singh and another, (2013) 9 SCC 491
Saukat Ali vs. State of Haryana 1996 Cri.LJ 3685 P&H.
Savita versus Binder Singh & others, 2014, AIR SCW 2053
Schneider vs. Irvington, (1939) 308 US 147 (16)
Secretary, H.S.E.B. Vs. Suresh and others (1999) 3 Supreme Court Cases 601
Secretary, Ministry of Information and Broadcasting, Government of India vs. Cricket Association of Bengal, (1995) 2 SCC 161
Sevaka Perumal and another vrs. State of Tamil Nadu, (1991) 3 SCC 471,
Shashi Pal and others vs. State of H.P., 1998(2) SLJ 1408
Shashi Pal and others vs. State of H.P., 1998(2) SLJ 1408
Shivaji Dayanu Patil and another versus Vatschala Uttam More, 1991 ACJ 777
Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121
Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1
Sodan Singh and others Vs. New Delhi Municipal Committee and others (1989) 4 Supreme Court Cases 155
Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
Sonu vs. State of H.P., Latest HLJ 2006(HP) 256
Speiser vs. Randall, (1958) 357 US 513 (530)
State Bank of India vs. Gracure Pharmaceuticals Ltd. 2014 AIR (SC) 731
State of Andhra Pradesh vrs. Gourishetty Mahesh and others, (2010) 11 SCC 226
State of Bihar and others v. Chandreshwar Pathak 2014 AIR SCW 5182
State of Bihar v. Subhash Singh (1997) 4 SCC 430
State of Bihar versus Upendra Narayan Singh and others (2009) 5 SCC 65
State of Delhi vrs. Ram Avtar alias Rama, (2011) 12 SCC 207
State of Gujarat vs. Raghunath Vamanrao Baxi, AIR 1985 SC 1092

State of H.P. vs. Bhangi Ram, Latest HLJ 2009(HP) 835
State of H.P. vs. Deen Mohammad, Latest HLJ 2010(HP) 1386
State of H.P. vs. Hanchoo alias Stewart, Latest HLJ 2004 HP 642 (DB)
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
State of H.P. vs. Man Singh, Latest HLJ 2009 (HP) 774
State of H.P. vs. Manohar Lal, Latest HLJ 2010 (HP) 705
State of H.P. vs. Sangat Ram and another, 2013(2) Shim.LC 1043
State of H.P. vs. Sudarshan Singh, 1993(1) SLJ 405
State of Haryana and another vs Jasbir Kaur and others, AIR 2003 Supreme Court 3696
State of Himachal Pradesh v. Asha Rani and others 2014 (3) Him. L.R. (DB) 1615
State of Himachal Pradesh vrs. Nishant Sareen, 2010 (14) SCC 527
State of Himachal Pradesh Vs. Asha Ram AIR 2006 SC 381
State of Jharkhand & others versus Manshu Kumbhkar, 2008 AIR SCW 488
State of M. P. vs. Kedia Leather and Liquor Ltd. and others (2003) 7 SCC 389
State of M.P. vs. State of Maharashtra, AIR 1977 SC 1466
State of Madhya Pradesh Versus Sheetla Sahai and others, (2009) 8 SCC 617,
State of Madhya Pradesh vs. Bacchudas 2007 Cri.LJ 1661 (SC)
State of Maharashtra & Anr. Versus Super Max International Private Limited & Ors., (2009) 9 SCC 772
State of Maharashtra vrs. Som Nath Thapa, (1996) 4 SCC 659
State of NCT of Delhi v. Sanjeev (2005) 5 SCC 181
State of Orissa & Anr. V. Mamata Mohanti 2011 AIR SCW 1332
State of Orissa and another versus Mamata Mohanty (2011) 3 SCC 436,
State of Punjab and another vrs. Mohammed Iqbal Bhatti, (2009) 17 SCC 92
State of Punjab vrs. Baldev Singh, (1996) 6 SCC 172
State of Punjab vs. Ajaib Singh AIR 1995 SC 975
State of Punjab vs. Gurmit Singh and others, (1996)2 SCC 384
State of Punjab vs. Karnail Singh AIR 2003 SC 3609
State of Rajasthan v. Parmanand (2014) 5 SCC 345
State of Rajasthan versus Harphool Singh (Dead) through is LRs (2000) 5 SCC, 652
State of Rajasthan vrs. Kashi Ram, (2006) 12 SCC 254
State of Rajasthan vrs. Parmanand and another, (2014) 5 SCC 345
State of Rajasthan vs. N.K. the accused, (2000)5 SCC 30
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257
State of Rajasthan vs. Parmanand and another 2014 SAR (Criminal) 432
State of U.P. and others vs Maharaja Dharmander Prasad Singh and ors (1989) 2 SCC 505
State of U.P. and others Vs. Pradhan Sangh Kshettra Samiti, AIR 1995 SC 1512
State of U.P. versus Neeraj Awasthi & Ors. 2006 AIR SCW 123.
State of U.P. vs. Babu AIR 2003 SC 3408
State of U.P. Vs. Jaibir Singh, 2005 Vol.V SCC 1
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
State of Uttaranchal and others Vs. Sidharth Srivastava and others (2003) 9 SCC 336
State of Uttaranchal v. Balwant Singh Chaufal (2010) 3 SCC 402
State through Superintendent of Police, CBI/SIT vrs. Nalini and others and connected matters, (1999) 5 SCC 253
State vs. Captain Jagjit Singh, AIR 1962 SC 253

State vs. Lekh Raj and another, (2000)1 SCC 247
Steel Authority of India Ltd. and others Vs. National Union Waterfront Workers and others (2001) 7 SCC 1
Subhash Kumar vs. State of Bihar and others (1991) 1 SCC 598
Sukhbir Singh and others vs. Brij Pal Singh and others Bihar, AIR 1996 SC 2510
Sundarajas Kanyalal Bhathua Vs. Collector, Thane, AIR 1990 SC 261,
Supreme Court Advocates-on-Record-Association and another Vs. Union of India, JT 2015 (10) SC1
Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241
Surinder Kumar vs. State of H.P. and others, and other, ILR 2015 V HP 842 (D.B.)
Surjit Singh Vs. State of Punjab and others AIR 1996 Supreme Court 1388
Syed T.A. Naqshbandi and others vs. State of Jammu and Kashmir and others (2003) 9 SCC 592

'T'

T. Lakshmi Narasimha Chari vs. High Court of A.P. and another (1996) 5 SCC 90
T.M. Sampath & Ors. versus Secretary, Ministry of Water Resources & Ors.,2015 AIR SCW 998
T.M.A. Pai Foundation and others Vs. State of Karnataka and others (2002) 8 SCC, 481
Tameezuddin @ Tammu Vs. State (NCT of Delhi), (2009) 15 SCC 566
Tandon Brothers v. State of W.B. (2001) 5 SCC 664
Tara Dutt Sharma vs. Sanjeev Dutt., Latest HLJ 2011 H.P.High Court
Tarlochan Dev Sharma v. State of Punjab (2001) 6 SCC 260
The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Thornhill v. Alabama (1940) 310 US 88
Tilak Raj versus Bhagat Ram and another, 1997 (1) Sim.L.C. 281

'U'

Union of India & Ors Vs. M.Aslam & Ors (2001) 1 SCC 720
Union of India and others versus Tarsem Singh (2008) 8 SCC 648
Union of India versus Bhagwati Prasad (D) and others, AIR 2002 Supreme Court 1301,
Union of India vs Motion Picture Association, 1999 (6) SCC 150
United India Insurance Co. Ltd. and others vs Patricia Jean Mahajan and others, (2002) 6 SCC 281
Uppari Venkataswamy vs. Public Prosecutor High Court A.P. AIR 1996 SCW 9
Urmila Devi vrs. Yudhvir Singh, (2013) 15 SCC 624
Usha Balashaheb Swami and others vrs. Kiran Appaso Swami and others, (2007) 5 SCC 602

'V'

Ved Mitra Verma v. Dharam Deo Verma, (2014) 15 SCC 578
Vellore Citizens' Welfare Forum vs. Union of India and others (1996) 5 SCC 647,
Vijay Shankar vrs. State of Haryana, JT 2015 (8) SC 216
Vijaya Devi Naval Kishore Bhartia and another vrs. Land Acquisition Officer and another, (2003) 5 SCC 83
Vikram Chauhan versus The Managing Director and others, Latest HLJ 2013 (HP) 742 (FB)
Vinod Kumar vs. Rajesh Kumar, 1995(1) SLC 452
Vinod vrs. State of Maharashtra, (2002) 8 SCC 351

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Nirmla Devi & another ....Petitioners
Versus
Bhag Singh & others. ....Non-petitioners.

CMPMO No. 222 of 2012
ORDER on: 29.10.2015.

Code of Civil Procedure, 1908- Order 41- A civil appeal restored to original position with the consent of the parties subject to the cost of Rs.1500/-.

For the petitioner : Mr. Rajul Mahajan, Advocate.
For non-petitioner No.2 : Mr. Anushal Attri, Advocate.
None for respondents No. 1, 3 to 5.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Heard. With the consent of learned Advocate appearing on behalf of the petitioner and with the consent of learned Advocate appearing on behalf of non-petitioner No.2, following order passed:-

i) Civil Appeal No. 37 of 2006 titled Nirmala Devi & others vs. Bhag Singh & others is restored to its original position.

ii) Costs to the tune of Rs. 1500/- (Rupees one thousand and five hundred) is also imposed.

iii) Parties are directed to appear before the first appellate Court on **2.12.2015**.

iv) File of learned trial Court along with certified copy of this order be sent back before the next date.

2. Present petition is disposed of. Pending applications if any also disposed of.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Hukam Singh alias Hukma ....Petitioner
Versus
State of H.P. ....Non-Petitioner

Cr.MP(M) No. 1542 of 2015
ORDER on: 4.11.2015.

Code of Criminal Procedure, 1973- Section 439- Petitioner is in judicial custody since 2014- statements of prosecution witnesses except investigating officer have been recorded -

case is pending since 2014 and the accused is in judicial custody- therefore, direction issued to the trial Court to dispose of the case within four weeks.

For the Petitioner : Mr. Anoop Chitkara, Advocate.
For the Non-Petitioner : Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Petition filed under Section 439 Code of Criminal Procedure for bail relating to FIR No. 275 of 2014 dated 27.8.2014 registered under Section 302 read with Section 34 IPC in P.S. Kullu (H.P.). Learned Advocate appearing on behalf of the petitioner submitted that entire prosecution evidence recorded in the present case except the statement of Investigation Officer and learned Advocate further submitted that case is pending since the year 2014 before the learned trial Court and petitioner is in judicial custody. Learned Advocate appearing on behalf of petitioner further submitted that direction be issued to learned trial Court for expeditious disposal of case and petition filed under Section 439 Code of Criminal Procedure be disposed of accordingly. Learned Assistant Advocate General submitted that he has no objection if direction is issued to learned trial Court for expeditious disposal of case. It is well settled law that accused has a legal right for expeditious disposal of his case. In view of the above stated facts and in view of the fact that petitioner is in judicial custody since 2014 learned trial Court is directed to dispose of Session Trial No. 13 of 2015 within four weeks. Learned Registrar (Judicial) is directed to transmit certified copy of this order to learned trial Court forthwith for compliance. Petition is disposed of. Pending applications if any also disposed of. Dasti copy.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Ramesh Kumar @ Rangil Singh ....Petitioner
Versus
State of H.P. ....Non-Petitioner

Cr.MP(M) No. 1541 of 2015
ORDER on: 4.11.2015.

Code of Criminal Procedure, 1973- Section 439- Learned Counsel submits that petition be disposed of with the direction to the trial Court to dispose of the trial expeditiously- held, that accused has a right to expeditious disposal of his case especially when accused is in custody since 25.10.2014- hence, direction issued to dispose of the case within 3 months.

For the Petitioner : Mr. Rajesh Mandhotra, Advocate.
For the Non-Petitioner : Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Present petition filed under Section 439 Code of Criminal Procedure 1973 for bail relating to FIR No. 135 of 2014 dated 24.10.2014 registered under Section 302, 34 IPC

in P.S. Lambagoan (Distt.) Kangra (H.P.). Learned Advocate appearing on behalf of the petitioner submitted that present petition be disposed with direction to learned trial Court to dispose of the criminal trial expeditiously. Learned Assistant Advocate General submitted that he has no objection if direction is issued to learned trial Court for expeditious disposal of the case. It is well settled law that accused has a legal right for expeditious disposal of his case. Petitioner is judicial custody since 25.10.2014. In view of the above stated facts learned trial Court is directed to dispose of the criminal case within three months. Learned Registrar (Judicial) is directed to transmit certified copy of this order to learned trial Court forthwith for compliance. Petition is disposed of. Pending applications if any also disposed of. Dasti copy.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sh. Anil Kumar & another ....Revisionists.

Versus

Sh. Satpal Sharma. ....Non-revisionist.

C.R. No. 4013 of 2013
ORDER on: 6.11.2015.

Code of Civil Procedure, 1908- Order 23- Parties have entered into a lawful compromise- therefore; order passed by Rent Controller is modified as per compromise which shall form part of the order.

For the revisionists : Ms. Charu Gupta, Advocate.
For non-revisionist : Mr. Dheeraj Vashishat, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocates appearing on behalf of the parties submitted that compromise deed executed inter-se the parties and present revision petition be disposed of as per the terms and conditions of the compromise deed executed inter-se the parties. Court perused the compromise deed carefully. Court is satisfied that a lawful compromise deed has been executed inter-se the parties. In view of the above stated facts order of learned Rent Controller dated 21.6.2013 passed in Execution Petition No. 48-10 of 2012 is modified as per the compromise deed Ext. PA. Ext. PA will form part and parcel of this order regarding which the statements of learned Advocates appearing on behalf of the parties have been recorded separately and placed on record.

2. Present revision petition is disposed of accordingly. No order as to costs. Record of learned Executing Court along with certified copy of this order be sent back forthwith for compliance. Pending applications if any also disposed of.

****

BEFORE HON'BLE MR.JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Amin Chand ...Petitioner.
Versus
State of H.P. and Ors. ...Respondents.

CWP No. 4382 of 2015.
Decided on: 19.11.2015

Constitution of India, 1950- Article 226- **Industrial Dispute Act, 1947-** Section 10- Petitioner sought a reference regarding his retrenchment from the service after the delay of 16 years- Joint Labour Commissioner refused to make a reference on the ground of delay- held, that although no limitation has been provided for making reference to labour court but where the reference is made after inordinate delay, the Authorized Officer can decline to make the reference on the ground of delay, when there is no explanation for the same- workman had not given any satisfactory explanation for the delay, therefore, competent authority had rightly declined to make the reference on the ground of delay- writ petition dismissed. (Para-3 to 6)

Case referred:
Jasmer Singh vs. State of Haryana and another, (2015) 4 SCC 458

For the petitioner: Mr.Neel Kamal Sood, Advocate.
For the respondents: Mr.Romesh Verma and Mr.Anup Rattan, Additional Advocate Generals with Mr.J.K.Verma, Dy. A.G.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge. (Oral):

The petitioner stands aggrieved by Annexure P-1 whereby the Joint Labour Commissioner, H.P. refused to refer for adjudication to the Labour Court-cum-Industrial Tribunal (hereinafter referred to in short as 'the Tribunal') concerned the industrial dispute raised by the petitioner herein/workman qua the factum of his having stood illegally retrenched or disengaged from service by his employer. The Industrial dispute as reared or engendered by the petitioner herein/workman qua his services standing illegally retrenched besides dispensed with by his employer stood nursed by him after an inordinately procrastinated delay of 16 years. The Joint Labour Commissioner, H.P. in refusing under annexure P-1 to make a reference for an adjudication by the Tribunal concerned upon the industrial dispute raised by the workman/petitioner herein qua his illegal disengagement/retrenchment from service by his employer had therein constituted the reason of its imprompt raising having sequelled its becoming stale. His construing of the industrial dispute raised by the petitioner/workman qua the latter's purported illegal dispensing of services by his employer being stale hence unreferable for adjudication to the Tribunal concerned stood anvilled upon a decision of this Court rendered in CWP No. 398 of 2001 which stood reiterated by a Full Bench decision of this Court in CWP No. 1486 of 2007.

2. Given the impugned order rendered by the Joint Labour Commissioner, H.P. declining to make a reference to the Tribunal concerned for an adjudication thereupon by

the latter upon the industrial dispute raised by the workman qua his illegal retrenchment from service by his employer standing bed rocked upon decisions of this Court as stand recorded in annexure P-1, it is imperative to at the outset extract the apposite issue whereon an answer was purveyed by this Court in its rendition recorded in Civil Writ Petition No. 1486 of 2007. The issue which stood formulated by this Court whereon an answer thereto stood purveyed by it stands extracted hereinafter.

> "where the appropriate Government is of opinion that any industrial dispute exists or is apprehended, it may at any time, by order in writing, refer the ……."

3. On an incisive consideration of a catena of decisions of the Hon'ble Apex Court upon the afore extracted factum probandum this Court had culled therefrom the legal proposition of though their being no statutorily engrafted rigid prescription of any inflexible period of limitation within which a workman is enjoined to raise an industrial dispute comprising his grievances against his employer nor as a corollary the authorized officer of the appropriate Government being empowered to decline to make a reference comprising the industrial dispute raised by the workman to the Tribunal concerned for an adjudication thereupon by the latter unless the inordinately procrastinated delay on the part of the workman to raise it without any tangible or sound explanation emanating from or adduced by the workman before the competent officer of the appropriate Government (Joint Labour Commissioner) renders it hence to be inevitably construable to have faded, its being infected with the vice of staleness arising from its imprompt raising entailing its rejection by the competent authority. The authorized officer of the appropriate government when exercising powers to make or decline to make a reference to the Tribunal concerned of the industrial dispute reared by the employee against his employer is jurisdictionally empowered to conclude from its unexplained inordinately procrastinated imprompt raising, of its hence acquiring the stain of staleness or its having faded necessarily it being no longer in existence on anvil whereof the competent authority was enjoined to tenably refuse to make reference qua it to the Tribunal concerned. The competent authority of the appropriate Government given the non emanation from the workman of a tangible or sound explanation qua its imprompt raising before it having hence construed it to have faded, eclipsed or its no longer surviving hence obviously his recording an order qua its unreferability to the Tribunal concerned would hence not invite qua it the disability of transgression hence of the domain of law governing the exercise of a purely administrative function by him in making or declining to make a reference to the Tribunal concerned of the industrial dispute inexplicably impromptly raised by the workman. While applying the ratio propounded by this Court in CWP No. 1486 of 2007 it was obviously incumbent upon the workman to promptly raise the industrial dispute qua his purported illegal disengagement from service by his employer for it to be free from any vice of staleness preeminently when any palpable inexplicable procrastinated delay in its raising by the workman would imbue it with the blur of its having stood eclipsed, faded or no longer alive with the concomitant legal effect of its being unreferable by the competent authority of the appropriate government to the Tribunal concerned for an adjudication thereupon by the latter. Even when this Court has ad nauseam expostulated in its verdict rendered in CWP No. 1486 of 2007 which verdict stands embedded on a piercing analysis by this Court of a catena of decisions of the Hon'ble Apex Court qua the signification borne by the apposite phrase 'any industrial dispute exists or is apprehended' as constituted in Section 10 of the Industrial Disputes Act (hereinafter referred to in short as 'the Act') inasmuch as of its not prescribing any rigid inflexible period of limitation for the raising of an industrial dispute by a workman, for concomitant delay if any as occurring in its raising not debarring the authorized officer of the appropriate Government to make a reference qua it to the Tribunal for its adjudication thereupon by the

latter yet even when this Court has imparted the aforesaid signification carried by the phrase "an industrial dispute exists" occurring in the apposite provisions of the Act, nonetheless when a further legal proposition is encapsulated therein qua an industrial dispute remaining surviving or in existence only on its prompt raising by the workman for hence ousting any inference of its being stale or no longer surviving for disempowering the authorized officer of the appropriate government to decline to make a reference qua it to the Tribunal concerned for an adjudication thereupon by the latter. However, the afore-referred legal proposition constituted in the apposite rendition of this Court of the vice of staleness or obscurity engendered by the belated raising of an industrial dispute by a workman imbuing an impromptly raised industrial dispute by a workman has also been therein enunciated to stand scored off besides standing benumbed in the event of a workman unfailingly substantiating by adducing cogent evidence before the authorized officer of the appropriate government, of delay on his part in his raising an industrial dispute standing spurred by a tangible and sound explanation as also its manifesting qua his having by his overt acts concerted to redress his grievances against his employer hence his having kept it rejuvenated, alive besides surviving. The exception carved out in the rendition of this Court in CWP No. 1486 of 2007 qua the imprompt raising of the industrial dispute by the workman not acquiring the stain of it having stood eclipsed, as such, unreferable is of the workman relaxing its rigor by affording a sound explanation at the pre reference stage before the authorized officer of the appropriate government qua its imprompt raising. However, there is no material on record connotative of the workman having by adducing any cogent evidence before the authorized officer of the appropriate government seized of a failure report transmitted to him by the Labour Officer-cum-conciliation Officer concerned purveyed before him a tangible or sound explanation for the occurrence of a delay on his part in promptly raising it nor there is any emphatic material on record magnifying the fact of the delay of 16 years as has occurred on the part of the workman in raising it standing effacement or condonation constituted by the workman concertedly by taking overt steps for keeping it alive had not sequelled its fading for hence its being unreferable for adjudication to the Tribunal concerned. Omission on the part of the workman to (a) adduce evidence before the authorized officer of the appropriate government portraying therein any sound and tangible explanation on his part in explication of the delay as stood occurred in the imprompt raising of the industrial dispute by him (b) adduce before the competent authority of the appropriate government material personificatory of his having by taking overt steps for keeping it alive had not rendered it to eclipse necessarily constrains this Court to conclude qua hence the industrial dispute raised by the workman being construable to have faded or eclipsed by efflux of time. The sine qua non of the signification borne by the apposite parlance extracted hereinabove constituted in Section 10 of the Act is of its enjoining upon the workman to raise it promptly. The omission of adduction by the workman of the aforesaid material before the authorized officer of the appropriate government in explication of the delay in its raising by him imperatively engenders a formidable conclusion of the belated raising of the industrial dispute by the workman being amenable to a natural inference of its being no longer in existence or of its having stood faded besides eclipsed hence unreferable for adjudication by the authorized officer of the appropriate government to the Tribunal concerned. Preeminently the services of the petitioner having stood disengaged 16 years prior to his raising an industrial dispute with a ventilation therein of his services having stood illegally retrenched by his employer rendered the dispute to acquire the vice of staleness besides its being construable to be no longer surviving rather by efflux of time it having stood faded especially when no explanation is forthcoming from the workman qua its imprompt raising. The impugned order of the Joint Labour Commissioner, in declining to formulate a reference qua it for its adjudication by the Tribunal concerned is in consonance with the verdict of this Court in CWP No. 1486 of 2007. Consequently, this Court does not

notice any apparent legal infirmity with the order of the Joint Labour Commissioner comprised in Annexure P-1 especially when it is founded upon the aforesaid decision of this Court.

4. The learned counsel appearing for the petitioner has relied upon a judgment of the Hon'ble Apex Court rendered in **Jasmer Singh vs. State of Haryana and another, (2015) 4 SCC 458** wherein with the Hon'ble Apex Court in the relevant Paragraph 9 extracted herein-after having held qua provisions of Article 137 of the Schedule of Limitation Act being inapplicable to the apposite proceedings held by the Tribunal on its receiving an apposite reference from the competent authority constituted under the Act for an adjudication thereupon by it hence relief being affordable by the Tribunal concerned to an aggrieved workman when the former stands seized of a reference comprising the industrial dispute raised by a workman made to it by the competent authority even when the employer contests the relief claimed by the workman before it on the score of its standing baulked by the legal embargo of limitation. Apart therefrom the hereinafter extracted relevant paragraph of the judgement enjoins a mandate upon the Tribunal to on receiving a reference from the competent authority comprising the industrial dispute generated by the workman, for rendition of an adjudication thereupon by it to while discarding delay it standing empowered to mould relief to the workman, by declining backwages to him.

> "9. On issue No. 3, after adverting to the case of State of Punjab v. Kalidass and Anr. in C.W.P. No. 1742 of 1996, wherein the High Court has observed that the workman cannot be allowed to approach the Labour Court after 3 years of termination of his services, upon which reliance placed by the respondent-employer with reference to the said plea the Labour Court has rightly placed reliance upon the judgment of this Court in Ajaib Singh v. Sirhind Co-operative Marketing-cum-Processing Service Society Ltd. and Anr., 1999 6 SCC 82 in which it is observed by this Court that there is no period of limitation to the proceedings in the Act. Accordingly, Issue No. 3 is answered against the respondent-management. The relevant paragraph from Ajaib Singh's case are extracted herein below:
>
> > "10. It follows, therefore, that the provisions of Article 137 of the Schedule to Limitation Act, 1963 are not applicable to the proceedings under the act and that the relief under it cannot be denied to the workman merely on the ground of delay. The plea of delay if raised by the employer is required to be proved as a matter of fact by showing the real prejudice and not as a merely hypothetical defence. No reference to the labour court can be generally questioned on the ground of delay alone. Even in a case where the delay in shown to be existing, the tribunal, labour court or board, dealing with the case can appropriately mould the relief by declining to grant back wages to the workman till the date he raised the demand regarding his illegal retrenchment/ termination or dismissal. The Court may also in appropriate cases direct the payment of part of the back wages instead of full back wages....."

5. However, the aforesaid submission addressed before this Court cannot command any sway especially in the face of distinctivity intra se the judgment relied upon by him for anchoring his espousal vis-à-vis the renditions of this Court encapsulated in CWP No. 1486 of 2007 which stand embedded in Annexure P-1, inasmuch as the judgment relied upon by the learned counsel for the petitioner is rendered qua inapplicability of the apposite article of the Limitation Act to only proceedings pending before the Tribunal in pursuance to

its receiving an apposite reference from the competent authority for its rendering an adjudication thereupon besides its expostulating the legal proposition of delay not deterring the Tribunal when seized of a reference made to it by the appropriate Government, to afford relief to a workman merely on the anvil of the employer contesting the claim of the workman as stands constituted in the apposite reference as stands transmitted to it by the appropriate government for an adjudication thereupon by it on the score of its being baulked by the legal embargo of limitation whereas in dire incongruity thereof in the instant case, the raising of an industrial dispute by the workman herein after an inordinate lapse of 16 years since his purported illegal disengagement from services by his employer has been hence construed to have faded besides stale hence unreferable for adjudication to the Tribunal concerned by the appropriate Government (Joint Labour Commissioner) especially when its referability to the Tribunal concerned is beset with a handicap of an unexplained procrastinated delay of 16 years. Necessarily when the industrial dispute raised by the workman stands rejected as constituted in annexure P-1 at a pre reference stage on the ground of it being un- referable for a tenable reason as embodied therein in sequel the Tribunal concerned came to be never seized of an apposite reference made to it by the authorized officer of the appropriate government constituted in the Act concomitantly when the verdict of the Hon'ble Apex Court relied upon by the learned counsel for the petitioner is applicable only to a post reference stage or to a stage when the Tribunal is seized of a reference encapsulating the industrial dispute reared by the workman obviously its applicability to a pre reference stage is unattractable. Moreso, for reiteration when the occurrence of the aforesaid delay is at a stage preceding the Tribunal concerned being seized of a reference qua it being made to it by the competent authority of the appropriate government, inasmuch as it stood occurred at a pre reference stage whereupon rather the para meters enshrined in the renditions of this Court in CWP No. 1486 of 2007 qua its referability or unreferability arising from its prompt or non explicated imprompt raising rather stand attracted. Furthermore when the Joint Labour Commissioner when seized of the failure report transmitted to it by the Labour Officer -cum-Conciliation Officer concerned was enjoined to on an application of mind to the material placed before him make only an order making or refusing to make a reference qua the industrial dispute raised by a workman against his employer hence not performing any judicial function nor any quasi judicial function rather was performing purely administrative functions necessarily any order of the learned Joint Labour Commissioner, Himachal Pradesh, in the performance of his administrative duties/functions was amenable to a legal onslaught only within the permissible parameters enshrined in the judgement of this Court. Obviously when reverence has been paid by the Joint Labour Commissioner to the mandate of this Court besides with the reasons cast therein not suffering from any legal debility necessitates its being sustained. Predominantly, when at the pre-reference stage given the stark distinctivity inter se the factual matrix in the judgement relied upon by the learned counsel for the petitioner is for the reasons aforestated invokable only at the post reference stage viz.a.viz the factual matrix in the judgement relied upon by the counsel for the respondent squarely applicable to the pre-reference stage hence renders the verdict of the Hon'ble Apex Court to be unworkable qua the facts at hand. Apart therefrom with this Court having held qua the Joint Labour Commissioner while declining to make a reference of the industrial dispute belatedly raised by the workman against his employer especially for want of any tangible explanation qua its imprompt raising by the workman having remained unevinced by him before the Joint Labour Commissioner had performed a purely administrative function necessarily when the verdict of the Hon'ble Apex Court only dis-empowers an employer to contest before the Tribunal when seized of a reference made to it by an appropriate officer of the appropriate government the claim of the employee on the ground of the bar of limitation thwarting it, upsurges an unfailing inference of the authorized official of the appropriate

government while discharging a purely administrative duty or function in making or declining to make a reference of an industrial dispute to the Tribunal concerned, was disempowered to while not performing judicial functions as a Tribunal concerned performs to at the pre reference stage hold any legal leverage to mould the relief affordable to the workman even when a contest qua its affordability to him arising from the unexplicated belated raising of an industrial dispute stood aroused before it by the employer engenders a concomitant deduction of the authorized officer of the appropriate government when not performing judicial or quasi judicial function rather performing merely an administrative function in declining or making a reference of the industrial dispute to the Tribunal for its adjudication thereupon by the latter was hence also not obliged to elicit the participation of the employer at the pre reference for eliciting a contest from him qua the tenability of the claim embedded in the industrial dispute arising from its inordinately procrastinated raising by the workman rather was only enjoined to fathom from the material existing before him the factum of its being promptly raised hence referable or even if it was impromptly raised a tangible explication for its imprompt raising having yet emanated before him on the part of the workman, which explanation in proof of its imprompt raising by the workman when remains un-adduced by the workman before it rendered the impugned annexure anchored upon the decision of this Court to acquire a legal solemnity. Dehors the above for reiteration with the legal expostulation cast in the aforesaid referred verdict of the Hon'ble Apex Court being obviously applicable with aplomb to a stage successive to the making of a reference embodying the apposite industrial dispute raised by the workman against his employer for rendition of an adjudication thereupon by the Tribunal concerned moreso, especially when the subtle nuance of the verdict of the Hon'ble Apex Court is of its mandating ouster of contest by an employer to the claim espoused by an employee before the Tribunal when harboured upon delay rather delay if any empowering the Tribunal to mould relief by declining relief of back-wages to the workman has its implication in the competent authority when seized of an unexplained delay in raising of an industrial dispute by a workman enjoying the legal capacity to construe it to have stood eclipsed, faded or stale hence unreferable for adjudication besides with the exercise of jurisdiction by the competent authority of the appropriate Government not constituting it to be judicial forum nor a quasi judicial forum for its being equipped to pronounce upon the validity of the claim reared by the workman nor hence its obviously enjoying the jurisdiction to mould relief if found affordable to the workman by refusing relief of backwages to him whereas the Tribunal alone being the adjudicatory forum to pronounce upon the validity of the claim of the workman comprised in the apposite reference made to it besides it being alone jurisdictionally competent to mould relief even when the claim of the workman comprised in the apposite reference is concerted to by his employer to be oustable on the score of delay, renders the verdict of the Hon'ble Apex Court inapplicable for reverence by the competent authority when seized of an industrial dispute raised by the workman nor it estops the competent authority to at an pre reference stage construe the impact of the belated unexplained raising of an industrial dispute by the workman against his employer and its concomitantly acquiring the jurisdiction to construe it to have faded or non existent hence unreferable. Moreso when the refusal on the part of the Joint Labour Commissioner to refer for adjudication the industrial dispute raised by the workman against his employer for its adjudication by the Tribunal is covered by a rendition of this Court in CWP No. 1486 of 2007.

6. Dehors the above, with a marked gross delay of 16 years as has occurred in the rearing of an industrial dispute by the workman which latter delay obviously for want of a tangible explanation qua its imprompt raising has been construed by the Joint Labour Commissioner to render it to stand faded, eclipsed besides annihilated, in sequel, annexure

P-1 is hence a legally sound view and in harmony with the verdict of this Court germane to the bar of an unexplained delay standing attraction at a pre-reference stage.

7. In view of the above discussion, the writ petition stands dismissed being devoid of any merit. The impugned Annexure P-1 is affirmed and maintained. Pending application(s), if any, also stand dismissed. No costs.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Sunil Kumar .....Respondent.

Cr. Appeal No. 803 of 2008.
Reserved on: November 20, 2015.
Decided on: November 21, 2015.

Indian Penal Code, 1860- Section 376 read with Section 511- Prosecutrix aged about 8 years, complained of pain in her private part to her mother- in the meanwhile another girl, aged about 10 years, came to the mother of the prosecutrix and disclosed that on 02.10.2008 when they were returning from the school, the accused had lifted prosecutrix, taken her to cowshed and prosecutrix had later on told her that accused had attempted to rape her - accused on trial was acquitted by the court- in appeal against acquittal, held that there was contradiction in the date of incident as the prosecutrix had stated the date of incident as 02/10/2007 whereas in investigation the date is shown as 29/09/2007-The prosecutrix had also admitted in her cross-examination that she had made the statement in the Court at the behest of her mother-prosecution has thus failed to prove the allegations- appeal dismissed. (Para 20 & 21)

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondent: Ms. Kiran Lata Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal has been instituted at the instance of the State against the judgment dated 9.9.2008, rendered by the learned Presiding Officer/ Addl. Sessions Judge (FTC), Hamirpur, H.P. in Sessions Trial No. 7 of 2008, whereby the respondent-accused (hereinafter referred to as the accused) who was charged with and tried for offence punishable under Sections 376 & 511 IPC, has been acquitted by the learned trial Court.

2. The case of the prosecution, in a nut shell, is that Sh. Deep Chand father of the prosecutrix and her brother came to the Police Station Sujanpur on 3.10.2007 to lodge the complaint. Deep Chand informed that he was working as Cook in the N.I.T., Hamirpur. He came from Hamirpur at about 6:30 AM to his village and his wife Anju Devi told him that the prosecutrix aged about 8 years, complained of pain in her private part. In the meantime, the daughter of Rangila Ram, namely, Kiran Kumari alis Indu aged about 10 years came to his house and told that on 2.10.2007 at about 2:30 PM, after school the

prosecutrix was coming home from the school and accused met her on the way. He lifted the prosecutrix and took her to the cowshed of Narain Singh. Upon this, the prosecutrix further disclosed that on 2.10.2007 when she was coming back from the school, the accused lifted her and took her inside the cowshed. Thereafter the door of the cowshed was closed and the accused opened her '*Pyjami*' and attempted to rape her. However, no blood stains were noticed on the clothes of the prosecutrix. On the basis of the statement, FIR Ext. PW-7/A was registered against the accused. The spot was inspected with the help of witnesses. The attendance certificate of the prosecutrix Ext. PW-10/B was obtained from Govt. Primary School, Bhater. During investigation, it was found that the occurrence in fact took place on 29.9.2007 at about 3:30 PM when the prosecutrix was coming from school to her house and the occurrence took place on the path below the cowshed on the grass when the accused was found to have attempted to rape the prosecutrix. The clothes of the prosecutrix were taken into possession. The same were sent to FSL, Junga. According to the FSL, report Ext. PW-12/C, human blood was found on exhibit (vaginal swab of the prosecutrix), but no semen was found on any exhibit. The investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 16 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. According to him, he was falsely implicated. The learned Trial Court acquitted the accused on 9.9.2008. Hence, the present appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Ms. Kiran Lata Sharma, Advocate, for the accused has supported the judgment of the learned trial Court dated 9.9.2008.

5. We have gone through the impugned judgment and records of the case carefully.

6. PW-1, Munshi Ram deposed that he was associated by the police during investigation. The prosecutrix identified the place of occurrence near the electric pole and cowshed of Narain Singh in his presence and in the presence of her parents. The mother of the prosecutrix Anju Devi handed over to the police shirt and payjami of the prosecutrix which were worn by her at the time of occurrence.

7. PW-2 Ashok Kumar issued the birth certificate of the prosecutrix vide Ext. PW-2/A. The date of birth of the prosecutrix was 31.3.2001. He also issued birth certificate of the accused vide Ext. PW-2/B.

8. PW-3 Narain Singh deposed that his cattle shed was situated on one side of the path which leads to Primary School, Bhater. It generally remains locked and key remains with him. The lock of his cattle shed was never broken.

9. PW-4 is the prosecutrix (name withheld). She testified that when the incident took place, she was studying in 3rd class. She did not know the date, month and year of the occurrence. On that day, the school was closed at about 3:30 PM. She was coming back from school. On the way, Bikku (accused) met her. He took her to the cowshed and opened her salwar and he also opened his pant. Thereafter, the accused lied upon her. She felt pain in her private part. Thereafter, accused ran away from the spot. She went to her house. On the way, she also met Indu to whom she told about the incident. Her father resides at Hamirpur. There was holiday on the next day. Her father came home on the next day of the occurrence. Her father did not inquire anything about the occurrence. However, her mother inquired about the same. She told her mother about

what had happened with her. When she told her mother about the occurrence, Indu also came there. Thereafter, she was taken to Doctor to Hamirpur and police also came there. In her cross-examination, she deposed that accused shut the door of the cowshed. She went to school regularly for six days after the incident. When accused took her to the cowshed, she also cried. However, no one came to the spot from the adjoining houses. She told the police about taking her to the cowshed. Confronted with her statement Mark D-1, under Section 161 Cr.P.C. wherein it is not so recorded. She told her mother about the occurrence on her reaching home on the same day. She was told by her mother to make statement before the Court.

10. PW-5 Munisha Kumari was also minor. She deposed that on 29th, it was Saturday. She was studying in the 4th class. On that day, the school closed at about 3:30 PM. She was going home from the school. On the way, the cowshed of Sh. Narain Singh falls on the side of the path. She saw accused near the cowshed. The prosecutrix was also with her. Thereafter, she went towards her home. On the way, she also met Indu. Thereafter, she went home. Indu came to her house and told her that she was told by the prosecutrix that the accused lied on her. Nothing else was told by the prosecutrix in her presence.

11. PW-6Kiran Kumari alias Indu is the most material witness. She was student of 6th class. According to her, last year, she was studying 5th class in Bhater school. She knew the prosecutrix and PW-5 Munisha, who were studying with her in the same school. On 29th the school closed at 3:30 PM. Thereafter, she was coming home from the school. When she reached at place Faat, where cowshed of Narain Singh is situated, she saw the accused and prosecutrix. On seeing her, the accused put on his pant. Thereafter, she went towards her house and did not stop on the way. She did not come across anybody on the way. The prosecutrix did not tell her anything. She denied the suggestion that PW-5 Munisha met her. She also denied that the prosecutrix told her about the occurrence after about 10 to 15 minutes. She also denied that thereafter in the evening Munisha came to her house and told her that prosecutrix told her about the occurrence. She also denied that when the mother and father of the prosecutrix were inquiring from her, she came to the house of the prosecutrix and told them about the occurrence.

12. PW-7 Deep Chand is the father of the prosecutrix. He deposed that on 3.10.2007, he went to his house along with his daughter and reached there at about 6:30 AM. On reaching there, his wife told him that the prosecutrix was complaining of pain in the abdomen and private part at night. They enquired from the prosecutrix but she did not tell about the incident. Thereafter, Indu came there and told him that on 29.9.2007, the accused committed rape on the prosecutrix in the cowshed. Thereafter, on enquiry by her mother, the prosecutrix also told that such act had been committed by the accused with her. He went to the Police Station and lodged the FIR Ext. PW-7/A. In his cross-examination, he deposed that in the FIR Ext. PW-7/A, the date of the incident mentioned as 2.10.2007, has been wrongly mentioned by the police, though it was 29.9.2007. He told the police the date of the incident as 29.9.2007. The police read over the FIR to him and thereafter he put his signatures over the same.

13. PW-8 Dr. P.K. Soni has conducted the radiological age verification of the prosecutrix. According to him, the radiological age of the prosecutrix was more than 6 years and less than 8 years. The opinion is Ext. PW-8/E.

14. PW-11 Anju Devi is the mother of the prosecutrix. She deposed that on 29.9.2007, her daughter came from the school late. She asked her daughter as to why she was late on that day. She did not say anything. Her daughter was not feeling well. On 3rd

day i.e. on Monday, her daughter went to school and she went to the fields for work. She came back in the evening. Her mother-in-law told her that the prosecutrix had come early from the school. On 2.10.2007 in the night when she was going to sleep, the prosecutrix complained of pain in her private part. She asked her daughter as to what had happened with her. However, she did not tell her anything. Next day morning her husband came home. She told her husband that the prosecutrix was feeling some pain in her private part. Indu also came to their house. Indu told them that she was told by the prosecutrix that accused took her to cowshed where he opened her Salwar and also opened his Pant. Thereafter accused lied on her. Then, she also asked the prosecutrix about it. She confirmed the incident. Her husband went to the Police Station alongwith the prosecutrix. The clothes were handed over to the police. The police also visited the spot on 4th at 4:00 PM. She has not made the statement to the police that PW-6 Indu and prosecutrix told her that the occurrence took place outside the cowshed. Confronted with the statement Mark-A, wherein it is so recorded.

15. PW-12 Dr. Archna Soni has medically examined the prosecutrix. According to the alleged history, prosecutrix was sexually assaulted by Bikku on 2.10.2007 at 2:30 PM. She gave her final opinion vide Ext. PW-12/D. According to her final opinion, no semen (spermatozoa) was found in the vaginal smears, however, the possibility of attempt to do sexual assault could not be ruled out.

16. PW-16 SI Anil Verma is the I.O in the case. He sent the prosecutrix to RH Hamirpur with LC Himani. He went to village Bhater and recorded the statements of Kiran Kumari alias Indu, Munisha Kumari and Narain Singh under Section 161 Cr.P.C. He obtained the birth certificate of the prosecutrix vide Ext. PW-2/A and PW-2/B, respectively. Shirt and Payjama were taken into possession. The accused was arrested on 4.10.2007. In his cross-examination, he deposed that he visited the spot and found the cowshed of Narain Singh locked. He also admitted that whatever was stated by Deep Chand was recorded in the FIR. The contents of the FIR were read over and explained to Deep Chand who admitted the contents of the same to be correct and thereafter put his signatures over the same.

17. According to the FIR Ext. PW-7/A, the incident has taken place on 2.10.2007. However, the case of the prosecution is that the incident has happened on 29.9.2007. The FIR was got registered by the father of the prosecutrix PW-7 Deep Chand. He has admitted categorically that the police has read over the contents of the FIR to him and thereafter, he has put his signatures. The statement of PW-7 Deep Chand that he had told the police that incident has taken place on 29.9.2007, which was wrongly recorded as 2.10.2007, cannot be believed. PW-16 SI Anil Verma has also admitted in his cross-examination that the FIR was written under his supervision. Whatever was stated by Deep Chand, father of the prosecutrix, was stated in the FIR. According to him, the contents of the FIR were read over and explained to Deep Chand who admitted the contents of the same to be correct and thereafter put his signatures.

18. Now, we will also advert to the statement of PW-12 Dr. Archana Soni. She has medically examined the prosecutrix. In the case history recorded by her, the date of assault has been mentioned as 2.10.2007 at 2:30 PM and not 29.9.2007. Thus, the statements of the prosecutrix PW-4, PW-6 Kiran Kumari alias Indu and PW-16 SI Anil Verma does not inspire confidence.

19. According to PW-4 prosecutrix, the incident has taken place inside the cowshed, however, as per PW-5 Munisha Kumari, she was told by the prosecutrix that the occurrence has taken place near the electric pole and bushes. PW-6 Kiran Kumari alias Indu also has not deposed as to where the incident has taken place. According to PW-7

Deep Chand, the father of the prosecutrix, he was told by PW-6 Kiran Kumari alias Indu that the occurrence has taken place inside the cowshed, though PW-6 Kiran Kumari alias Indu has never stated so in her statement. Different versions have been given by the witnesses regarding the place of occurrence. According to some witnesses, the incident has taken place inside the cowshed, however, according to others, as discussed hereinabove, the incident has taken place near the electric pole and bushes. The case of the prosecution is that PW-6 Kiran Kumari alias Indu has narrated the incident to the parents of the prosecutrix but PW-6 Kiran Kumari alias Indu has categorically denied that she has ever narrated the incident to them. It has also come in the statement of PW-3 Narain Singh that the cowshed used to remain locked.

20. According to the prosecution case, the prosecutrix told her mother about the occurrence on the same day. However, the mother stated that the prosecutrix told her about the incident after three days. PW-4 prosecutrix has not mentioned date, month or year of the occurrence. According to her, it has happened on Wednesday, but other witness deposed that the incident has taken place on Saturday. There are inconsistencies in the statements of the witnesses. The prosecutrix has also admitted in her cross-examination that she has made the statement in the Court at the behest of her mother. Even if hypothetically it is assumed that the incident has taken place on 29.9.2007 and not on 2.10.2007, then also there is delay of 4 days in lodging the FIR. No explanation, whatsoever, has been put forth as to why the FIR was not lodged promptly.

21. PW-12 Dr. Archana Soni, in her cross-examination, has also admitted that she has given the date of incident as 2.10.2007 for the alleged history on MLC Ext. PW-12/B, as per the police papers Ext. PW-12/A. She denied the suggestion that since the human blood was found in the swab of the prosecutrix, slight penetration has taken place. In her further cross-examination, she has admitted that she has given the opinion on the basis of the possibilities and she could not say definitely whether any rape has been committed by way of penetration or not. Thus, the prosecution has failed to prove the case against the accused. There is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court dated 9.9.2008.

22. Accordingly, there is no merit in this appeal and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Yash Pal .....Appellant.

Versus

State of H.P .....Respondent.

Cr. Appeal No. 303 of 2015
Reserved on: 20.11.2015
Decided on: November 27, 2015.

N.D.P.S. Act, 1985- Section 20- Police party found a vehicle parked on the road- accused was found sitting in the vehicle on the driver seat- he told on inquiry that the vehicle had heated up and it was parked on the road side due to this reason- accused was asked to produce Driving Licence but he could not produce the same- Registration Certificate was produced which was in the name of one 'R'- search of the vehicle was conducted by the

police on which one POP bag with two strings was recovered from underneath the seat of the driver- it was found to be containing 2 kg. 240 grams of charas- accused was convicted by the trial Court- recovery was effected during the night, therefore, the non-association of independent person will not affect the prosecution case- personal search of the accused was conducted by the police prior to the recovery of the charas- however, police officials had not complied with the requirement of Section 50 of N.D.P.S. Act and had not apprised the accused of his right to be searched before the Magistrate or Gazetted Officer- further, abstract of Malkhana register was not produced before the Court to connect the case property produced in the court with the property recovered from the spot- held, that in these circumstances, prosecution case was not proved- appeal accepted- accused acquitted.

(Para- 8 to 13)

For the Appellant: Mr. N.S Chandel, Advocate.
For the Respondent: Mr. P.M Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

This appeal is directed against the judgment rendered on 2.6.2015 by the learned Special Judge, Solan, in Sessions trial No. 14-S/7 of 2012 whereby the latter convicted and sentenced the accused for his having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, for short "the Act".

2. The accused/convict is aggrieved by the judgment of the learned Special Judge, Solan. Being aggrieved, he has by instituting the instant appeal before this Court assailed the findings recorded therein. A prayer has been made therein that his appeal be accepted and the findings of conviction recorded against him by the learned trial Court qua his having committed an offence punishable under Section 20 of the Act be reversed and set-aside in the exercise of its appellate jurisdiction by this Court.

3. Brief facts of the case are that on 27.7.2012, S.I Maheshender Singh , PW-9 along with HHC Laiq Ram, Constable Kewal Krishan, PW-6 and Bir Singh came to Solan from Police Station, State CID Bharari, Shimla after getting entered the rapat in the daily diary Ext.PW.2/E in an official vehicle, which was being driven by HHG Saroj Kumar and on reaching Solan, they associated with them SI Jai Gopal, PW-5 and proceeded towards Ochghat side on Rajgarh road on patrolling as well as to collect secret information. At about 12.15 A.M. during night when the aforesaid police officials were proceeding on the road then ahead of Kali Mata, Temple Shamti at a lonely place, they found one vehicle No.HP-12C-2962 to be parked there and on seeing the said vehicle the police officials alighted from their official vehicle and proceeded towards the vehicle and accused was found sitting alone in the said vehicle on the driver seat. On inquiry, the accused told that the vehicle had heated up and due to this reason he has parked the vehicle on the side of the road. S.I. Maheshender Singh, PW-9 asked the accused to produce the driving licence, but he could not produce the same and had shown the registration certificate, which was in the name of Rakesh Kumar Jamwal, resident of Lower Bazar, Solan, Bye pass. Thereafter the search of the vehicle was conducted by the police party and one POP bag with two strings was recovered from underneath the seat of the driver and on checking one transparent polythene pack was recovered from inside the polythene pack and on opening of the polythene pack another small carry bag light yellow in colour was recovered, which was containing Charas in the shape of wicks and balls. The charas so recovered was weighed and found to be 2 Kg 240 gms. After weighing the charas, it was placed in the same light yellow coloured carry bag, which was put into the polythene pack and was thereafter put

inside the POP carry bag, which was sealed in a cloth parcel by affixing five seals of seal impression 'P', specimen of seal Ext.PW.5/A was taken separately and seal impression was also affixed over NCB form Ext.PW.9/A, which was filled in triplicate by the Investigating Officer. Thereafter, Ruka Ext.PW.9/B was prepared by the S.I. Maheshender Singh, PW-9, which was forwarded to the Police Station, State CID, Bharari, Shimla, through constable Kewal Krishan, PW-6 along with the parcel containing charas, sample seal, copy of seizure memo, NCB form in triplicate and on receipt of which FIR Ext.PW.2/A came to registered. The case property was deposited with the then MHC of the said Police Station, who made entry in the malkhana register, the abstract of which is Ext.PW.2/C. Site Plan Ext.Pw.9/C was prepared by S.I. Maheshender Singh, PW-9, Investigating Officer and the accused was arrested vide memo Ext.PW.9/D. The parcel containing contraband along with sample seals, seizure memo, NCB form etc. was forwarded to FSL, Junga by HC Parkash Chand on 28.7.2012, through Constable Kewal Krishan, PW.6. The parcel on analysis was found to be containing extract of cannabis and sample of Charas.After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court.

4. The trial Court charged the accused for his having committed an offence punishable under Section 20 of the Act to which he pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined as many as 10 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused was given an opportunity to adduce evidence in defence which he chose to adduce, however, later refused to adduce the same.

6. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. Shri N.S Chandel, learned Advocate, has concerted to vigorously contend before this Court qua the findings of conviction, recorded by the learned trial Court, being not based on a proper appreciation of evidence on record, rather, theirs being sequelled by gross mis-appreciation of 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 appearing for the State, 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 they 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. Recovery of charas weighing 2 kilograms & 240 grams was effected from the alleged conscious and exclusive possession of the accused while its being kept by him in vehicle No. HP-12C-2962 underneath its driver's seat whereupon he was atop at the apposite stage under memo Ex. Pw-5/B. Even though the prosecution witnesses have deposed in tandem besides in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of circumstances, hence it is argued that when the prosecution case stand established, it would be legally unwise for this Court to acquit the accused.

10. Besides when the testimonies of the official witnesses, unravel the fact of theirs being bereft of any inter-se or intra-se contradictions hence, they too enjoy credibility

for sustaining thereupon findings of conviction recorded against the accused by the learned trial Court. Apparently, proof of the prosecution case is endeavoured to be sustained on the strength of the unblemished testimonies of police witnesses. A close and studied perusal of the deposition of the police witnesses underscores the factum of theirs having therein neither given a version qua the factum of recovery of contraband from the exclusive and conscious possession of the accused inconsistent with the manner thereof as recited in the F.I.R. Ext.PW-2/A for begetting a conclusion of hence their testimonies comprised in their respective examinations in chief are ridden with a vice of inter se contradictions vis-à-vis their testimonies comprised in their respective cross-examinations nor when their depositions are afflicted with any vice of intra se contradictions rather when they have rendered a deposition qua the manner of recovery of charas from the alleged conscious and exclusive possession of the accused bereft of any disharmony or inconsistency, gives leverage to an inference of hence the prosecution succeeding in sustaining its charge against the accused of charas weighing 2 kgs. 240 grams having stood recovered from his conscious and exclusive possession while its being kept by him in a vehicle underneath its driver seat whereupon he was atop at the apposite stage.

11. Even the factum of non-association of independent witnesses by the Investigating Officer would not dilute the efficacy of the depositions of the official witnesses unveiling therein with intra-se harmony the factum of recovery of charas weighing 2 kg 240 grams having stood effectuated from the purported conscious and exclusive possession of the accused. Now this court would not strip the efficacy of their testimonies underscoring the factum probandum deposed with intra-se consistency by each of them, even if despite availability of habitations in somewhat close proximity to the site of occurrence no concerted efforts were purportedly made by the Investigating Officer, to solicit participation of their inhabitants in the apposite proceedings especially given the factum of the apposite proceedings purportedly having stood initiated in the wee hours of 27.7.2012 in as much as at 12.15 a.m. whereat even if habitations existed in somewhat close proximity to the site of occurrence the concert, if any, of the Investigating Officer to solicit participation of their inhabitants in the apposite proceedings, would have not borne any fruition. Even if this court has taken to not disimpute sanctity to the depositions of the official witnesses nonetheless the genesis of the prosecution case of charas weighing 2kg. 240 grams having stood recovered in a manner espoused by the prosecution witnesses gets capsized in the face of (a) Ex. PW-9/E a memo reflective of the Investigating Officer having conducted a personal search of the accused palpably besides explicitly manifesting therein at column No. 8 qua a memo whereunder charas stood recovered on his personal search alongwith other articles depicted therein, begets an inference of its carrying an implication of the accused at the time of the Investigating Officer holding his personal search his having been found in possession of a copy of memo whereunder charas stood recovered**.** Since the preparation of PW-9/E preceded the recovery of charas weighing 2 Kg. 240 grams from vehicle No. HP-12C-2962 occupied by the accused, the reflection in column No. 8 of Ex. PW-9/E of the Investigating Officer having on holding a personal search of the accused recovered a copy of recovery memo connotative of effectuation of recovery of charas, foments a conclusion of the Investigating Officer prior to the effectuation of recovery of charas in the manner propounded by the official witnesses having effectuated its recovery on his purportedly holding a personal search of the accused. Even no valid explanation emanates from the Investigating Officer qua the reflection in column No. 8 of Annexure PW-9/E of his on holding a personal search of the accused having effectuated recovery of a memo displaying effectuation of recovery of charas. With no explanation having emanated from the Investigating Officer qua the aforesaid reflection at column No. 8 in Ex. PW-9/E, the further factum of the memo existing in PW-9/E portraying the factum of recovery of charas having stood effectuated thereunder having remained un-adduced in evidence, has its implication

in begetting the sequel of the reflection at column No. 8 in Ex. PW-9/E with its unfolding the effectuation of recovery of a memo with a portrayal therein of recovery of charas having stood effectuated thereunder rendering contrived besides camouflaged the manner of its recovery under Ext.PW-5/B from the alleged conscious and exclusive possession of the accused. Moreover, the stark distinctivity inter se the manner of recovery of Charas denoted in a memo cited in Column No.8 of Ext.PW-9/E vis-à-vis the effectuation of its recovery under Ext.PW-5/B naturally renders the genesis of the prosecution case of its recovery having stood effectuated under Ext.PW-5/B to falter, it being an invention. As a corollary, the reflections in Ex. PW-5/.B are vulnerable to skepticism. Be that as it may, if assumingly, effectuation of recovery of charas from the alleged conscious and exclusive possession of the accused is construable to be at a stage contemporaneous to the Investigating Officer conducting a personal search of the accused where before Ex. PW-9/E stood prepared, imperatively given its recovery by the Investigating Officer on his holding a personal search of the accused, enjoined him for validating its recovery therefrom, to mete compliance with the statutory/mandatory provisions engrafted in Section 50 of the Act, warranting his preparing a consent memo communicative of the accused having a legal right to be searched before a gazetted officer or a magistrate which options in case forgone by the accused in favour of the Investigating Officer would render the Investigating Officer empowered to conduct his personal search. However there is no forthcoming evidence of the investigating Officer having meted compliance to the enjoined mandatory statutory requirements of section 50 of the Act in as much as, his before proceeding to carry out a personal search of the accused his having communicated to the latter his having a legal right of his being personally searched before a gazetted officer or a magistrate which option in case waived by him in favour of the Investigating Officer would have validated the act of the latter holding the personal search of the accused. Absence of the aforesaid apposite evidence personficiatory of adherence by the Investigating Officer with the statutory requirement of Section 50 of the Act renders suspicious the personal search of the accused by the Investigating Officer wherefrom apart from the other articles depicted therein a memo whereunder charas stood recovered was un-earthed/detected. Recovery whereof rather galvanizes an inference of the Investigating Officer having after effectuation of recovery of contraband in infraction in the manner aforesaid of the mandatory provisions of section 50 of the Act planted it in the car occupied by the accused. Consequently, for reiteration, the aforesaid inference renders ridden with grave skepticism the prosecution version of its recovery having stood effectuated from the car occupied by the accused. In aftermath the depositions of the official witnesses though bereft of any taint or embellishment are discardable besides construable to be not acquiring any probative tenacity for founding thereupon the guilt of the accused.

12. Be that as it may, it was also incumbent upon the prosecution to fortifyingly establish the factum probandum in as much as the case property produced before the trial Court being linkable to its recovery standing effectuation from the alleged conscious and exclusive possession of the accused in the manner espoused by the prosecution. The germane besides apt material for forming a conclusion qua the case property as produced in Court being linkable to the apposite stage of its recovery from the alleged conscious and exclusive possession of the accused in the manner propagated by the prosecution, stood embedded in the apposite descriptive entries qua it, recorded in the Malkhana register of the police station concerned. Imperatively at the stage contemporaneous to its production in Court by the learned PP for its being shown to the PWs (a) the former was enjoined to produce in Court either the abstract of the malkhana register personificatory of narrations or descriptions compatible or congruous to the one borne on Ex.PW-5/B as shown to the prosecution witnesses (b) or he was obliged to elicit from the PWs to whom the case property stood shown in Court by him communications portraying the factum of it being carried by

them on its being handed over to them by an authorized official after its retrieval by the latter from the Malkhana concerned whereupon it stood handed over by them to the learned PP for facilitating on its production by him in Court emanation of apposite elicitations from them unveiling the factum of it being the case property as attributed by the prosecution to the accused (c) even in the face of the aforesaid omission the learned PP at the time of production of case property Ex.P-5 in Court, for its being shown to the PWs for theirs deposing qua it being the very same property as was recovered from the alleged conscious and exclusive possession of the accused in the manner as propagated by the prosecution to yet gain muscle was obliged to on its production in Court by him besides prior to its being shown to the PWs communicate before it the factum of his having received it from an empowered official after its retrieval by the latter from the Malkhana concerned.

13. However, a close and circumspect reading of the testimonies of PW-5 and PW-9 to whom the case property on its production in Court by the learned PP was shown omits to unfold (a) the factum of either at the stage contemporaneous to its production in Court by the learned PP for its being shown to the PWs aforesaid he divulged to the trial Court the factum of his having received it from an authorized officer on its retrieval by the latter from the Malkhana concerned (b) nor is there any emanation in the deposition of both PWs aforesaid of theirs having received it from an authorized official on it retrieval by the latter from the malkhana concerned, (c) besides there is no communication by both in their recorded depositions on oath of theirs carrying with them at the time of recording their depositions in court during course whereof the learned PP showed them case property Ex.P-5, the relevant abstract of the malkhana register wherefrom compatibility intra-se descriptions or narrations borne thereon on its comparison with the abstract of the malkhana register could stand either disinterred or fathomed, for as a corollary rendering a conclusion of the case property as produced in the Court being the one as stood recovered from the conscious and exclusive possession of the accused.

14. The summom bonum of the above discussion is of the omissions aforesaid countervailing the propagation of the prosecution of case property Ex.P-5 produced in Court by the learned PP for its being shown to PWs being relatable to the contraband recovered from the alleged conscious and exclusive possession of the accused under memo Ex. PW-5/B. The crux of the above discussion is of the prosecution having not adduced cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

15. In view of above discussion, the instant appeal is allowed and the impugned judgment of 2.6.2015 rendered by the learned Special Judge, Solan is set-aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

16. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of the jail concerned, in conformity with the judgment forthwith. Records be sent back forthwith.

****

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

Gandhru and others .....Petitioners.
Versus
Hanifa .....Respondent.

CMPMO No. 161 of 2015.
Decided on: 30.11.2015.

Code of Civil Procedure, 1908- Order 8 Rule 1- The defendant failed to file the written statement within 90 days of the service of the summons and the trial court closed the right to file the written statement- held that the defendant could not approach their Advocate due to heavy snowfall in Churah valley and the written statement could not be filed within the stipulated period- in these exceptional circumstances the time to file written statement could have been extended - petition allowed and the petitioners permitted to file written statement within three weeks. (Para 1 to 5)

Case referred:
Kailash vrs. Nankhu and others, (2005) 4 SCC 480

For the petitioners: Mr. Rakesh Chauhan, Advocate.
For the respondent: None.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order dated 24.2.2015, rendered by the learned Civil Judge (Jr. Divn.), Chamba, H.P. in Civil Suit No. 195 of 2014.

2. Key facts, necessary for the adjudication of this petition are that the respondent filed a suit for permanent prohibitory injunction and possession with a prayer to restrain the petitioners from interfering and causing nuisance and damage to the suit property, as detailed in the plaint. The petitioners counsel appeared on 5.12.2014. The Written Statement was ordered to be filed by 24.2.2015. The petitioners could not approach their Advocate due to heavy snowfall in Churah valley. The learned trial Court closed the right to file written statement on 24.2.2015.

3. The learned Civil Judge (Jr. Divn.), Chamba, H.P., has taken a very hyper-technical view while passing orders dated 24.2.2015. The period of 90 days can be enlarged to file the reply/written statement in the interest of justice, more particularly, when it was merely impossible for the petitioners to approach their Advocate.

4. Their lordships of the Hon'ble Supreme Court in the case of ***Kailash vrs. Nankhu and others,*** reported in ***(2005) 4 SCC 480*** have held that through Order 8 Rule 1 CPC casts an obligation on the defendant to file written statement within the time prescribed therein, the provisions do not deal with nor specifically take away the power of the Court to take a written statement on record, though filed beyond the time as provided for therein. Their lordships have also clarified that ordinarily the time schedule contained in the provisions is to be followed as a rule and departure therefrom would be by way of exception only. Their lordships have also held that the extension of time sought for by defendant from Court, whether within 30 or 90 days, should not be granted as a matter of routine and

merely for the asking, and especially when period of 90 days has expired. Extention of time beyond the limits laid down in Order 8 Rule 1 CPC could only be by way of exception and for reasons assigned by defendant and also recorded in writing by Court to its satisfaction, howsoever brief they might be. Their lordships have held as follows:

> "27. Three things are clear. Firstly, a careful reading of the language in which Order VIII, Rule 1 has been drafted, shows that it casts an obligation on the defendant to file the written statement within 30 days from the date of service of summons on him and within the extended time falling within 90 days. The provision does not deal with the power of the court and also does not specifically take away the power of the court to take the written statement on record though filed beyond the time as provided for. Secondly, the nature of the provision contained in Order VIII, Rule 1 is procedural. It is not a part of the substantive law. Thirdly, the object behind substituting Order VIII, Rule 1 in the present shape is to curb the mischief of unscrupulous defendants adopting dilatory tactics, delaying the disposal of cases much to the chagrin of the plaintiffs and petitioners approaching the court for quick relief and also to the serious inconvenience of the court faced with frequent prayers for adjournments. The object is to expedite the hearing and not to scuttle the same. The process of justice may be speeded up and hurried but the fairness which is a basic element of justice cannot be permitted to be buried.
>
> 28. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice. The observations made by Krishna Iyer, J. in Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774, are pertinent:-
>
> > "The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.
> >
> > The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. Justice is the goal of jurisprudence __ processual, as much as substantive."
>
> 29. In The State of Punjab and Anr. v. Shamlal Murari and Anr. (1976) 1 SCC 719, the Court approved in no unmistakable terms the approach of moderating into wholesome directions what is regarded as mandatory on the principle that "Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice." In Ghanshyam Dass and Ors. v. Dominion of India and Ors. (1984) 3 SCC 46, the Court reiterated the need for interpreting a part of the adjective law dealing with procedure alone in such a manner as to sub- serve

and advance the cause of justice rather than to defeat it as all the laws of procedure are based on this principle.

30. It is also to be noted that though the power of the Court under the proviso appended to Rule 1 of Order VIII is circumscribed by the words "shall not be later than ninety days" but the consequences flowing from non-extension of time are not specifically provided though they may be read by necessary implication. Merely, because a provision of law is couched in a negative language implying mandatory character, the same is not without exceptions. The courts, when called upon to interpret the nature of the provision, may, keeping in view the entire context in which the provision came to be enacted, hold the same to be directory though worded in the negative form.

33. As stated earlier, Order VIII, Rule 1 is a provision contained in the CPC and hence belongs to the domain of procedural law. Another feature noticeable in the language of Order VIII Rule 1 is that although it appoints a time within which the written statement has to be presented and also restricts the power of the Court by employing language couched in a negative way that the extension of time appointed for filing the written statement was not to be later than 90 days from the date of service of summons yet it does not in itself provide for penal consequences to follow if the time schedule, as laid down, is not observed. From these two features certain consequences follow.

41. Considering the object and purpose behind enacting Rule 1 of Order VIII in the present form and the context in which the provision is placed, we are of the opinion that the provision has to be construed as directory and not mandatory. In exceptional situations, the court may extend the time for filing the written statement though the period of 30 days and 90 days, referred to in the provision, has expired. However, we may not be misunderstood as nullifying the entire force and impact the entire life and vigour of the provision. The delaying tactics adopted by the defendants in law courts are now proverbial as they do stand to gain by delay. This is more so in election disputes because by delaying the trial of election petition, the successful candidates may succeed in enjoying the substantial part, if not in its entirety, the term for which he was elected even though he may loose the battle at the end. Therefore, the judge trying the case must handle the prayer for adjournment with firmness. The defendant seeking extension of time beyond the limits laid down by the provision may not ordinarily be shown indulgence.

42. Ordinarily, the time schedule prescribed by Order VIII, Rule 1 has to be honoured. The defendant should be vigilant. No sooner the writ of summons is served on him he should take steps for drafting his defence and filing the written statement on the appointed date of hearing without waiting for the arrival of the date appointed in the summons for his appearance in the Court. The extension of time sought for by the defendant from the court whether within 30 days or 90 days, as the case may be, should not be granted just as a matter of routine and merely for asking more so, when the period of 90 days has expired. The extension can be only by way of an exception and for reasons assigned by the defendant and also recorded in writing by the Court to its satisfaction. It must be spelled out that a departure from the time schedule prescribed by Order VIII, Rule 1 of the

Code was being allowed to be made because the circumstances were exceptional, occasioned by reasons beyond the control of the defendant and such extension was required in the interest of justice, and grave injustice would be occasioned if the time was not extended.

43. A prayer seeking time beyond 90 days for filing the written statement ought to be made in writing. In its judicial discretion exercised on well-settled parameters, the Court may indeed put the defendants on terms including imposition of compensatory costs and may also insist on affidavit, medical certificate or other documentary evidence (depending on the facts and circumstances of a given case) being annexed with the application seeking extension of time so as to convince the Court that the prayer was founded on grounds which do exist.

44. The extension of time shall be only by way of exception and for reasons to be recorded in writing, howsoever brief they may be, by the court. In no case, the defendant shall be permitted to seek extension of time when the court is satisfied that it is a case of laxity or gross negligence on the part of the defendant or his counsel. The court may impose costs for dual purpose: (i) to deter the defendant from seeking any extension of time just for asking and (ii) to compensate the plaintiff for the delay and inconvenience caused to him.

46. We sum up and briefly state our conclusions as under:-

(i) The trial of an election petition commences from the date of the receipt of the election petition by the Court and continues till the date of its decision. The filing of pleadings is one stage in the trial of an election petition. The power vesting in the High Court to adjourn the trial from time to time (as far as practicable and without sacrificing the expediency and interests of justice) includes power to adjourn the hearing in an election petition affording opportunity to the defendant to file written statement. The availability of such power in the High Court is spelled out by the provisions of theRepresentation of the People Act, 1951 itself and Rules made for purposes of that Act and a resort to the provisions of the CPC is not called for.

(ii) On the language of Section 87(1) of the Act, it is clear that the applicability of the procedure provided for the trial of suits to the trial of election petitions is not attracted with all its rigidity and technicality. The rules of procedure contained in the CPC apply to the trial of election petitions under the Act with flexibility and only as guidelines.

(iii) In case of conflict between the provisions of the Representation of the People Act, 1951 and the Rules framed thereunder or the Rules framed by the High Court in exercise of the power conferred by Article 225 of the Constitution on the one hand, and the Rules of Procedure contained in the CPC on the other hand, the former shall prevail over the latter.

(iv) The purpose of providing the time schedule for filing the written statement under Order VIII, Rule 1 of CPC is to expedite and not to scuttle the hearing. The provision spells out a disability on the defendant. It does not impose an embargo on the power of the Court

to extend the time. Though, the language of the proviso to Rule 1 of Order VIII of the CPC is couched in negative form, it does not specify any penal consequences flowing from the non- compliance. The provision being in the domain of the Procedural Law, it has to be held directory and not mandatory. The power of the Court to extend time for filing the written statement beyond the time schedule provided by Order VIII, Rule 1 of the CPC is not completely taken away.

(v) Though Order VIII, Rule 1 of the CPC is a part of Procedural Law and hence directory, keeping in view the need for expeditious trial of civil causes which persuaded the Parliament to enact the provision in its present form, it is held that ordinarily the time schedule contained in the provision is to be followed as a rule and departure therefrom would be by way of exception. A prayer for extension of time made by the defendant shall not be granted just as a matter of routine and merely for asking, more so when the period of 90 days has expired. Extension of time may be allowed by way of an exception, for reasons to be assigned by the defendant and also be placed on record in writing, howsoever briefly, by the Court on its being satisfied. Extension of time may be allowed if it was needed to be given for the circumstances which are exceptional, occasioned by reasons beyond the control of the defendant and grave injustice would be occasioned if the time was not extended. Costs may be imposed and affidavit or documents in support of the grounds pleaded by the defendant for extension of time may be demanded, depending on the facts and circumstances of a given case."

5. Accordingly, the petition is allowed. Order dated 24.2.2015 is set aside. The petitioners are permitted to file the written statement within three weeks from today.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Harbhajan Singh .....Appellant.

Versus

State of H.P. .....Respondent.

Cr. Appeal No. 312 of 2015.
Reserved on: November 27, 2015.
Decided on: November 30, 2015.

Indian Penal Code, 1860- Section 302**- Indian Arms Act-** Section 27- The accused armed with a gun started abusing the deceased who was nearby- the deceased requested the accused not to do so-Accused threatened the deceased and then fired at the deceased who collapsed at the spot - incident was witnessed by PW1 and PW2 - they informed the family members of the deceased-the accused was convicted and sentenced by the trial court-in appeal held that, both the eye witnesses had categorically supported the prosecution case - gun is proved to be in working order - barrel of firearm bore the evidence of recent firing- there is no reason to interfere with the well reasoned judgment by the trial court- appeal dismissed. (Para 19)

For the appellant: Mr. Anoop Chitkara, Advocate.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 30.6.2015, rendered by the learned Addl. Sessions Judge, Sirmaur at Nahan, H.P. in Sessions Trial No. 42-N/7 of 2013, whereby the appellant-accused, namely Harbhajan Singh (hereinafter referred to as the accused) who was charged with and tried for offence punishable under Section 302 IPC and Section 27 of the Indian Arms Act, has been convicted and sentenced to undergo imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine to further undergo imprisonment for a period of six months for the offence punishable under Section 302 IPC. The accused was acquitted for the offence punishable under Section 27 of the Indian Arms Act.

2. The case of the prosecution, in a nut shell, is that on 20.5.2013, an information was received in the Police Station, Paonta Sahib from Civil Hospital, Paonta Sahib that one person was admitted in the hospital with gunshot injury. Rapat Ext. PW-17/A was recorded to this effect. PW-20 ASI Mohar Singh alongwith other police officials, went to the Civil Hospital, Paonta Sahib. The statement of PW-1 Surjeet Singh under Section 154 Cr.P.C. was recorded vide Ext. PW-1/A. According to the averments made in the statement made under Section 154 Cr.P.C., PW-1 Surjeet Singh used to visit the house of Avtar Singh at Haripur Tohana as he was in good terms with him. On 19.5.2013, he came to the house of Avtar Singh at Haripur Tohana and stayed overnight in his house. On 20.5.2013, he alongwith Kamaljeet Singh went in the orchard at about 11:30 AM. One person, named Ayub Khan (PW-2) was going on his bicycle in front of them. He had taken Mango Orchard from Avtar Singh on contract. Kamaljeet Singh had sold out his bamboo trees. When PW-1 Surjeet Singh reached on the spot, accused Harbhajan Singh was already sitting on another cot armed with gun. Accused was abusing Kamaljeet Singh by saying that the daughter of Kamaljeet Singh had illicit relations and she also eloped. Kamaljeet Singh came on the spot within 5-7 minutes, who asked the accused as to why he was abusing him and his family members. Accused threatened Kamaljeet Singh that he would kill him by gun. Thereafter, accused fired upon Kamaljeet Singh on his chest. Kamaljeet Singh collapsed on the spot. The accused ran away from the spot and PW-1 Surjeet Singh and PW-2 Ayub Khan went towards the house of Kamaljeet Singh and informed his family members that accused has fired upon Kamaljeet Singh. Many persons gathered on the spot. Thereafter, Kamaljeet Singh (hereinafter referred to as the deceased) was taken to the hospital at Paonta Sahib. FIR Ext. PW-15/A was registered. The case property was taken into possession, including the gun. The post mortem of deceased was conducted at Civil Hospital, Paonta Sahib by PW-13 Dr. Sanjeev Sehgal. The recovery of gun and cartridges was made on the basis of disclosure statement made by the accused. The investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 21 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. According to him, he was falsely implicated. The learned Trial Court convicted and sentenced the accused on 30.6.2015. Hence, the present appeal.

4. Mr. Anoop Chitkara, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. M.A.Khan, learned Addl. Advocate General, appearing for the State, has supported the judgment of the learned trial Court dated 30.6.2015.

5. We have heard the learned Advocates at length and have also gone through the impugned judgment and records of the case carefully.

6. PW-1, Surjeet Singh is one of the eye-witnesses. He testified that on 20.5.2013, he alongwith Kamaljeet Singh went in the orchard at about 11:30 AM. When he reached the spot, accused Harbhajan Singh was already sitting on another cot armed with gun. The accused was abusing Kamaljeet (deceased) by saying that the daughter of Kamaljeet had illicit relation with some person and she eloped. Kamaljeet also came on the spot after 5-7 minutes who asked the accused as to why he was abusing him and his family members. Accused threatened the deceased that he would kill him with gun. Thereafter, accused fired gunshot upon Kamaljeet on the chest. The deceased collapsed on the spot. He got perplexed and accused left the spot. Thereafter, he went to the house of Kamaljeet and informed the family members of deceased. Many persons gathered on the spot. His statement was recorded under Section 154 Cr.P.C. In his cross-examination, he deposed that when Kamaljeet came on the spot after checking the bamboo trees, only thereafter, the accused started abusing Kamaljeet. The accused fired at Kamaljeet after 3-4 minutes of abusing. He along with the wife and daughter of Kamaljeet (deceased) came back on the spot. Many persons had already assembled on the spot.

7. PW-2 Ayub Khan, is also the eye-witness to the incident. According to him, he was taking meals nearby the traditional fire oven. PW-1 Surjeet Singh came there. Accused started saying that the daughter of Kamaljeet has eloped. Kamaljeet also reached on the spot who asked the accused as to why he was abusing him and his family members. The accused threatened Kamaljeet that he would kill him with gun. Thereafter, accused fired gun shot on Kamaljeet on his chest. Kamaljeet collapsed on the ground. He along with PW-1 Surjeet Singh left the spot and went to the house of deceased and informed his wife of the incident that accused had fired on Kamaljeet. The wife and daughter of Kamaljeet came on the spot. They both came back in the garden. Many persons had gathered there. In his cross-examination, he deposed that they all i.e. daughter and wife of Kamaljeet, PW-1 Surjeet Singh and he came on the spot together. He has denied the suggestion that Surjeet Singh has not visited the garden on 20.5.2013.

8. PW-3 Ms. Satwinder Kaur is the daughter of the deceased. She has testified that at about 11:30 AM, Surjeet Singh and Ayub Khan came to their house from the Mango garden. They told them that accused had fired upon her father Kamaljeet Singh. She along with her mother rushed to the Mango garden. She saw accused Harbhajan Singh armed with gun. He was going towards his house. She asked the accused as to why he fired upon her father. He replied that he has done whatever he wanted to do. She reached on the spot and saw that her father was lying on the ground.

9. PW-4 Jaspal Singh deposed that the accused made disclosure statement about the gun vide Ext. PW-4/A. He signed the memo Ext. PW-4/A. The gun was recovered at the instance of the accused from his house. It was taken into possession vide memo Ext. PW-4/B. He identified gun Ext. P-14 and empty cartridge Ext. P-15. In his cross-examination, he deposed that when the police along with the accused reached the house of the accused, the accused pointed towards the cot and told that the gun was lying under the cot. Thereafter, the gun was taken into possession from the house of the accused.

10. PW-6 Smt. Santosh, Sr. Asstt., SDM Office, Paonta Sahib, deposed that as per the record at Sr. No. 144 dated 8.2.1986, the gun licence was issued in the name of Harbhajan Singh and thereafter renewed on 26.12.2012 upto 31.12.2015. The entry in Ext. PW-6/A was correct as per the original record produced by her in the Court.

11. PW-7 Shakeel Ahmad deposed that on 5.3.2013, accused had purchased five live cartridges KF-12 bore. He made entry in the relevant Register at Sr. No. 18.

12. PW-8 Mewa Singh deposed that on 20.5.2013 at about 11:30 AM, he was at his house and he heard noise of a gunshot. He received call on his mobile phone from the mobile phone of Kamaljeet. He reached the garden. He saw Kamaljeet lying on the ground. PW-1 Surjeet Singh and PW-2 Ayub Khan were also present on the spot along with other persons.

13. PW-13 Dr. Sanjeev Sehgal has conducted the post mortem examination and the report is Ext. PW-13/B. According to him, the deceased died due to gunshot injury causing excessive hemorrhage due to laceration of right lung and consequent shock and death. The shot was fired from a close range probably.

14. PW-20 ASI Mohar Singh is the Investigating Officer in the case. He reached the spot and recorded the statement of PW-1 Surjeet Singh vide Ext. PW-1/A under Section 154 Cr.P.C. The case property was taken into possession, including control sample of the soil from the spot. The accused made the disclosure statement vide Ext. PW-4/A, on the basis of which gun and cartridge were taken into possession.

15. The prosecution has proved the case against the accused to the hilt. PW-1 Surjeet Singh and PW-2 Ayub Khan are the eye-witnesses. According to them, the accused was abusing Kamaljeet (deceased) in the garden. The deceased asked the accused as to why he was abusing him and his family members. Thereafter, accused fired at Kamaljeet. He collapsed on the spot. PW-1 Surjeet Singh and PW-2 Ayub Khan informed the family members. The family members came to the spot.

16. PW-3 Satwinder Kaur has also supported the version of PW-1 Surjeet Singh and PW-2 Ayub Khan. She also saw accused armed with gun. He was going towards his house. She asked accused Harbhajan Singh as to why he fired gunshot at his father. The accused told her that he has done whatever he intended to do. The gun and cartridge were recovered on the basis of disclosure statement of the accused made vide Ext. PW-4/A. It was duly proved by PW-4 Jaspal Singh. The gun licence was issued in the name of the accused. It was recorded at Sr. No. 144 on dated 8.2.1986. The same was renewed on 26.12.2012 upto 31.12.2015. PW-7 Shakeel Ahmad has deposed that on 5.3.2013, the accused had purchased five live cartridges KF-12 bore. He made entry in the relevant Register at Sr. No. 18.

17. PW-8 Mewa Singh has carried deceased to Paonta Sahib hospital. Kamaljeet was declared dead by the M.O at Paonta Sahib hospital. PW-13 Dr. Sanjeev Sehgal has conducted the post mortem examination and the report is Ext. PW-13/B. According to him, the deceased died due to gunshot injury causing excessive hemorrhage due to laceration of right lung and consequent shock and death. The shot was probably fired from a close range.

18. According to the FSL report Ext. PW-20/L, the gunshot hole on Ext. E/1a (shirt) was caused by shot gun and the range of firing was about 2 meter. The soil in Ext. E/5 was found similar to the soil in Ext. E/6 (control sample soil). The Ext. E/7a was a Single Barrel Breech Loading (SBBL) gun and was found to be in working order. The barrel

of the firearm bore evidence of recent firing. The cartridge case in Ext. E/7b was fired from firearm Ext. E/7a. The pellets in Ext. E/3 were fired pellets generally used in 12 bore ammunition.

19. There is no merit in the contention of Mr. Anoop Chitkara, Advocate for the accused that the accused was not present on the spot. PW-1 Surjeet Singh and PW-2 Ayub Khan are the eye-witnesses of the incident. They have seen the accused firing on Kamaljeet Singh (deceased). The deceased died due to excessive loss of blood. Ext. E/7a (gun) was found to be in working condition and the barrel of firearm bore the evidence of recent firing, as discussed hereinabove, vide Ext. PW-20/L, FSL report. Thus, there is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court dated 30.6.2015.

20. Accordingly, there is no merit in this appeal and the same is dismissed.

****

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

Sh. Shyam Lal & anr. .....Appellants.

Versus

Sh. Mohan Lal .....Respondent.

RSA No. 569 of 2005.
Reserved on: 26.11.2015.
Decided on: 30.11.2015.

Specific Relief Act, 1963- Section 34- Plaintiff claimed that he was the only legal heir of M and R, who had died issueless and that the defendants had got mutation attested wrongly claiming themselves to be the legal heirs- suit was dismissed by the trial Court- appeal was allowed- held, in regular second appeal that no inquiry was conducted at the time of attestation of mutation- trial Court had wrongly relied upon the certificate issued by the Gram Panchyat without examining the Panchyat Official- Appellate Court had correctly appreciated the oral and documentary evidence- appeal dismissed. (Para-12)

For the appellant(s): Mr. Rajnish K. Lall, Advocate, vice Mr. K.D.Sood, Sr. Advocate.

For the respondent: Mr. Bhupinder Gupta, Sr. Advocate with Mr. Ajeet Jaswal, Advocate.

The following judgment of the Court was delivered :

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Solan, H.P., dated 25.7.2005, passed in Civil Appeal No. 87/S-13 of 2004.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the respondent-plaintiff (hereinafter referred to as the plaintiff), has instituted suit for declaration and permanent injunction against the appellants-defendants (hereinafter referred to as the defendants). According to the plaintiff, late Sh. Ramdiya, son of Angru, son of Sh. Nagahia, had three sons, namely, Sh. Kahanu, Sanwalia and Surtia. Sanwalia

and Surtia died issueless and had no legal heirs. Kahnu had three sons, namely, Sh. Ratia, Mushu and Daulu. Sh. Ratia and Mushu had no legal heirs. Sh. Daulu had one son i.e. the plaintiff. According to the plaintiff, he was the only legal heir of Mushu and Ratia as they died issueless. The defendants have got wrongly entered and attested mutation No. 501 dated 16.12.1992 in their favour claiming themselves to be the legal heirs of Sh. Mushu son of Kahanu son of Sh. Ram Diya and have got mutation attested, qua the suit land, as detailed in the plaint. The defendants and their mother fraudulently represented themselves to be the sons of Mushu son of Kahanu son of Ramdiya and mutation No. 501 of inheritance dated 16.12.1992 was vitiated by fraud and misrepresentation. The defendants and their predecessor-in-interest never resided in Mauja Sua, Tehsil, Kasauli, Distt. Solan, H.P.

3. The suit was contested by the defendants. It is admitted that Sh. Sanwalia and Sh. Surtia died issueless and they had no legal heirs. They also admitted that Kahanu had three sons, namely, Ratia, Mushu and Daulu. It was denied that Ratia and Mushu had no legal heirs. Infact, Ratia was married to Smt. Zafara and a son Dila Ram was born along with three daughters, namely, Sewati, Bala Devi and Kamla Devi. Mushu was married to Smt. Niyakoo and had two sons, namely, Kali Ram and Shyam Lal, the present defendants. The allegations regarding the mutation being fraud and illegal were denied. According to the defendants, mutation No. 501 dated 16.12.1992 was correctly attested. Sh. Mushu and Kahnu had left the village Sua to Village Basheel.

4. The learned Civil Judge (Jr. Divn.), Kasauli, Distt. Solan, framed the issues on 5.7.1994. The suit was dismissed vide judgment dated 13.9.2004. The plaintiff, feeling aggrieved, preferred an appeal against the judgment and decree dated 13.9.2004. The learned District Judge, Solan, allowed the same on 25.7.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted on 7.11.2005 by making observation that various substantial questions of law, as detailed in the grounds of appeal, arose for determination.

6. Mr. Rajnish K. Lall, Advocate, appearing on behalf of the appellants, on the basis of the substantial questions of law framed, has vehemently argued that the first appellate Court has misread Ext. PW-1/A and revenue record. According to him, the defendants were sons of Mushu. He has supported the judgment and decree of the trial Court dated 13.9.2004. On the other hand, Mr. Bhupinder Gupta, Sr. Advocate, for the respondent has supported the judgment and decree of the learned first appellate Court dated 25.7.2005.

7. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

8. I have heard the learned Advocates and have also gone through the judgments and records of the case carefully.

9. PW-1 Mohan Lal deposed that the suit land was in his possession since his forefathers. The defendants have no right over the suit land. He has produced copy of jamabandi of suit land Mark-A and of Village Basheel as Mark-B. He also proved copies of Shajra Nasab Ext. PW-1/A and PW-1/B. He has produced copy of jamabandi Ext. PW-1/C. He has denied in the cross-examination that the name of the wife of Ratia was Zafaria. PW-2 Prabhu Dayal deposed that the name of the father of plaintiff was Dulu Ram. Ratia and Mushu died issueless. PW-3 Ram Krishan deposed that the name of the father of plaintiff was Dulu. They were three brothers. The names of other two brothers were Ratia and Mushu. PW-4 Budh Ram deposed that the land was owned by the plaintiff. PW-5 Durga

Dutt Attri has deposed that he has prepared the Shajra Nasab Ext. P-1. It was correct as per the record. He has proved the copy of translation Ext. PW-1/A. PW-6 (Patwari) Jagdish has produced the record. According to him, the jamabandi for the year 1975-76 was prepared with black ink but the name of Ramdia was written with blue ink. He has admitted that tampering does not find mention in "*Parat Padtal*" i.e. Ext. P-2/A.

10. DW-1 Kali Ram deposed that Kahnu had three sons, namely, Dulu, Ratia and Mushu. The eldest son was Dulu. The marriage of his father was solemnized with Naiku. Mushu was born in Sua. Thereafter, they went to village Basheel. Kahnu was called Sadhu due to his simplicity in village Basheel. This fact was told to him by the villagers. His father died in the year 1975. DW-2 Dhani Ram deposed that he did not know Kahnu. He knew Ratia, Mushu and Dulu. DW-3 Ram Saran deposed that Kahnu was also known as Sadhu. DW-4 Dila Ram, in his cross-examination, has admitted that the name of Kahnu alias Sadhu was never recorded in any revenue record. He was not aware as to how many families were residing in village Sua.

11. The copy of Shajra Nasab of Mauja Basheel is Ext. PW-1/A and Ext. PW-1/B is the Shajra Nasab of Mauja Sua. In Ext. PW-1/B, Naghia is shown to have one son Angrhu. Anghru had five sons, namely, Ramdia, Gurmukh, Khaman, Pariman and Nathu. Ramdia had three sons, namely, Kahnu, Sanwalia and Surtia. Kahnu had three sons, namely, Ratia, Mushu and Dulu. The plaintiff is the son of Dulu. In Ext. PW-1/A, copy of pedigree table of Mauza Basheel, Ravindu has been shown as first male descendent of the plaintiff. Ravindu had one son, namely, Sadhu. Sadhu had three sons, namely, Budh Ram, Mushu and Ratia. In the pedigree table of Village Sua i.e. Ext. PW-1/B, the ancestor of Ratia, Dulu and Mushu is shown as Kahnu whereas Kahnu's father is shown as Ramdia. However, in the pedigree table Ext. PW-1/A, the name of the father of Ratia and Mushu has been recorded as Sadhu. Sadhu's father has been shown as Ravindu. It is not believable that the name of Kahnu was changed to Sadhu. The only explanation put forth by DW-1 Kali Ram is that since Kahnu was of simple habits, he was called Sadhu.

12. DW-4 Dila Ram, in his cross-examination, has admitted that the name of Kahnu alias Sadhu was not shown in any revenue record. He was also not aware as to how many families were residing in village Sua. It is evident from the perusal of mutation attested in favour of the defendants that no enquiry was made at the time of attestation. The detailed enquiry was required to be made on the basis of the pedigree table. In Ext. P-2 the name of Ramdia has been written with blue ink whereas rest of the contents of the jamabandi were written in black ink. In the subsequent jamabandis also, the name of Ramdia does not find mention. The learned trial Court has wrongly relied upon the certificate issued by the Gram Panchayat, without examining the Panchayat Officials. The learned first appellate Court has correctly appreciated the oral as well as documentary evidence available on record. The defendants have failed to prove that Kahnu was also known as Sadhu in village Basheel. The substantial questions of law are answered accordingly.

16. Accordingly, there is no merit in this appeal and the same is dismissed. No costs.

****

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

M/s Valley Iron & Steel Company Ltd. .....Petitioner.

Versus

Union of India & others ....Respondents.

CWP No. 141 of 2008
Reserved on: 5.11.2015
Decided on : 1.12.2015

Constitution of India, 1950- Article 226- Petitioner is a registered company- show cause notice was issued to it as to why the Cenvat Credit be not recovered from it along with interest and Penal action under Cenvat Credit Rules, 2002 should not be taken against it- petitioner filed a reply but it was rejected and demand was confirmed- an appeal was preferred against this order - a settlement application was filed by the company in which an interim order was pronounced directing the company to furnish a revised application- company failed to file revised application on which a rejection order was passed- appeal was dismissed and the order was confirmed - company contended that Commissioner (Appeal) had no jurisdiction as the Settlement Commission was seized of a settlement application- order passed by Settlement Commission was wrong - held, that company had failed to comply with the order passed by Settlement Commission – Company had not acted with due diligence- there was no error on the part of Commission to reject the application- dispute was not alive before the Settlement Commissioner due to non-cooperation of the petitioner- therefore, Commissioner(Appeals) had jurisdiction to decide the appeal preferred before it- appeal dismissed. (Para-2 to 9)

For the Petitioner: Mr. B.C Negi, Sr. Advocate with Mr. Vikrant Chandel, Advocate.

For the Respondents: Mr. Sandeep Sharma, Senior Advocate with Mr. Pankaj Negi, Advocate.

The following judgment of the court was delivered:

Sureshwar Thakur, Judge

Through the instant writ petition, the petitioner prays for granting in its favour the following reliefs:-

> ***"(i) Rejection Order (Annexure P/10) may be set aside and the Settlement Commission be directed to restore the case and dispose of the same in accordance with law.***
>
> ***(ii) The order of Commissioner (Appeals) (Annexure P/7) be held as null and void. The Commissioner (Appeals), Central Excise, Chandigarh be directed to restore the petitioner's appeal.***
>
> ***(iii) The Assistant Commissioner, Central Excise, Shimla be restrained from resorting to coercive measures for recovery of the penalty or any other due connected with the case.***
>
> ***(iv) That in the alternative order of the settlement commission relating to the first settlement application***

(Annexure P/6) may be set aside and the first settlement application may be restored and disposed as per law.

(v) That in the alternative the petitioners be granted liberty to file appeal in the Tribunal by ordering that appeal be not barred by limitation prescribed under Section 32B(3) of Central Excise Act."

2. The petitioner as portrayed by Annexure PA is a registered company. Annexure P comprises the resolution of the Board of Directors of the petitioner-company authorizing its director Mr. Naveen Agarwal to institute the instant petition before this Court. The certificate denoting the factum of Commencement of Business by the petitioner-company is appended with the writ petition as Annexure PB. A show cause notice comprised in Annexure P-1 was served upon the petitioner-company by the competent authority enjoining upon it, to explain as to why :-

1. the Cenvat Credit of Rs.15,83,372/- involved in the case should not be recovered from them under Rule 12 of the Cenvat Credit Rules 2002 readwith Section 11 A of the Central Excise Act, 1944.

2. Interest in terms of Section 11 AB of Central Excise Act, 1944 should not be recovered from them on account of delayed payment of cenvat credit/duty involved in the case.

3. Penal action under Rule 13 of the Cenvet Credit Rules 2002 read with Section 11 AC of Central Excise Act 1994 should not be taken against them for the contraventions of the Rules cited above."

3. The petitioner-company filed a reply to the show cause notice served upon it, by the competent authority. Vide Annexure P-2 the competent authority repudiated the reply furnished by the petitioner-company to the show-cause notice served upon it, hence confirmed the demands raised against the petitioner-company comprised in Annexure P-1. Subsequently on 27.2.2006 the petitioner filed an appeal therefrom before the Commissioner (Appeals), Central Excise, Chandigarh, for short "Commissioner (Appeals)". However, during the pendency of the aforesaid appeal, the petitioner-company filed an application (Annexure P-3) under Section 32E of the Central Excise Act, for short "the Act", before the Customs and Central Excise Settlement Commission Principal Bench at New Delhi, for short "the Settlement Commission" for according to it immunity from payment of penalty, interest and prosecution. Vide Communication Annexure P-4, it was intimated to the petitioner-company that its settlement application filed before the Settlement Commission stands listed for hearing on 12.12.2006. An interim order was pronounced on 14.12.2006 by the Settlement Commission wherein a conclusion was formed by it, that though the entire liability fastened upon the petitioner-company in the show-cause notice (Annexure P-1) stood admitted by it, yet the material available before it divulging its liability towards illegal availment of Cenvat credit being higher than the one constituted in the show cause notice which stood confirmed in Annexure P-2, besides a disclosure emanating therefrom of the petitioner-company being in shortfall towards defrayment of custom duties, hence with the settlement application preferred before it, by the petitioner-company not encompassing the entire gamut of its liability towards the revenue qua the facets aforesaid constrained the Settlement Commission to direct the petitioner-company to furnish a revised application unfolding therein its total liability encompassing both the facets aforesaid. The petitioner-company despite having been afforded an opportunity to file a revised application before the Settlement Commission for its being facilitated to pass a settlement order yet omitted to, since 14.12.2006 when the interim order (Annexure P-5) was passed by the Settlement commission upto 23.3.2007 comply with it. Even though,

on 23.3.2007 the petitioner-company had sought time uptill 15.4.2007 to comply with the interim order comprised in Annexure P-5, nonetheless it then too omitted to comply with it. Consequently, the Settlement Commission was constrained to pass a "rejection order" comprised in Annexure P-6. However, liberty was reserved in favour of the petitioner-company to file a fresh application before it making a full and true disclosure of its additional duty liability. On 30.4.2007, the Commissioner (Appeals) dismissed the appeal preferred before it by the petitioner-company against the order of the adjudicating authority whereby the latter under Annexure P-2 confirmed the demand raised under Annexure P-1 by the competent authority upon the petitioner-company. The petitioner-company vide Annexure P-8 reinstituted a settlement application under Section 32E of the Act, before the Settlement Commission, wherein it admitted its liability towards the revenue comprised in a sum of Rs.15,83,372/-on account of cenvat credit and in the sum of Rs.2,69,094 on account of deficit defrayment of custom duty**.** However, under Annexure P-10, the Settlement Commission rejected the application filed by the petitioner-company.

4. The learned counsel representing the petitioner-company before the settlement Commission had contended before it that the order dated 30.4.2007 passed by the Commissioner (Appeals) is nonest, which vice imbuing it stood spurred by its being rendered for want of jurisdiction in the Commissioner (Appeals) arising from the factum of the Settlement Commission while being seized of a settlement application preferred before it by the petitioner-company which stood subsequently rejected by it on 10.5.2007 especially when significantly with Section 31(c) of the Act, while defining "case" and the statutory signification thereof taking within its ambit the yet pending lis before the Settlement Commission inter-se the petitioner-company and the Revenue embedded in settlement application (Annexure P-3) also with the Settlement Commission falling within the ambit of "adjudicating authority" constituted in the definition of "case" existing in Section 31(c) of the Act, in addition with the provisions of Section 32I(2) of the Act which stand extracted hereinafter envisaging a mandate of the Settlement Commission when seized of a lis inter-se the petitioner-company and the revenue embedded in settlement application (Annexure P-3) being alone, subject to the provisions of sub Section (6) of Section 32F of the Act, till its acceptance or rejection by it, jurisdictionally competent to decide the "case" hence jurisdictionally barred the Commissioner (Appeals) to previous to the rejection of settlement application on 10.5.2007 by the Settlement Commission pronounce an order on the appeal preferred before it by the petitioner-company herein. Apart therefrom he contended qua the order dated 30.4.2007 passed by the Commissioner (Appeals) when as such standing ingrained with the vice of jurisdictional incompetence its necessitating its being quashed. The aforesaid contention addressed by the learned counsel for the petitioner-company before the Settlement Commission stood discountenanced by the latter. The learned counsel for the petitioner-company contends before this Court that in the Settlement Commission having discountenanced the aforesaid submission addressed before it, had committed a grave legal misdemeanor which be undone by this Court.

> "31© "Case" means any proceeding under this Act or any other Act for the levy, assessment and collection of excise duty, pending before an adjudicating authority on the date on which an application under sub-section (1) of section 32E is made:
>
> Provided that when any proceeding is referred back in any appeal or revision, as the case may be, by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be then such proceeding shall not be deemed to be a proceeding pending within the meaning of this clause;

> 32I (2). Where an application made under Section 32 E has been allowed to be proceeded with under Section 32F, the Settlement Commission shall, until an order is passed under Sub-Section [(5)] of Section 32F, have, subject to the provisions of sub-section [(4)] of that section, exclusive jurisdiction to exercise the powers and perform the functions of any Central Excise Officer, under this Act in relation to the case."

5. The submission aforesaid addressed before this Court by the learned counsel for the petitioner-company to constrain this Court to quash Annexure P-10 cannot bear any fruition inasmuch as even if vide Annexure P-6 the Settlement Commission rejected the settlement application of the petitioner-company comprised in Annexure P-3 subsequent to the passing of order dated 30.4.2007 by the Commissioner (Appeals) on an appeal preferred before it by the petitioner company against Annexure P-2, nonetheless the legal solemnity of the interim order passed by the Settlement Commission on 14.12.2006 directing the petitioner-company to furnish a revised application unfolding therein its total liability towards the revenue against cenvat credit as also against custom duty, is not to be slighted, moreso when there was slothful omission on the part of the petitioner-company to beget compliance therewith even upto 15.4.2007 whereupto it had obtained time from the Settlement Commission to comply with, hence constraining the Settlement Commission to ultimately reject its settlement application. Even therein it had reserved an opportunity in favour of the petitioner-company to file a fresh application making a full and true disclosure of its additional duty liability towards the revenue. Even though the aforesaid opportunity was availed by the petitioner-company yet when it stood availed belatedly, sequelly its imprompt availment by the petitioner-company for the reasons assigned hereinafter would not render the Commissioner (Appeals) to be disempowered to exercise jurisdiction thereupon nor render him to be jurisdictionally incompetent to pass it for hence disrobing it of its jurisdictional vigor nor would belittle the legal efficacy of the order of Commissioner (Appeals) passed on 30.4.2007. It appears that the petitioner-company had been indiligent to avail the mechanism of the settlement commission for settling its lis with the revenue. For reiteration, when the petitioner-company omitted to file before the settlement commission the enjoined revised application disclosing therein its full liability towards revenue on the excise as well as on the custom side, since 14.12.2006 up till 15.4.2007. In aftermath, when hence ex-facie perse by its overt proactive indiligence it rendered Annexure P-3 to be unrejuvenated as also rendered it to be not surviving arising from inaction on the part of the petitioner-company in begetting compliance with the interim order passed by the Settlement Commission. Naturally when the availment of the mechanism of settlement by the defaulter for settling its lis with the revenue through the auspices of the settlement commission is entirely dependent upon cooperation rendered to it by the petitioner-company which having remained un-rendered arising from the fact of its having not complied with the interim order dated 14.12.2006 passed by the Settlement Commission up till 15.4.2007, hence sequelling the deadening of its lis with the revenue concerted to be settled through Annexure P-3, hence concomitantly an apt inference which is drawable therefrom is of the order passed by the Commissioner (Appeals) on 30.4.2007 prior to the Settlement Commission rejecting subsequently on 10.5.2007 the settlement application Annexure P-3 preferred before it by the petitioner-company despite the existence of a bar constituted in Section 32I(2) of the Act against the Commissioner(Appeals) exercising jurisdiction thereupon during the pendency of Annexure P-3 before the Settlement Commission not wanting in jurisdictional sinew especially when the statutory bar embedded in Section 32I(2) of the Act is for the reasons aforestated rendered un-attractable. As a corollary the Commissioner (Appeals) was not divested of jurisdiction to adjudicate upon the appeal preferred before it by the petitioner-company against Annexure P-2. Redoubled vigor to the inference aforesaid is garnered, for

reiteration, by the factum of the petitioner-company having not complied up to 15.4.2007 with the interim order of the Settlement Commission which indolence is a palpable reflection of its proactive indiligence, with a concomitant effect of its lis with the revenue getting deadened or its being stripped of rejuvenation, sequelly hence with no "case" pending before the Settlement Commission for hence precluding the Commissioner (Appeals) to pass orders thereon rendered, the order passed by him on 30.4.2007 being construable to be not suffering from any jurisdictional frailty.

6. Tritely put the argument of the learned counsel for the petitioner-company would have gained momentum only when the lis inter-se the petitioner-company and the revenue had remained alive or surviving before the Settlement Commission, it looses its force when given the hereinabove discussion the lis inter-se the petitioner-company and the revenue remained not pending before it, arising from the factum of the petitioner-company by its proactive indiligence or indolence to beget compliance with the interim order made by the Settlement Commission rather rendered it to be deadened as well as un-rejuvenated. The gross passivity on the part of the petitioner-company to mete compliance with the interim order of the settlement commission rendered its lis with the revenue pending before the settlement Commission to be having no element of survival, besides it hence being construable to be "no case" pending before it as a corollary the Commissioner(Appeals) was not divested of jurisdiction to pass orders on an appeal preferred before it by the petitioner-company.

7. In view of the above discussion, it is directed that the petitioner-company may avail of its statutory right, if any, to assail the order dated 30.4.2007 passed by the Commissioner (Appeals) before the competent statutory forum/authority. Even if the statutory remedy if any vesting in the petitioner-company to assail the order of 30.4.2007 passed by the Commissioner (Appeals) stands barred by time, yet the period of limitation spent by the petitioner-company by its bonafide preferring the instant petition before this Court shall in consonance with section 14 of the limitation Act stand excluded in computing the statutorily prescribed period of limitation for its availment by the petitioner-company.

8. In view of above, the present writ petition is dismissed alongwith pending applications, if any.

****

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

Maan Chand ……Appellant.
Versus
State of H.P. …….Respondent.

Cr. Appeal No. 138 of 2012
Reserved on: November 30, 2015.
Decided on: December 01, 2015.

N.D.P.S. Act, 1985- Section 18 and 20- Accused was found carrying a black bag- search of the bag was conducted during which 1850 grams charas and 50 grams opium were recovered from the bag- accused was told of his right to be searched before nearest Magistrate or Gazetted Officer- however, his search was conducted by the Police Officer- this requirement is mandatory- police had also not associated any independent witness despite the fact that recovery was effected in the Bus stand- no entry was made in the malkhana

register regarding the production of the property before the trial Court- held, that in these circumstances, prosecution case is not proved- accused acquitted. (Para-15 to 28)

Cases referred:
Saiyad Mohd. Saiyad Umar Saiyad and others vrs. State of Gujarat, (1995) 3 SCC 610
State of Punjab vrs. Baldev Singh, (1996) 6 SCC 172
Ahmed vrs. State of Gujarat, (2000) 7 SCC 477
Vinod vrs. State of Maharashtra, (2002) 8 SCC 351
State of Delhi vrs. Ram Avtar alias Rama, (2011) 12 SCC 207
Nirmal Singh Pehlwan alias Nimma vrs. Inspector, Customs, Customs House, Punjab,
Ashok Kumar Sharma vrs. State of Rajasthan, (2013) 2 SCC 67
State of Rajasthan vrs. Parmanand and another, (2014) 5 SCC 345

For the appellant: Mr. B.S.Chauhan, Sr. Advocate with Mr. Vaibhav Tanwar, Advocate.
For the respondents: Mr. Parmod Thakur, Addl. Advocate General.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 25.2.2012, rendered by the learned Special Judge (Sessions Judge), Shimla, in N.D.P.S. Case No. 1-S/7 of 2010, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 18 & 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for seven years and to pay fine of Rs. 50,000/- for offence under Section 20 of the ND & PS Act. He was further sentenced to undergo rigorous imprisonment for six months and to pay fine of Rs. 1,000/- for offence under Section 18 of the ND & PS Act. The sentences were ordered to run concurrently. In default of payment of fine, the accused was further ordered to undergo simple imprisonment for one year under Section 20 and simple imprisonment for three months under Section 18 of the ND & PS Act.

2. The case of the prosecution, in a nut shell, is that on 3.11.2009, PW-8 S.I. Sato Kumar, State Vigilance and Anti Corruption Bureau, Shimla (hereinafter referred to as SV & ACB, in short), in connection with routine patrol duty left for Inter State Bus Terminal (hereinafter referred to as ISBT, in short). At about 5:15 PM, the police party was at some distance from ISBT towards the Winter Field, when a secret information was received. It was alleged that one person carrying black bag containing psychotropic substance was on way towards ISBT. The suspect was stated to be wearing red pullover, white shirt and cream colour pant. On receipt of the information, PW-8 SI Sato Kumar reduced the information into writing vide Ext. PW-4/A under Section 42 of the ND & PS Act. It was submitted to the Dy. S.P., S.I.U., through PW-4 HC Ramesh Chand. PW-8 S.I. Sato Kumar sent for the independent and non official witnesses but none opted to associate with him. At that time, PW-1 HHG Gagan Sharma was noticed on way towards the Winter Field. PW-8 S.I. Sato Kumar associated PW-1 in the raiding party. A person matching the particulars of secret information was noticed on way from Army Training Command side who was moving towards ISBT. PW-8 S.I. Sato Kumar interrogated that person. The accused was found to be carrying black bag Ext. P-3. PW-8 S.I. Sato Kumar, in the presence of PW-1 HHG Gagan Sharma, PW-2 HHC Babu Ram and PW-3 Const. Manoj Kumar, gave an option of search to the accused to be searched before the Magistrate or Gazetted Officer vide memo Ext. PW-

1/A. The accused declined the offer and consented for search before the local police party. PW-8 S.I. Sato Kumar checked bag Ext. P-3 of the accused and recovered one polythene envelope Ext. P-4 from one of the pockets of the bag. The polythene envelope Ext. P-4 was found containing charas Ext. P-5 in the shape of billets and balls. Another pocket of bag Ext. P-3 was found containing opium Ext. P-8 wrapped in polythene paper. The charas weighed 1850 grams and opium was found to be 50 grams. The sealing proceedings were completed on the spot. PW-8 S.I. Sato Kumar produced packets Ext. P-2 and P-7 before PW-9 SI/SHO Amar Singh, who resealed the same with seal impression "T". The police got the packets of charas and opium examined from the Chemical Examiner. The investigation was completed and the challan was put up after completing all the codal formalities.

4. The prosecution, in order to prove its case, has examined as many as 9 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

5. Mr. B.S.Chauhan, Sr. Advocate, appearing on behalf of the accused, has vehemently argued that the prosecution has failed to prove its case against the accused beyond reasonable doubt. On the other hand, Mr. Parmod Thakur, learned Addl. Advocate General for the State has supported the judgment of the learned trial Court dated 25.2.2012.

6. I have heard learned counsel for both the sides and have also gone through the judgment and records of the case carefully.

7. PW-1, HHG Gagan Sharma, deposed that he was proceeding from ISBT, Shimla towards The Mall. S.I. Sato Kumar met him there. He was accompanied by HHC Babu Ram and Const. Manoj Kumar of SV & ACB, Shimla. One person having small beard wearing red coloured pullover, white shirt, cream coloured Cotrai pent came carrying black coloured bag on his left shoulder from Western Command side. He was stopped by SI Sato Kumar. The accused disclosed his identity. He was asked by SI Sato Kumar as to whether he wanted to give his personal search to Gazetted Officer, upon which he disclosed that he wanted to give his personal search to SI Sato Kumar. The statement is Ext. PW-1/A. The search of the bag was carried by SI Sato Kumar. On search, a polythene was found in the central pocket of bag in which charas in the shape of sticks and balls was found. SI Sato Kumar also checked other pockets of the bag upon which opium in polythene wrapper was recovered. The identification memo was prepared. The recovered charas weighed 1850 grams and opium weighed 50 grams. S.I. Sato Kumar put the recovered charas in the same polythene and recovered charas in the same bag and the bag was placed in a piece of cloth and sealed by putting eight seal impressions of seal "H". The recovered opium after putting the same in polythene wrapper was put in a piece of cloth and the cloth was sealed with by putting five seal impressions of seal "H". The seal after use was handed over to him. Both the sealed parcels were taken into possession vide memo Ext. PW-1/D. NCB forms were filled in. Seizure memo is Ext. PW-1/D. The case property was produced by the learned Public Prosecutor, while examining this witness. In his cross-examination, he deposed that SI Sato Kumar had asked few persons to stay but they did not cooperate. The police post was located nearby. In his cross-examination towards the end, he admitted that the road in question was a general road where large number of persons passes.

8. PW-2 HHC Babu Ram also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. He deposed that they asked persons passing nearby to stop and cooperate them in the investigation, but it was 5:30 PM, hence the people were in hurry to take buses. They did

not stop. In the meantime, PW-1 HHG Gagan Sharma, came on the spot. He was associated by SI Sato Kumar in the investigation. In his cross-examination, he admitted that there was rain shelter nearby the bus stop. Many pedestrians used to pass from there. They did not associate any person or witness from there. Volunteered that nobody was ready to become a witness and associate himself in the investigation. SI Sato Kumar had not asked him to call any witness. He himself asked the witnesses to participate in the investigation. There was great rush at the bus stand at that time. SI Sato Kumar had not called any witness from the bus stand. He had only asked the persons who were passing nearby the spot. No written notice was given to any of the persons to become witnesses. No case was made out against a person who had refused to become a witness. SI Sato Kumar had specifically asked the accused that he had a legal right to get himself searched either before the Gazetted Officer or a Magistrate. (Confronted with memo Ext. PW-1/A, wherein the word "right" was not mentioned). He also admitted that a police post was also located at bus stand, at some distance from the spot.

9. PW-3 Constable Manoj Kumar also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. He was handed over the rukka by SI Sato Kumar with direction to take the same to Police Station of SV and ACB, Khalini, Shimla. He handed over the rukka to MHC Ashok Kumar at Police Station. In his cross-examination, he admitted that the bus stand was located nearby the road. He also admitted that many persons were also walking on the road. He also admitted that many buses were parked nearby. He also admitted that there is colony of army personnels of Western Command above the road. He also admitted that no independent witness was associated by SI Sato Kumar from the bus stand. However, he tried to associate the witnesses from the spot where the accused was apprehended because nobody was ready and willing to become witness. No person from the quarters of Western Command was called. Volunteered that the Western Command is a prohibited area. SI Sato Kumar had asked many persons to become witnesses. No written notice was given to them.

10. PW-4 HC Ramesh Chand deposed that there was suspicion that the person had some narcotic substance in his possession. The grounds of belief to this effect were recorded by SI Sato Kumar which were handed over to him with the direction to hand over the same to Superior Officer at Police Station, SV & ACB (SIU), Khallini. In his cross-examination, he admitted that near bifurcation point to Winter Field, there was local bus stand from where the buses for Boileauganj, Summerhill and Totu used to ply.

11. PW-6 HC Ashok Kumar testified that on 3.11.2009 at 11:00 PM, SI Amar Singh, Police Station, SV & ACB, Khallini, deposited with him one parcel Ext. P-1 allegedly containing 1850 grams of charas, sealed with 5 seals of impression "T" and another parcel Ext. P-6 allegedly containing 50 grams of opium sealed with three seal impressions of seal "T", one sample of seal "T" having three seal impressions, one sample of seal "H", having three seal impressions, NCB forms in triplicate and asked him to deposit in the Malkhana. He entered the receipt of the case property against Sr. No. 12 in the Malkhana Register dated 3.11.2009. He handed over the case property and documents to Const. Rajesh Kumar vide RC No. 49/2009.

12. PW-7 Const. Rajesh Kumar deposed that PW-6 Ashok Kumar had handed over to him the case property to be taken to FSL, Junga. He carried the same and handed it over at FSL, Junga.

13. PW-8 SI Sato Kumar also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. He tried to associate other persons who were passing through the road to join the investigation but

none of them stopped. The accused gave his consent to be searched by him. He prepared the memo Ext. PW-1/A. In his cross-examination, he deposed that he has not associated any police officials from the police post or the traffic duty Constable to join the raiding party. He also admitted that several persons walk through the road in question. He also admitted that many people remain present at the bus stand. He has not given any written notice to any person for joining the raiding party.

14. PW-9 Insp. Amar Singh deposed that he has handed over the case property to MHC Ashok Kumar of the Police Station after resealing the same. He filled in column No. 9 of the NCB forms vide Ext. PW8/D. He also prepared the re-sealing certificate.

15. Mr. B.S. Chauhan, Sr. Advocate, appearing for the accused has taken the Court through memo Ext. PW-1/A, whereby the consent of the accused was sought to be either searched before the Magistrate or the Gazetted officer. The accused opted to be searched by the police officer. The accused was specifically required to be told of his legal right to be searched before the nearest Magistrate or the Gazetted Officer. Section 50 of the ND & PS Act is mandatory. In the instant case, the charas and opium has been recovered from the bag but despite that the personal search of the accused was carried out, necessitating compliance of Section 50 of the ND & PS Act. PW-2 HHC Babu Ram, in his cross-examination, has deposed that SI Sato Kumar specifically asked the accused that he has legal right to get himself searched either before the Gazetted Officer or a Magistrate, but it is not so stated in Ext. PW-1/A memo.

16. Their lordships of the Hon'ble Supreme Court in the case of ***Saiyad Mohd. Saiyad Umar Saiyad and others vrs. State of Gujarat,*** reported in ***(1995) 3 SCC 610,*** have held that the prosecution must prove that the accused was made aware of his right that he was entitled to demand that search be carried out in the presence of a Gazetted Officer or a Magistrate but if no evidence to this effect is given, the Court must assume that the accused was not informed of the protection the law gave to him. It has been held as follows:

> "7. Having regard to the object for which the provisions of Section 50 have been introduced into theNDPS Act and when the language thereof obliges the officer concerned to inform the person to be searched of his right to be searched in the presence of a Gazetted Officer or a Magistrate, there is no room for drawing a presumption under Section 114, illustration (e) of the Indian Evidence Act, 1872. By reason of Section 114 a court "may presume the existence of any fact which it thinks likely to have happened, regard be- ing had to the common course of natural events, human conduct and public and private business, in their relation to facts of the particular case." It may presume " (e) that judicial and official acts have been regularly performed." There is no room for such presumption because the possession of illicit articles under the NDPS Act has to be satisfactorily established before the court. The fact of seizure thereof after a search has to be proved. When evi- dence of the search is given all that transpired in its connection must be stated. Very relevant in this behalf is the testimony of the officer conducting the search that he had informed the person to be searched that he was entitled to demand that the search be carried out in the presence of a Gazetted Officer or a Magistrate and that the person had not chosen to so demand. If no evidence to this effect is given the court must assume that the person to be searched was not informed of the protection the law gave him and must find that the possession of illicit articles under the NDPS Act was not established."

17. Their lordships of the Hon'ble Supreme Court in the case of ***State of Punjab vrs. Baldev Singh,*** reported in ***(1996) 6 SCC 172,*** have held that it is imperative for the investigating officer to inform the suspect, orally or in writing, about his right to be searched before a gazetted officer or a Magistrate. It has been held as follows:

> "32. However, the question whether the provisions of Section 50 are mandatory or directory and if mandatory to what extent and the consequences of non-compliance with it does not strictly speaking arise in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched. Therefore, without expressing any opinion as to whether the provisions of Section 50 are mandatory or not, but bearing in mind the purpose for which the safeguard has been made, we hold that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the Investigating Officer (empowered officer) to ensure that search of the concerned person (suspect) is conducted in the manner prescribed bySection 50, by intimating to the concerned person about the existence of his right, that if he so requires, he shall be searched before a Gazetted Officer or a Magistrate and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, would cause prejudice to an accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. The omission may not vitiate the trial as such, but because of the inherent prejudice which would be caused to an accused by the omission to be informed of the existence of his right, it would render his conviction and sentence unsustainable. The protection provided in the section to an accused to be intimated that he has the right to have his personal search conducted before a Gazetted Officer or a Magistrate, if he so requires, is sacrosanct and indefeasible it cannot be disregarded by the prosecution except at its own peril.
>
> 57. On the basis of the reasoning and discussion above, the following conclusions arise :
>
> (1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 of being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing;
>
> (2) That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to an accused;
>
> (3) That a search made, by an empowered officer, on prior information, without informing the person of his right that, if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act;

(4) That there is indeed need to protect society from criminals. The societal intent in safety will suffer if persons who commit crimes are let off because the evidence against them is to be treated as if it does not exist. The answer, therefore, is that the investigating agency must follow the procedure as envisaged by the statute scrupulously and the failure to do so must be viewed by the higher authorities seriously inviting action against the concerned official so that the laxity on the part of the investigating authority is curbed. In every case the end result is important but the means to achieve it must remain above board. The remedy cannot be worse than the disease itself. The legitimacy of judicial process may come under cloud if the court is seen to condone acts of lawlessness conducted by the investigating agency during search operations and may also undermine respect for law and may have the effect of unconscionably compromising the administration of justice. That cannot be permitted. An accused is entitled to a fair trial. A conviction resulting from an unfair trial is contrary to our concept of justice. The use of evidence collected in breach of the safeguards 50 have by Section 50 at the trial, would render the trial unfair.

(5) That whether or not the safeguards provided in Section 50 have been duly observed would have to be determined by the Court on the basis of evidence led at the trial. Finding on that issue, one way or the other, would be relevant for recording an order of conviction or acquittal. Without giving an opportunity to the prosecution to establish, at the trial, that the provisions of Section 50, and particularly the safeguards provided therein were duly complied with, it would not be permissible to cut- sho rt a criminal trial;

(6) That in the context in which the protection has been incorporated in Section 50 for the benefit of the person intended to be searched, we do not express any opinion whether the provisions of Section 50 are mandatory or directory, but, hold that failure to inform the concerned person of his right as emanating from Sub-section (1) of Section 50, may render the recovery of the contraband suspect and the conviction and sentence of an accused bad and unsustainable in law;

(7) That an illicit article seized from the person of an accused during search conducted in violation of the safeguards provided in Section 50of the Act cannot be used as evidence of proof of unlawful possession of the contraband on the accused though any other material recovered during that search may be relied upon by the prosecution, in other proceedings, against an accused, notwithstanding the recovery of that material during an illegal search;

(8) A presumption under Section 54 of the Act can only be raised after the prosecution has established that the accused was found to be in possession of the contraband in a search conducted in accordance with the mandate of Section 50. An illegal search cannot entitle the prosecution to raise a presumption under Section 54 of the Act;

(9) That the judgment in Pooran Mal's case cannot be understood to have laid down that an illicit article seized during a search of a person, on prior information, conducted in violation of the provisions of Section 50 of the Act, can by itself be used as evidence of unlawful possession of the illicit article on the person from whom the contraband has been seized during the illegal search;

(10) That the judgment in Ali Mustaffa's case correctly interprets and distinguishes the judgment in Pooran Mal's case and the broad observations made in Pirthi Chand's case and Jasbir Singh's case are not in tune with the correct exposition of law as laid down in Pooran Mal's case."

18. Their lordships of the Hon'ble Supreme Court in the case of ***Ahmed vrs. State of Gujarat,*** reported in ***(2000) 7 SCC 477,*** have held that it is obligatory for the prosecution to inform the accused of his right to be searched before the nearest gazetted officer or before the nearest Magistrate in compliance with the mandatory requirement of Section 50. It has been held as follows:

"4. The learned counsel appearing for the respondent, on the other hand contended that in the case in hand, the search itself having been made by a Gazetted Officer namely PW2, it cannot be said that there has been an infraction of Section 50 of the Act, and, therefore, the conviction cannot be held to be invalid. The question for consideration, therefore, is whether when a search is made by a gazetted officer, is it obligatory for the prosecution to inform the accused of his right to be searched before a gazetted officer or before a Magistrate, as provided under Section 50 of the Act? According to the learned counsel for the respondent, it is only when a search is made by an authorised officer under Section 41(2) of the Act, it is only then, the provisions of Section 50 can be attracted but when a search is made by an officer of gazetted rank of the department of Central Excise, who is empowered under sub-section(2) of Section 41, then the provisions of Section 50 are not required to be complied with inasmuch the empowered officer himself is a gazetted officer. According to the learned counsel for the accused appellant, however the provisions of Section 50 are required to be complied with irrespective of the fact whether the search is being made by the empowered officer, who may be an officer of the gazetted rank or by an officer duly authorised by the empowered officer under Section 42 of the Act. To ensure fairness in the search itself and for compliance ofSection 50 of the Act, no differentiation can be made whether the search is being made by the empowered officer, who obviously is an officer of a gazetted rank or the authorised officer, who may be a subordinate officer to whom the empowered officer authorises. To appreciate the point in issue, it is necessary to extract the provisions of Sections 41, 42 and 50 of the Act:-

.....

.....

Section 50. Conditions under which search of persons shall be conducted(1)When any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41,section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in section 42 or to the nearest Magistrate.

(2)If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub-section(1).

(3)The Gazetted Officer or the Magistrate before whom any such person is brought shall, if he sees no reasonable ground for search,

forthwith discharge the person but otherwise shall direct that search be made.

(4)No female shall be searched by anyone excepting a female.

An analysis of the aforesaid provisions, unequivocally indicate that under sub-section(2) of Section 41, an officer of a gazetted rank of the department of Central Excise, narcotics, customs, revenue intelligence or any other department of the Central Government or the Border Security Force, can be empowered by a general or special order by the Central Government, conferring the power to arrest a person or search a building, conveyance or place, if he has reason to believe from personal knowledge or information that the person concerned has committed an offence punishable under Chapter IV or that any narcotic drug or psychotropic substance, in respect of which any offence punishable under Chapter IV, has been committed or any document or other article which may furnish evidence of the commission of such offence, has been kept or concealed in any building, conveyance or place. Sub-section(2) of Section 41 further enables the State Government to empower any officer of the gazetted rank of the revenue, drug control, excise, police or any other department by a general or special order to perform the said function. The said sub-section also confers power on such empowered gazetted officer to authorise any officer, subordinate to him but superior in rank to a peon, sepoy or a constable to perform the said function, for which the general or special order has empowered him. Section 42 is the power of entry, search, seizure and arrest without any warrant or authorisation. Section 50, which is supposed to be the minimum safeguard afforded to an accused, provides that when a search is about to be made of a person under Section 41 or Section 42 or Section 43, and if the person so requires, then the said person of whom, search is about to be made has to be taken to the nearest gazetted officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. The argument of the learned counsel for the respondent is based upon the expression used in Section 50 to the effect any person duly authorised under Section 42 and, therefore, a distinction is sought to be made in case of a search between an empowered officer and a search made by an authorised officer. But the said argument is devoid of any substance, since Section 42 itself also speaks of search to be made by an officer, as is empowered by a general or special order by the Central Government or as is empowered by a general or special order by the State Government. A combined reading of the provisions of Section 42 and Section 50 would make it crystal clear that whenever a search of a person is about to be made on the basis of personal knowledge or information received in that behalf, then if the person to be searched requires to be taken to a gazetted officer or the nearest Magistrate, the same must be complied with and failure to compliance of the same would constitute an infraction of the requirements of the provision of Section 50, which would ultimately vitiate the conviction. For the purpose of complying with the provisions of Section 50, no differentiation can be made on a plain reading of the language used in Section 50, depending upon the

officer who is going to search the person concerned. In our considered opinion, since the search is about to be effected on the basis of any prior information or personal knowledge, which the person going to search has the reasons to believe that an offence under the Act is being committed, then for the sanctity of the search itself, the person to be searched has been afforded the minimum right to be searched before another gazetted officer or the Magistrate and that right cannot be taken away, merely because the officer going to search happens to be a gazetted officer, who has been empowered either by the Central Government or by the State Government by a general or special order. In fact the legislature has enacted the safeguard contained in Section 50 to obviate any doubt of the illicit articles under the Act and this provision was engrafted having regard to the grave consequences that may entail the possession of illicit articles under the NDPS Act, namely, the shifting of the onus to the accused and the severe punishment to which he becomes liable.

In the aforesaid judgment, not only the decision of this Court in Balbir Singhs case to the effect that the provisions of Section 50 are mandatory, has been endorsed but also, it further indicates that it obliges the officer concerned to inform the person to be searched of his right to demand that the search be conducted in the presence of a Gazetted Officer or a Magistrate. In the case in hand, the evidence of PW1 indicates that even though the obligation of the officer had not been discharged by way of informing the accused of his right to demand that the search be conducted in the presence of a gazetted officer or a Magistrate but the accused himself wanted to be searched before another gazetted officer or a Magistrate but that was not acceded to. It is not necessary to notice several decisions of this Court, holding the provisions of Section 50 to be mandatory and we would notice the recent Constitution Bench decision on the point. In the case of State of Punjab vs. Baldev Singh, 1999(6) SCC, 172, this question was considered and answered by the Constitution Bench by holding that it is an obligation of the empowered officer and his duty before conducting the search of the person of a suspect, on the basis of prior information, to inform the suspect that he has the right to require his search being conducted in the presence of a gazetted officer or a Magistrate and the failure to so inform the suspect of his right would render the search illegal because the suspect would not be able to avail of the protection which is inbuilt in Section 50. It was further held that if the person concerned requires, on being so informed by the empowered officer or otherwise, that his search be conducted in the presence of a gazetted officer or a Magistrate, the empowered officer is obliged to do so and failure on his part to do so would cause prejudice to the accused and also render the search illegal and the conviction and sentence of the accused based solely on recovery made during that search bad. This Court further held that bearing in mind the purpose for which the safeguard has been made, it is held that the provisions of Section 50 of the Act implicitly make it imperative and obligatory and cast a duty on the investigating officer (empowered officer) to ensure that search of the person (suspect) concerned is conducted in the manner prescribed bySection 50, by intimating to the person concerned about the existence of his right, that if he so requires, he shall be searched before a gazetted officer or a Magistrate and

in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate would cause prejudice to the accused and render the recovery of the illicit article suspect and vitiate the conviction and sentence of the accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered during a search conducted in violation of the provisions of Section 50 of the Act. In paragraph 57 of the judgment in Baldev Singhs case, the Constitution Bench held as follows:

> "(1) That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section(1) of Section 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> (2) That failure to inform the person concerned about the existence of his right to be searched before a gazetted officer or a Magistrate would cause prejudice to an accused.
>
> (3) That a search made by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a gazetted officer or a Magistrate for search and in case he so opts, failure to conduct his search before a gazetted officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act."

In view of the aforesaid conclusions of the Constitution Bench, the submission of Mr. M.N. Shroff, appearing for the State-respondent, that the requirement of compliance of Section 50 will not arise, if a search is going to be made by an empowered officer, who happens to be a gazetted officer, is devoid of any substance inasmuch as this Court in no uncertain terms has held that when an empowered officer or a duly authorised officer, acting on prior information is about to search a person, it is imperative for him to inform the person concerned of his right under sub-section(1) ofSection 50 of being taken to the nearest gazetted officer or the nearest Magistrate for making the search. In view of the aforesaid position of law and in view of the evidence of PW1., as indicated in the earlier part of this judgment, the accused himself having wanted to be searched before a gazetted officer or a Magistrate and the same having been denied, there cannot be any doubt that failure on the part of the prosecution in complying with the provisions of Section 50, renders the recovery of illicit article suspect and vitiates the conviction and sentence of the accused, since the conviction in the case in hand is based solely on the alleged possession of Charas, which was recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act. In the aforesaid circumstances, the conviction and sentence is set aside and the accused be set at liberty forthwith, unless required in any other case. Fine amount, if has been paid, may be refunded to the accused."

19. Their lordships of the Hon'ble Supreme Court in the case of ***Vinod vrs. State of Maharashtra,*** reported in ***(2002) 8 SCC 351,*** have held that the police officer concerned must inform the accused of his right to be searched before an Executive Magistrate or a gazetted officer. It has been held as follows:

> "[7] The law enunciated by this Court in K. Mohanan is clear as to the manner in which Section 50 of the Act has to be complied with. Before conducting the search the police officer concerned cannot merely ask the accused whether he would like to be produced before an Executive magistrate or a gazetted officer for the purpose of the search but inform him of his right in that behalf under the law. The recital in Exhibit 38 and Exhibit 39 does not indicate the same. In that view of the matter, we set aside the findings recorded by the High Court that there was compliance with Section 50 of the Act. The view of the trial court that non-compliance with Section 50 of the Act does not prejudice the accused cannot be sustained for the requirement of the section is mandatory. If Exhibit 38 and Exhibit 39 cannot be used to establish search of the person of the accused, his possession of brown sugar is not proved. Hence we set aside the order of the trial court as affirmed by the High Court. The appeal is allowed accordingly."

20. Their lordships of the Hon'ble Supreme Court in the case of ***State of Delhi vrs. Ram Avtar alias Rama,*** reported in ***(2011) 12 SCC 207,*** have held that while discharging the onus of Section 50, the prosecution has to establish that the information regarding existence of such a right had been given to the suspect and if such information is incomplete and ambiguous then Section 50 is not complied with. Non-compliance with the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, would amount to denial of a fair trial. It has been held as follows:

> "27. It is a settled canon of criminal jurisprudence that when a safeguard or a right is provided, favouring the accused, compliance thereto should be strictly construed. As already held by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), the theory of `substantial compliance' would not be applicable to such situations, particularly where the punishment provided is very harsh and is likely to cause serious prejudices against the suspect. The safeguard cannot be treated as a formality, but it must be construed in its proper perspective, compliance thereof must be ensured. The law has provided a right to the accused, and makes it obligatory upon the officer concerned to make the suspect aware of such right. The officer had prior information of the raid; thus, he was expected to be prepared for carrying out his duties of investigation in accordance with the provisions of Section 50 of the Act. While discharging the onus of Section 50 of the Act, the prosecution has to establish that information regarding the existence of such a right had been given to the suspect. If such information is incomplete and ambiguous, then it cannot be construed to satisfy the requirements of Section 50 of the Act. Non-compliance of the provisions of Section 50 of the Act would cause prejudice to the accused, and, therefore, amount to the denial of a fair trial."

21. Their lordships of the Hon'ble Supreme Court in the case of ***Nirmal Singh Pehlwan alias Nimma vrs. Inspector, Customs, Customs House, Punjab,*** reported in ***(2011) 12 SCC 298,*** have held that when no information was given to the accused of his right to be searched in presence of a gazetted officer or a Magistrate and only option to be

searched before one or the other, given and consent memo drawn up recording choice of appellant, Section 50 was not complied with. It has been held as follows:

> "6. The Trial Court, on a consideration of the evidence, held that the case against the appellant had been proved beyond doubt more particularly as he had made a confession to PW.4 which was admissible in evidence as PW.4 was not a police officer. It was also found that the provisions ofSection 50 of the Act had been complied with as Ex. P.A., a consent memo, had been drawn up prior to the search. The Trial Court accordingly convicted and sentenced the appellant, as already mentioned above. The conviction and sentence has been confirmed by the High Court.
>
> 7. Before us, Mr. Sanjay Jain, the learned counsel for the appellant, has raised primarily two arguments based on the judgments of this Court. The first is Vijaisingh Chandu Bha Jadeja vs. State of Gujarat (2011 (1) SCC 609). In this case it has been observed by the Constitution Bench that the provisions of Section 50 of the Act postulated that before a search was made of a person suspected of carrying a narcotic he should be informed of his right that he had an option of being searched in the presence of a Gazetted Officer or a Magistrate and that merely because a consent memo had been drawn up whereby he had chosen to be searched before the Magistrate or a Gazetted Officer (on the option given to him by an authorized officer) would not amount to full compliance with the aforesaid provision.
>
> 10. We have examined the facts of the case in the light of the arguments raised by the learned counsel for the parties and the case law cited. Ext. P.A. is the consent memo under which the appellant had opted to be searched in the presence of a Gazetted officer. This memo is in the Gurmukhi script and has been read to us and we see that it cannot by any stretch of imagination be said to be informing the appellant of his right to be searched in the presence of a Gazetted Officer or a Magistrate as he was only given the option to be searched before one of the other.
>
> 11. In Vijaisingh's case (supra) the Constitution Bench crystalised the issue before it in para 1 as under:
>
> > "The short question arising for consideration in this batch of appeals is whether Section 50 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the NDPS Act") casts a duty on the empowered officer to "inform" the suspect of his right to be searched in the presence of a gazetted officer or a Magistrate, if he so desires or whether a mere enquiry by the said officer as to whether the suspect would like to be searched in the presence of a Magistrate or a gazetted officer can be said to be due compliance with the mandate of the said section?"
>
> 12. This was answered in paragraph 29 in the following terms:
>
> > "In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer of a Magistrate. We

have no hesitation in holding that insofar as the obligation of the authorised officer under sub- section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision."

13. It is therefore apparent that the precise question that was before the Constitution Bench was as to whether a consent memo could be said to be information conveyed to an accused as to his right under Section 50 of the Act. The Constitution Bench clearly stated that a consent memo could not be said to be such information as the provisions of Section 50 of the Act were mandatory and strict compliance was called for and any deviation therefrom would vitiate the prosecution. It was further held that it was not necessary that this information should be in a written form but the information had to be conveyed in some form or manner which would depend on the facts of the case.

14. We have accordingly gone through the evidence of PW.4 Prem Singh. He did not utter a single word as to whether he had informed the appellant of his right and he merely took his option as to whether he would like to be searched before a Gazetted Officer or a Magistrate as noted in Ex.P.A. In the light of the judgment in Vijaisingh's case (supra) we find that there has been complete non-compliance with the provisions of Section 50 of the Act."

22. Their lordships of the Hon'ble Supreme Court in the case of ***Ashok Kumar Sharma vrs. State of Rajasthan,*** reported in ***(2013) 2 SCC 67,*** have held that the fact that the accused person has a right under Section 50 of the ND & PS Act to be searched before a gazetted officer or a Magistrate was not made known to him, the non-compliance with this mandatory procedure has vitiated the entire proceedings. It has been held as follows:

"7. We are in this case concerned only with the question whether PW1, the officer who had conducted the search on the person of the appellant had followed the procedure laid down underSection 50 of the NDPS Act. On this question, there were conflicts of views by different Benches of this Court and the matter was referred to a five Judge Bench. This Court in Vijaysingh Chandubha Jadeja (supra) answered the question, stating that it is imperative on the part of the officer to apprise the person intended to be searched of his right under Section 50 of the NDPS Act, to be searched before a Gazetted Officer or a Magistrate. This Court also held that it is mandatory on the part of the authorized officer to make the accused aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this mandatory provision requires strict compliance. The suspect may or may not choose to exercise the right provided to him under the said provision, but so far as the officer concerned, an obligation is cast on him underSection 50 of the NDPS Act to apprise the person of his right to be searched before a Gazetted Officer or a Magistrate. The question, as to whether this procedure has been complied with or not, in this case the deposition of PW1 assumes importance, which reads as follows:

> "He was apprised while telling the reason of being searched that he could be searched before any Magistrate or any Gazetted Officer if he wished. He gave his consent in written and said that I have faith on you, you can search me. Fard regarding apprising and consent is Ex.P- 3 on which I put my signature from A to B and the accused put his signature from C to D. E to F is the endorsement of the consent of the accused and G to H is signature, which has been written by the accused."

8. The above statement of PW1 would clearly indicate that he had only informed the accused that he could be searched before any Magistrate or a Gazetted Officer if he so wished. The fact that the accused person has a right under Section 50 of the NDPS Act to be searched before a Gazetted Officer or a Magistrate was not made known to him. We are of the view that there is an obligation on the part of the empowered officer to inform the accused or the suspect of the existence of such a right to be searched before a Gazetted Officer or a Magistrate, if so required by him. Only if the suspect does not choose to exercise the right in spite of apprising him of his right, the empowered officer could conduct the search on the body of the person.

9. We are of the view that non-compliance of this mandatory procedure has vitiated the entire proceedings initiated against the accused- appellant. We are of the view that the Special Court as well as the High Court has committed an error in not properly appreciating the scope of Section 50of the NDPS Act. The appeal is, therefore, allowed. Consequently the conviction and sentence imposed by the Sessions Court and affirmed by the High Court are set aside. The accused-appellant, who is in jail, to be released forthwith, if not required in connection with any other case."

23. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Parmanand and another,*** reported in ***(2014) 5 SCC 345,*** have held that if merely a bag carried by a person is searched, without there being any search of his person, S. 50 will have no application but if bag carried by him is searched and his person is also searched, S. 50 would be attracted. Their lordships have also held that it was improper for PW-10 SI "Q" to tell respondents that a third alternative was available. It has been held as follows:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs,Section 50 of the NDPS Act will have application.
>
> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a

> nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

24. The accused was apprehended near the bus stand on 3.11.2009 at 5:30 PM. PW-1 HHG Gagan Sharma, has admitted that SI Sato Kumar had asked few persons to stay but they did not come forward to be associated as independent witnesses. He also admitted that the police post was located at some distance. He also admitted that the road in question was a general road which is used by large number of persons. PW-2 HHC Babu Ram also admitted that they asked many people to cooperate but they did not cooperate. He also admitted that many pedestrians were passing, however, they did not associate any person from the spot. Nobody was ready to become witness in the investigation. SI Sato Kumar had not asked him to call any witness. He himself had asked the witnesses to participate in the investigation. According to him, there was great rush at the bus stand at that time and despite that SI Sato Kumar has not called any witness from the bus stand. He also admitted that the police post was also located at bus stand near the spot where the accused was apprehended. Similarly, PW-3 Constable Manoj Kumar has admitted that many pedestrians were walking on the road. The buses were also parked nearby. In his cross-examination, he has categorically deposed that no independent witness was associated by SI Sato Kumar from the bus stand, however, he tried to associate the witnesses from the spot where the accused was apprehended because nobody was ready to become witness. He also admitted that no notice in writing was given to any person to be associated as independent witness.

25. PW-8 SI Sato Kumar deposed that he tried to associate other persons who were passing through the road to join the investigation but neither anybody stopped nor agreed to be a witness. The place where the accused was apprehended was fairly busy place. It cannot be said to be secluded or isolated place. In case the persons were not ready and willing to be witnesses in the investigation, PW-8 S.I. Sato Kumar was bound to issue them notices in writing, as prescribed under the Code of Criminal Procedure, 1973. In his examination-in-chief, PW-8 SI Sato Kumar, though has stated that he asked accused to give consent in writing but he has not stated that he has told the accused that he has a legal right to be searched before the Gazetted Officer or Executive Magistrate. He has also admitted in his cross-examination that he has not associated any police officials from the police post nearby nor the traffic constable to join the raiding party. He has also admitted that several persons used the road. The bus stand was also nearby. He has not given any written notice to anyone for joining the raiding party to the persons whom he contacted. It was necessary for the prosecution to join the independent witnesses to inspire confidence at the time of apprehending, search, seizure and sealing proceedings.

26. The case property was produced by the learned Public Prosecutor while recording the statement of PW-1 HHG Gagan Sharma. The extract of copy of the malkhana

register is Ext. PW-6/A. There is entry of the deposit of the contraband on 3.11.2009 and when it was received back from the FSL Junga. There is no entry when the case property was taken out from the malkhana and produced in the Court. There is no DDR recorded when the case property was produced before the trial Court. Similarly, there is no entry when the case property after production in the trial Court was re-deposited in the malkhana register. It is necessary for the prosecution to prove that the case property was taken out from the malkhana for the production in the Court and also preparing DDR to this effect and the same process is to be undergone when the case property after its production in the Court is taken back and deposited in the malkhana. There has to be entry in the malkhana register when it is re-deposited and DDR is also prepared. The production of the case property in the Court is mandatory. There is doubt whether the case property which was produced in the Court was the same which was recovered from the accused and sent to FSL, Junga in the absence of any corresponding entries made at the time of taking it and re-deposit in the malkhana register or it was case property of some other case. It has caused serious prejudice to the accused. The nabbing of the accused, recovery and sealing proceedings in the instant case are doubtful. When the case property was produced in the Court, there is no reference as to who brought the case property to the Court from malkhana and by whom it was taken back. It is necessary to keep the case property in safe custody from the date of seizure till its production in the Court in ND & PS cases.

27. Thus, the prosecution has failed to prove the case against the accused person for the commission of offence punishable under Sections 18 & 20 of the N.D & P.S., Act.

28. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 25.2.2012, rendered by the learned Special Judge (Sessions Judge), Shimla, H.P., in N.D.P.S. case No. 1-S/7 of 2010, is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

29. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

****

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

Nain Sukh .....Appellant.

Versus

HRTC & others .....Respondents.

LPA No. 184 of 2010
Reserved on: 5.11.2015
Decided on : 1.12.2015

Constitution of India, 1950- Article 226- Writ petitioner was engaged as a conductor- bus was inspected by the Inspector, and it was found that four passengers were travelling without tickets, although, fare was collected by the petitioner - un-punched tickets were also recovered from the bag of the petitioner - inquiry was conducted against the petitioner for

misconduct- Inquiry Officer concluded that charge stood proved- Disciplinary Authority imposed penalty of stoppage of two increment without cumulative effect- appeals preferred against this order were rejected- Writ Petition was also dismissed- appeal was preferred against the order passed by the writ Court- held, that Inquiry Officer had afforded sufficient opportunities to the petitioner to lead evidence and defend himself – principles of natural justice were complied with- Writ Court cannot re-appraise the evidence and cannot sit in appeal over the decision passed by the Disciplinary Authority and Inquiry Officer- Appeal dismissed. (Para-6 to 9)

For the Appellants	Ms. Abhilasha Kaundal, Advocate.
For the Respondents:	Mr. Sushant Veer Singh Thakur, Advocate vice Mr. Vikrant Thakur, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Letters Patent Appeal has been preferred before this Court by the appellant against the judgment of the learned Single judge of this Court whereby the reliefs ventilated therein, of the impugned orders comprised in Annexures A-2, A-3 and A-4 being quashed and set aside were declined to the appellant.

2. The facts necessary for deciding the instant appeal are of the appellant having been engaged as a conductor by the respondents. He was deployed in the aforesaid capacity in bus No.HP-10-0358 plying from Rohru to Reckongpeo. On 23.11.1998 the bus came to be inspected near Samarkot by Shri Krishan Chand and Darshan Chand, Inspectors. During the course of its inspection by the aforesaid it was found carrying 58 ½ passengers besides 600 kg load. Their inspection of the bus unearthed the factum of four passengers travelling without tickets from Rohroo to Samarkot from whom though a fare in the sum of Rs.36 stood collected by the appellant, yet the appellant having not issued tickets to them. The inspection party also recovered unpunched tickets from the bag of the appellant. The detection by the inspection party of commission of the aforesaid misdemeanor/misconduct by the appellant sequelled the serving of articles of charges upon him comprised in Annexure A-1.

3. The appellant herein submitted a reply to the charge sheet wherein he denied the imputations levelled against him in Annexure A-1.

4. The Inquiry Officer during the course of holding an inquiry against the appellant in proof of the articles of charges comprised in Annexure A-1, recorded the statements of Shri Krishan Chand, Inspector who appeared as PW-1 and Satish Kumar, who appeared as DW-1. The Inquiry Officer on appraising the testimony of PW-1, who deposed in tandem with as also in corroboration to the imputations of misconduct levelled against the appellant comprised in Annexure A-1, construed his testimony to be both credible as well as inspiring. However, the testimony of Satish Kumar (DW-1) who deposed, that he along with Savir Dass, Banvir Singh and Bhag Singh were travelling in the aforesaid bus and all had been issued tickets by the appellant yet the same remained in the custody of one of them, who had earlier alighted therefrom at a distance preceding 200 meters to the bus having been subjected to inspection, was disbelieved by the Inquiry officer especially when the unpunched tickets continued to be retained in the bag of the appellant wherefrom they were collected by the Inspectors aforesaid. In sequel, the Inquiry officer concluded that the

imputations levelled against the appellant herein comprised in Annexure A-1 stood established.

5. The appellant herein was served on 11.7.2000 with a memo by the respondent whereto he furnished a reply. The Disciplinary Authority vide order dated 15.9.2000 imposed a penalty of stoppage of two increments with cumulative effect upon the appellant. The order of the Disciplinary Authority was assailed by the appellant before the Appellate Authority. The Appellate Authority vide order Annexure A-3 rejected his appeal. However the appellant preferred another appeal which vide order of 27.2.2002 stood rejected on the ground of his earlier appeal having been considered and it having stood previously rejected by the Divisional Manager. The appellant had instituted OA No. 3017/2002 before the H.P State Administrative Tribunal which OA on disbandment of the Administrative Tribunal was transferred to this Court and was assigned No. CWP(T) No. 8915 of 2008. Therein the appellant had sought for quashing of impugned Annexures P-2, P-3 and P-4. The learned Single Judge of this Court while seized of the CWP(T) aforesaid had on a close and circumspect discernment of the entire record of the case rendered the impugned judgment concluding therein the factum of the Inquiry Officer having carried out the inquiry against the appellant in accordance with law besides therein held that the power vested in this Court to judicially review the findings and conclusions recorded by the Inquiry officer in his inquiry report comprised in Annexure A-1, being circumscribed to unearth from the material on record portrayals upsurging the factum of the Inquiry Officer preceding his authoring the inquiry report wherein he recorded conclusions of guilt against the appellant, his having infringed the principles of natural justice for hence rendering both the procedure adopted by him in conducting the inquiry as also conclusions drawn thereupon by him to be both vitiated as well as legally unsustainable. Contrarily the power vested in a writ Court to judicially review the findings recorded by the Inquiry Officer in inquiry report comprised in Annexure A-3 not obviously extending to its reappraising or reevaluating evidence as existed before the Inquiry Officer rather the power to reassess or reevaluate the evidence relied upon by the Inquiry Officer vesting in the appellate forum which the writ court is not, precluded the learned Single judge to not delve into the evidence relied upon by the Inquiry Officer or to reevaluate or reappraise it, rather with the material on record depicting adherence by the Inquiry Officer with the principles of natural justice in conducting the inquiry constrained the learned Singe Judge to impute sanctity to the conclusions drawn by him in Annexure A-3. Apart therefrom hence with existence of telling material portraying adherence by the Inquiry Officer with the principles of natural justice in conducting the inquiry hence rendered unavailable for succor by the appellant, the permissible parameter on infringement whereof a Writ Court may have been coaxed to judicially review the findings of fact recorded in Annexure A-3. Necessarily then the learned Single Judge accepted the findings recorded by the Inquiry Officer. It was also concluded by the learned Single Judge that the conclusions drawn therein by the Inquiry Officer could not be rendered infirm merely on the score of his having relied upon the testimony of PW- 1.

6. This Court has with incision traversed through the entire material on record. In the aforesaid endeavor it has been unable to unearth therefrom the imperative fact of the Inquiry Officer having conducted the inquiry against the appellant in transgression of the cardinal tenets of natural justice rather there exists on record abundant material depicting the factum of the inquiry Officer while holding an inquiry against the appellant his having begotten compliance with the principles of natural justice, in as much, as his having afforded an opportunity to the appellant to adduce evidence in defence as also his having afforded an opportunity to the appellant to cross-examine the witness. In aftermath with material on record vividly manifesting adherence, by the Inquiry Officer while his conducting an inquiry against the appellant, with the tenets of natural justice rendered the proceedings

preceding the authoring of inquiry report comprised in Annexure A-3 to remain un-vitiated besides as a corollary with the power vested in this Court to judicially review it, being restricted to this court gauging any inherent lapse or shortcoming in the holding of an inquiry by the Inquiry Officer against the appellant herein arising from non-adherence by the Inquiry Officer with the principles of natural justice which parameter for the reasons assigned hereinabove and hereinafter when is unavailable , precludes this Court to interfere with Annexure A-3. Sequelly in other words given the non-existence or lack of unfoldment by the material existing on record of the Inquiry Officer having not conformed to the principles of natural justice while conducting the inquiry against the appellant constrains this Court to, in the exercise of its power to judicially review the findings drawn by the Inquiry Officer in Annexure A-3, not dislodge them. The endeavor on the part of the learned counsel for the appellant that the Inquiry Officer had untenably relied upon the testimony of PW-1 in pronouncing thereupon the guilt of the appellant qua the imputations of misconduct levelled against him in Annexure A-1 besides had committed a gross legal misdemeanor in discarding the testimony of DW-1 gathers no legal sinew as countenancing the aforesaid endeavor of the learned counsel for the appellant would constrain this Court to re-appreciate/re-evaluate besides reappraise the testimonies of PW-1 and DW-1 for hence upsetting the findings of fact recorded by the Inquiry Officer which concert would tantamount to this court proceeding to fathom the weight, sufficiency or adequacy of evidence adduced and relied upon by the Inquiry Officer even when it is for the reasons assigned hereinafter legally interdicted to do so.

7. The Hon'ble Apex Court in a judgment reported in 2015 AIR SCW 455 titled as G.M (Operations) S.B.I v. R. Periyasamy, the relevant paragraphs 9 and 12 stand reproduced hereinafter has graphically spelt out therein that a writ Court is prohibited to gauge whether the evidence adduced before the Inquiry Officer besides relied upon by him to anchor thereupon his conclusion of imputations of misconduct levelled against the appellant having stood proven, is either sufficient or adequate. However, it has been also vividly with explicity pronounced therein that a writ Court may interfere with the findings of fact recorded by the Inquiry Officer in the Inquiry report only when such findings are anchored upon palpably inadmissible evidence**.** Apart therefrom it further stands enunciated therein that the factum of existence or non-existence of clinching evidence in support of the charges against the appellant is too not a parameter for warranting any interference by a writ Court with the findings of fact recorded by the Inquiry Officer, as the aforesaid parameter necessitates embarking upon by this Court a legally proscribed exercise qua existence of sufficient and adequate evidence on record for sustaining the findings of fact recorded against the appellant by the Inquiry Officer in his Inquiry report. When the parameter of existence of sufficient or adequate evidence on record in support of the charges against the appellant is a parameter prohibited to be resorted to, by this Court for it to hence in the exercise of its power of judicially reviewing Annexure A-3 upset the findings of fact recorded therein, as a corollary, for reiteration any endeavor on the part of this court to by reappraising or reevaluating evidence as exists on record gauge the tenacity of the findings of fact recorded against the delinquent/appellant by the Inquiry Officer in Annexure A-3 would obviously be a resort to by this Court of a legally proscribed exercise of its adjudging both the sufficiency or adequacy of evidence especially when the existing evidence is ex-facie not demonstrably inadmissible. In sequel, when there is no emanation from the evidence existing on record of its being inadmissible hence discardable for thereupon pronouncing upon the guilt of the appellant herein, necessarily when the aforesaid parameter of inadmissibility of evidence for constraining this Court to dislodge the findings recorded in Annexure A-3, which yet stood relied upon by the Inquiry Officer in concluding qua the guilt of the appellant is amiss whereas its existence may have prodded this court to while discarding it quash Annexure A-3. In aftermath when no permissible parameter enjoined by

the verdict of the Hon'ble Apex Court exists for prodding this court to interfere with the findings of fact recorded by the Inquiry Officer in Annexure A-3, moreso when any fathoming by this Court qua existence on record of clinching evidence for sustaining the charges against the appellant would tantamount to an impermissible exercise by this Court especially when it devolves upon sufficiency or abundancy of evidence moreso with its falling within the gamut or ambit of the prohibitions cast by the Hon'ble Apex Court in its judgment, apt paragraphs whereof stands extracted hereinafter, upon this court to judicially review the findings of fact recorded by the Inquiry Officer.

> "9. It is not really necessary to deal with the judgment of the learned Single Judge since that has merged with the judgment of the Division Bench. However, some observations are necessary. The learned single judge committed an error in approaching the issue by asking whether the findings have been arrived on acceptable evidence or not and coming to the conclusions that there was no acceptable evidence and that in any case the evidence was not sufficient. In doing so, the learned single judge lost sight of the fact that permissible enquiry was whether there is no evidence on which the enquiry officer could have arrived at the findings or whether there was any perversity in the findings. Whether the evidence was acceptable or not, was a wrong question, unless it raised a question of admissibility. Also, the learned single judge was not entitled to go into the question of the adequacy of evidence and come to the conclusion that the evidence was not sufficient to hold the respondent guilty. .....
>
> 12. On the question of shortage of money, the Division Bench merely upheld the findings of the learned single judge that there was no clinching evidence in support of the charges. The Division Bench approved the findings of the single judge that the enquiry report that the shortage of cash occurred only between 16.11.1985 and 05.04.1986, when the respondent was a joint custodian, was based on surmise and conjecture. The Division bench did not care to advert to the evidence. That evidence rightly relied on by the enquiry officer which established that the shortage did occur between 16.11.1985 and 05.04.1986. In fact the Inquiring Officer has given cogent reasons for rendering the findings that the shortage could not have occurred after 05.04.1986 up to the discovery of 15.04.1986, when two acting cashiers had functioned. Moreover, the observation that there is no clinching evidence in support of the charges is another way of saying that the evidence is insufficient or inadequate, which is not permissible. It bears repetition that sufficiency or adequacy of evidence is not the ground on which the findings of facts may be set aside by the High Court under Article 226. The justification offered by the Division Bench that the learned single judge had to undertake the exercise of analysing the findings of the enquiry officer because the appellants had deprived the respondent of his livelihood is wholly untenable. A transgression of jurisdiction cannot be justified on the ground of consequences, as has been done. Moreover, the reliance by the Division Bench on Mathura Prasad v. Union of India & Ors. is entirely misplaced, since that case arose in an entirely different set of circumstances. We also find it difficult to understand the justification offered by the Division Bench that there was no failure on the part of

> the respondent to observe utmost devotion to duty because the case was not one of misappropriation but only of a shortage of money. The Division Bench has itself stated the main reason why its order cannot be upheld in the following words," on re-appreciation of the entire material placed on record, we do not find any reason to interfere with the well considered and merited order passed by the learned single Judge."

8. In trite the ratio propounded by the Hon'ble Apex Court in the aforesaid judgment, the relevant paragraphs whereof stand reproduced hereinabove is with aplomb appositely applicable to the facts at hand, for hence discountenancing the submission of the learned counsel for the appellant of there being neither adequate or sufficient evidence nor any clinching evidence in support of conclusions arrived at by the Inquiry Officer in his inquiry report comprised in Annexure A-3. Necessarily with this Court having for the reasons aforesaid concluded qua the parameters enjoined in the relevant extracted paragraph of the afore-referred judgment of the Hon'ble Apex Court for constraining this Court to judicially review the findings and conclusions recorded by the Inquiry Officer ask for evidence portraying the factum of the Inquiry Officer having conducted the inquiry against the appellant in transgression of the principles of natural justice, which apposite parameter for the reasons aforesaid remains un-satiated also qua unfoldment by material on record of the Inquiry Officer in authoring Annexure A-3 having relied upon inadmissible evidence besides discardable evidence which taint besmirching Annexure A-3 has not surged forth. As a concomitant, this Court does not deem it fit to either interfere with the findings and conclusions recorded by the Inquiry Officer vide Annexure A-3 nor hence this Court deems fit to interfere with the well reasoned judgment of the learned Single Judge of this Court.

9. The summom bonum of the above discussion is of the findings of fact qua the guilt of the appellant recorded by the Inquiry Officer in Annexure A-3 necessitating reverence by this Court. Even otherwise they remain un-tainted by any misdemeanor committed by the Inquiry Officer while his holding an inquiry against the appellant arising from his not affording to the appellant herein an opportunity to adduce evidence in defence or of theirs being infected with any vice qua his having misconducted the inquiry in as much as his having prohibited the appellant to cross examine PW-1 for precluding him from eliciting truth from him. Naturally when sufficient and adequate opportunity was afforded to the appellant to defend himself in the proceedings conducted by the Inquiry Officer, no ground hence remains with the appellant for warranting this Court to rely upon the statement of DW-1 for ousting the findings of fact founded upon the credible deposition of PW-1 as recorded by the Inquiry Officer in Annexure A-3. For reiteration, the contention of the learned counsel for the appellant that the testimony of DW-1 was un-tenably discarded by the Inquiry Officer whereas it comprises a credible piece of evidence to succor his defence is unworthy of acceptance by this court, as it impinges upon the existence of sufficiency or adequacy of evidence adduced before the Inquiry Officer any exercise whereto by this Court is legally interdicted by the Hon'ble Apex Court in the decision supra.

10. Consequently, the impugned judgment is upheld and the instant appeal is dismissed alongwith pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No.618 of 2014 alongwith CWP Nos. 3800 and 3943 of 2014.
Judgment reserved on: 26.11.2015.
Date of decision: December 1st ,2015,

1. CWP No.618 of 2014.

Santosh Kumari Rana .....Petitioner.
Versus
Union of India and others .....Respondents.

For the Petitioner : Mr.Sanjeev Bhushan, Senior Advocate with Ms.Abhilasha Kaundal, Advocate.
For the Respondents : Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Nipun Sharma, Advocate, for respondent No.1.
Mr.Sandeep Sharma, Senior Advocate with Mr.Pankaj Negi, Advocate, for respondents No.2 and 3.
Mr.Vijay Chaudhary, Advocate, for respondent No.4.

2. CWP No.3800 of 2014.

Seema Devi and others .....Petitioners.
Versus
Union of India and others .....Respondents.

For the Petitioners : Mr.Vijay Chaudhary, Advocate.
For the Respondents : Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Nipun Sharma, Advocate, for respondent No.1.
Mr.Sandeep Sharma, Senior Advocate with Mr.Pankaj Negi, Advocate, for respondents No.2 and 3.

3. CWP No.3943 of 2014.

Pawan Kumar and others .....Petitioners.
Versus
Union of India and others .....Respondents.

For the Petitioners : Mr.Ramakant Sharma, Advocate.
For the Respondents : Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Nipun Sharma, Advocate, for respondent No.1.
Mr.Sandeep Sharma, Senior Advocate with Mr.Pankaj Negi, Advocate, for respondents No.2 and 3.

Constitution of India, 1950- Article 226- Petitioners are engaged in different capacity – their grievance is that their services should not be dispensed with- respondents be restrained from out sourcing services against which they appointed – respondents pleaded that appointment of the petitioners was not in accordance with the Law and they were appointed as casual worker on fixed wages as per requirement for three months and were re-engaged after breaks- record shows that requirement of issuing advertisement following selection process and observance of the reservation policy at the time of initial appointment of the petitioners was not followed- mere continuous in service was extending period of

appointment will not confer any right to perpetuate the illegality- no person can be appointed even on a temporary or adhoc basis without inviting applications from all eligible candidates- a person employed in violation of these provisions is not entitled to any relief including salary- a person appointed through the back door must also leave from the same- further decision to outsource of service is matter of the policy, which cannot be inferred in the writ petition- writ petition dismissed. (Para-4 to 12)

Cases referred:

State of Bihar versus Upendra Narayan Singh and others (2009) 5 SCC 65

State of Orissa and another versus Mamata Mohanty (2011) 3 SCC 436,

Renu and others versus District and Sessions Judge, Tis Hazari Courts, Delhi and another (2014) 14 SCC 50

Lal Singh versus H.P. State Co-operative Milk Producers Federation Limited, I L R 2015 (VI) HP 353 (D.B.)

Rattanlal and others etc. etc. versus State of Haryana and others AIR 1987 SCC 478

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of facts and law arise for consideration in these petitions and were, therefore, taken up together for disposal.

2. The petitioners have been engaged by the respondents on contractual basis in different capacities like Matron, Security Guards, Malis, Safai Karamchari, Electrician, Chowkidar etc. In principle, their grievance is that their services should not be dispensed with and the respondents should be restrained from out sourcing the services against which they were appointed and are working to the entire satisfaction of the respondents.

3. The respondents have opposed the claim of the petitioners by filing reply wherein it has been specifically pointed out that the appointment of the petitioners was not in accordance with law and the petitioners were merely appointed as casual workers on fixed wages as per requirement initially for three months and thereafter re-engaged after intermittent breaks. The earliest appointments have been made only in June, 2012 and the same does not in any manner vest any legal right in the petitioners.

I have heard the learned counsel for the parties and have also gone through the records of the case.

4. There is no denial of the fact in the writ petitions that the mandate of Articles 14 and 16 of the Constitution of India by issuance of advertisements in newspaper and selection process as also observance of the reservation policy at the time of initial appointment of the petitioners was not followed. Mere allowing continuance in service or extending the period of appointment in itself cannot confer any right in teeth of Article 14 and the petitioners cannot claim any ground to perpetuate this illegality. This aspect of the matter has been considered in detail by the Hon'ble Supreme Court in ***State of Bihar*** *versus* ***Upendra Narayan Singh and others (2009) 5 SCC 65*** wherein it was held :-

> "44. The scenario is worst when it comes to appointment to lower strata of the civil services. Those who have been bestowed with the power to make appointment on Class III and Class IV posts have by and large misused and abused the same by violating relevant rules and instructions and have

indulged in favouritism and nepotism with impunity resulting in total negation of the equality clause enshrined in Article 16 of the Constitution.

45. Thousands of cases have been filed in the Courts by aggrieved persons with the complaints that appointment to Class III and Class IV posts have been made without issuing any advertisement or sending requisition to the employment exchange as per the requirement of the 1959 Act and those who have links with the party in power or political leaders or who could pull strings in the power corridors get the cake of employment. Cases have also been filed with the complaints that recruitment to the higher strata of civil services made by the Public Service Commissions have been affected by the virus of spoil system in different dimensions and selections have been made for considerations other than merit.

46. Unfortunately, some orders passed by the Courts have also contributed to the spread of spoil system in this country. The judgments of 1980s and early 1990s show that this Court gave expanded meaning to the equality clause enshrined in Articles 14 and 16 and issued directions for treating temporary/ad hoc/daily wage employees at par with regular employees in the matter of payment of salaries etc. The schemes framed by the Governments and public bodies for regularization of illegally appointed temporary/ad hoc/daily wage/casual employees got approval of the Courts. In some cases, the Courts also directed the State and its instrumentalities/agencies to frame schemes for regularization of the services of such employees.

47. In State of Haryana v. Piara Singh (1992) 4 SCC 118, this Court reiterated that appointment to the public posts should ordinarily be made by regular recruitment through the prescribed agency and that even where ad hoc or temporary employment is necessitated on account of the exigencies of administration, the candidate should be drawn from the employment exchange and that if no candidate is available or sponsored by the employment exchange, some method consistent with the requirements of Article 14 of the Constitution should be followed by publishing notice in appropriate manner calling for applications and all those who apply in response thereto should be considered fairly, but proceeded to observe that if an ad hoc or temporary employee is continued for a fairly long spell, the authorities are duty bound to consider his case for regularization subject to his fulfilling the conditions of eligibility and the requirement of satisfactory service.

48. The propositions laid down in Piara Singh's case (supra) were followed by almost all High Courts for directing the concerned State Governments and public authorities to regularize the services of ad hoc/temporary/daily wage employees only on the ground that they have continued for a particular length of time. In some cases, the schemes framed for regularization of the services of the backdoor entrants were also approved. As a result of this, beneficiaries of spoil system and corruption garnered substantial share of Class III and Class IV posts and thereby caused irreparable damage to the service structure at the lower levels. Those appointed by backdoor methods or as a result of favoritism, nepotism or corruption do not show any commitment to their duty as public servant. Not only this, majority of them are found to be totally incompetent or inefficient.

49 . In Delhi Development Horticulture Employees Union v. Delhi Administration, Delhi and others (1992) 4 SCC 99, the Court took cognizance of the illegal employment market which has developed in the country and observed: (SCC pp. 111-12, para 23)

> "23. Apart from the fact that the petitioners cannot be directed to be regularised for the reasons given above, we may take note of the pernicious consequences to which the direction for regularisation of workmen on the only ground that they have put in work for 240 or more days, has been leading. Although there is an Employment Exchange Act which requires recruitment on the basis of registration in the Employment Exchange, it has become a common practice to ignore the Employment Exchange and the persons registered in the Employment Exchanges, and to employ and get employed directly those who are either not registered with the Employment Exchange or who though registered are lower in the long waiting list in the Employment Register. The courts can take judicial notice of the fact that such employment is sought and given directly for various illegal considerations including money. The employment is given first for temporary periods with technical breaks to circumvent the relevant rules, and is continued for 240 or more days with a view to give the benefit of regularization knowing the judicial trend that those who have completed 240 or more days are directed to be automatically regularized. A good deal of illegal employment market has developed resulting in a new source of corruption and frustration of those who are waiting at the Employment Exchanges for years. Not all those who gain such backdoor entry in the employment are in need of the particular jobs. Though already employed elsewhere, they join the jobs for better and secured prospects. That is why most of the cases which come to the courts are of employment in government departments, public undertakings or agencies. Ultimately it is the people who bear the heavy burden of the surplus labour. The other equally injurious effect of indiscriminate regularization has been that many of the agencies have stopped undertaking casual or temporary works though they are urgent and essential for fear that if those who are employed on such works are required to be continued for 240 or more days they have to be absorbed as regular employees although the works are time-bound and there is no need of the workmen beyond the completion of the works undertaken. The public interests are thus jeopardised on both counts."
>
> (emphasis added)

50. In State of U.P. and others v. U.P. State Law Officers Association and others (1994) 2 SCC 204, this Court examined the correctness of an order passed by Allahabad High Court quashing the termination of the services of 26 law officers and appointment of new law officers. After noticing the provisions of Legal Remembrancer's Manual which regulate appointment of Government counsel in the State of U.P. and the manner in which the respondents were appointed, this Court reversed the order of the High Court and observed: (SCC pp.217-18, para 19)

> "19. It would be evident from Chapter V of the said Manual that to appoint the Chief Standing Counsel, the Standing Counsel and the

> Government Advocate, Additional Government Advocate, Deputy Government Advocate and Assistant Government Advocate, the State Government is under no obligation to consult even its Advocate-General much less the Chief Justice or any of the judges of the High Court or to take into consideration, the views of any committee that "may" be constituted for the purpose. The State Government has a discretion. It may or may not ascertain the views of any of them while making the said appointments. Even where it chooses to consult them, their views are not binding on it. The appointments may, therefore, be made on considerations other than merit and there exists no provision to prevent such appointments. The method of appointment is indeed not calculated to ensure that the meritorious alone will always be appointed or that the appointments made will not be on considerations other than merit. In the absence of guidelines, the appointments may be made purely on personal or political considerations, and be arbitrary. This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the back door have to go by the same door. This is more so when the order of appointment itself stipulates that the appointment is terminable at any time without assigning any reason. Such appointments are made, accepted and understood by both sides to be purely professional engagements till they last. The fact that they are made by public bodies cannot vest them with additional sanctity. Every appointment made to a public office, howsoever made, is not necessarily vested with public sanctity. There is, therefore, no public interest involved in saving all appointments irrespective of their mode. From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them."
>
> [emphasis added]

"58. In the Letters Patent Appeal filed by them, the appellants reiterated that the respondents had been appointed without following any procedure and without any selection. They also contended that even though vacant posts were not available, the then Regional Director, Gaya made large number of illegal appointments and this fact was established in the enquiry got conducted by the department. However, the Division Bench did not deal with the issues raised in the appeal and dismissed the same by making reference to the orders passed in LPA No.325 of 2000, Civil Review No.279 of 2000 and LPA No.47 of 2005 and observing that taking different view in the case of the respondents could lead to an anomalous position inasmuch as some persons would get back into service on the strength of the court's order while others will be thrown out.

59. At the hearing of this appeal, we asked the learned Senior Counsel appearing for the respondents to show that before appointing his clients on ad hoc basis, the then Regional Director, Gaya had issued an advertisement and/or sent requisition to the employment exchange and made selection after considering competing claims of the eligible candidates but he could not draw our attention to any document from which it could be inferred that the respondents were appointed after advertising the posts or by adopting some

other method which could enable other eligible persons to at least apply for being considered for appointment. He, however, submitted that issue relating to legality of the initial appointments of the respondents has become purely academic and this Court need not go into the same because their services had been regularised by the competent authority in 1992.

60. In our opinion, there is no merit in the submission of the learned senior counsel. If the initial appointments of the respondents are found to be illegal per se, the direction given by the High Court for their reinstatement with consequential benefits cannot be approved by relying upon the so-called regularization of their services. Had the respondents been appointed by the competent authority after issuing an advertisement or sending requisition to the employment exchange so as to enable the latter to sponsor the names of eligible persons then they would have certainly produced the relevant documents before the High Court or at least before this Court. However, the fact of the matter is that none of the documents which could give a semblance of legitimacy to the appointments of the respondents was produced before the High Court and none has been produced before this Court."

5. In ***State of Orissa and another*** *versus* ***Mamata Mohanty (2011) 3 SCC 436***, it was held by the Hon'ble Supreme Court that no person can be appointed even on a temporary or adhoc basis without inviting applications from all eligible candidates. Even if the appointments have been made by inviting names from the Employment Exchange or putting a notice on the notice board etc., that will not meet the requirement of Articles 14 and 16 of the Constitution of India. A person employed in violation of these provisions is, therefore, not entitled to any relief including salary. It is apt to reproduce paragraphs 35 and 36 of the judgment which read thus:-

"Appointment/employment without advertisement

35. At one time this Court had been of the view that calling the names from Employment Exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from Employment Exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in Radio and Television as merely calling the names from the Employment Exchange does not meet the requirement of the said Article of the Constitution. (Vide: Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi & Ors., AIR 1992 SC 789; State of Haryana & Ors. v. Piara Singh & Ors., AIR 1992 SC 2130; Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao & Ors., (1996) 6 SCC 216; Arun Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors., AIR 1998 SC 331; Binod Kumar Gupta & Ors. v. Ram Ashray Mahoto & Ors., AIR 2005 SC 2103; National Fertilizers Ltd. & Ors. v. Somvir Singh, AIR 2006 SC 2319; Telecom District Manager & Ors. v. Keshab Deb, (2008) 8 SCC 402; State of Bihar v. Upendra Narayan Singh & Ors., (2009) 5 SCC 65; and State of Madhya Pradesh & Anr. v. Mohd. Ibrahim, (2009) 15 SCC 214).

36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

6. In ***Renu and others*** *versus* ***District and Sessions Judge, Tis Hazari Courts, Delhi and another (2014) 14 SCC 50***, it was held by the Hon'ble Supreme Court that the appointments of the employees including Class IV employees should be made on touchstone of equality of opportunity which is cornerstone of Constitution. It was held:-

"4. In view of the aforesaid submissions, we do not think it necessary to peruse the record in order to gauge the amount of irregularities or illegalities. Our basic concern is that the appointments in judicial institutions must be made on the touchstone of equality of opportunity enshrined in Article 14 read with Article 16 of the Constitution of India and under no circumstance any appointment which is illegal should be saved for the reason that the grievance of the people at large is that complete darkness in the light house has to be removed. The judiciary which raises a finger towards actions of every other wing of the society cannot afford to have this kind of accusations against itself.

6. Article 14 of the Constitution provides for equality of opportunity. It forms the cornerstone of our Constitution.

8. As Article 14 is an integral part of our system, each and every state action is to be tested on the touchstone of equality. Any appointment made in violation of mandate of Articles 14 and 16 of the Constitution is not only irregular but also illegal and cannot be sustained in view of the judgments rendered by this Court in Delhi Development Horticulture Employees' Union v. Delhi Administration, Delhi & Ors., AIR 1992 SC 789; State of Haryana & Ors. v. Piara Singh & Ors. etc.etc., AIR 1992 SC 2130; Prabhat Kumar Sharma & Ors. v. State of U.P. & Ors., AIR 1996 SC 2638; J.A.S. Inter College, Khurja, U.P. & Ors. v. State of U.P. & Ors., AIR 1996 SC 3420; M.P. Housing Board & Anr. v. Manoj Shrivastava, AIR 2006 SC 3499; M.P. State Agro Industries Development Corporation Ltd. & Anr. v. S.C. Pandey, (2006) 2 SCC 716; and State of Madhya Pradesh & Ors. v. Ku. Sandhya Tomar & Anr., JT 2013 (9) SC 139.

9. In Excise Superintendent Malkapatnam, Krishna District, A.P. v. K.B.N. Visweshwara Rao & Ors., (1996) 6 SCC 216, a larger Bench of this Court reconsidered its earlier judgment in Union of India & Ors. v. N. Hargopal & Ors., AIR 1987 SC 1227, wherein it had been held that insistence of requisition through employment exchanges advances rather than restricts the rights guaranteed by Articles 14 and 16 of the Constitution. However, due to the possibility of non sponsoring of names by the employment

exchange, this Court held that any appointment even on temporary or ad hoc basis without inviting application is in violation of the said provisions of the Constitution and even if the names of candidates are requisitioned from Employment Exchange, in addition thereto, it is mandatory on the part of the employer to invite applications from all eligible candidates from open market as merely calling the names from the Employment Exchange does not meet the requirement of the said Articles of the Constitution. The Court further observed: (*K.B.N. Visweshwara Rao case, SCC p. 218 para 6)*

> "6.....In addition, the appropriate department.....should call for the names by publication in the newspapers having wider circulation and also display on their office notice ...and employment news bulletins; and then consider the case of all candidates who have applied. If this procedure is adopted, fair play would be sub served. The equality of opportunity in the matter of employment would be available to all eligible candidates."
>
> (Emphasis added)
>
> (See also: Arun Tewari & Ors. v. Zila Mansavi Shikshak Sangh & Ors., AIR 1998 SC 331; and Kishore K. Pati v. Distt. Inspector of Schools, Midnapur & Ors., (2000) 9 SCC 405).

10. In Suresh Kumar & Ors. v. State of Haryana & Ors., (2003) 10 SCC 276, this Court upheld the judgment of the Punjab & Haryana High Court wherein 1600 appointments made in the Police Department without advertisement stood quashed though the Punjab Police Rules, 1934 did not provide for such a course. The High Court reached the conclusion that process of selection stood vitiated because there was no advertisement and due publicity for inviting applications from the eligible candidates at large.

11. In Union Public Service Commission v. Girish Jayanti Lal Vaghela & Ors., AIR 2006 SC 1165, this Court held: (SCC p. 490, para 12)

> "12.....The appointment to any post under the State can only be made after a proper advertisement has been made inviting applications from eligible candidates and holding of selection by a body of experts or a specially constituted committee whose members are fair and impartial, through a written examination or interview or some other rational criteria for judging the inter se merit of candidates who have applied in response to the advertisement made.....Any regular appointment made on a post under the State or Union without issuing advertisement inviting applications from eligible candidates and without holding a proper selection where all eligible candidates get a fair chance to compete would violate the guarantee enshrined under Article 16 of the Constitution."
>
> (Emphasis added)

12. The principles to be adopted in the matter of public appointments have been formulated by this Court in M.P. State Coop. Bank Ltd., Bhopal v. Nanuram Yadav & Ors., (2007) 8 SCC 264 as under: (SCC pp. 274-75, para 24)

> "(1) The appointments made without following the appropriate procedure under the rules/government circulars and without advertisement or inviting applications from the open market would amount to breach of Articles 14 and 16 of the Constitution of India.

(2) Regularisation cannot be a mode of appointment.

(3) An appointment made in violation of the mandatory provisions of the statute and in particular, ignoring the minimum educational qualification and other essential qualification would be wholly illegal. Such illegality cannot be cured by taking recourse to regularisation.

(4) Those who come by back-door should go through that door.

(5) No regularisation is permissible in exercise of the statutory power conferred under Article 162 of the Constitution of India if the appointments have been made in contravention of the statutory rules.

(6) The court should not exercise its jurisdiction on misplaced sympathy.

(7) If the mischief played is so widespread and all pervasive, affecting the result, so as to make it difficult to pick out the persons who have been unlawfully benefited or wrongfully deprived of their selection, it will neither be possible nor necessary to issue individual show-cause notice to each selectee. The only way out would be to cancel the whole selection.

(8) When the entire selection is stinking, conceived in fraud and delivered in deceit, individual innocence has no place and the entire selection has to be set aside."

13. A similar view has been reiterated by the Constitution Bench of this Court in Secretary, State of Karnataka & Ors. v. Umadevi & Ors., AIR 2006 SC 1806, observing that any appointment made in violation of the Statutory Rules as also in violation of Articles 14 and 16 of the Constitution would be a nullity. "Adherence to Articles 14 and 16 of the Constitution is a must in the process of public employment". The Court further rejected the prayer that ad hoc appointees working for long be considered for regularisation as such a course only encourages the State to flout its own rules and would confer undue benefits on some at the cost of many waiting to compete.

14. In State of Orissa & Anr. v. Mamata Mohanty, (2011) 3 SCC 436, this Court dealt with the constitutional principle of providing equality of opportunity to all which mandatorily requires that vacancy must be notified in advance meaning thereby that information of the recruitment must be disseminated in a reasonable manner in public domain ensuring maximum participation of all eligible candidates; thereby the right of equal opportunity is effectuated. The Court held as under" (SCC, p. 452, para 36)

"36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board, etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article

> 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."

15. Where any such appointments are made, they can be challenged in the court of law. The quo warranto proceeding affords a judicial remedy by which any person, who holds an independent substantive public office or franchise or liberty, is called upon to show by what right he holds the said office, franchise or liberty, so that his title to it may be duly determined, and in case the finding is that the holder of the office has no title, he would be ousted from that office by judicial order. In other words, the procedure of quo warranto gives the Judiciary a weapon to control the Executive from making appointment to public office against law and to protect a citizen from being deprived of public office to which he has a right. These proceedings also tend to protect the public from usurpers of public office who might be allowed to continue either with the connivance of the Executive or by reason of its apathy. It will, thus, be seen that before a person can effectively claim a writ of quo warranto, he has to satisfy the Court that the office in question is a public office and is held by a usurper without legal authority, and that inevitably would lead to an enquiry as to whether the appointment of the alleged usurper has been made in accordance with law or not. For issuance of writ of quo warranto, the Court has to satisfy that the appointment is contrary to the statutory rules and the person holding the post has no right to hold it. (Vide: The University of Mysore & Anr. v. C.D. Govinda Rao & Anr., AIR 1965 SC 491; Shri Kumar Padma Prasad v. Union of India & Ors., AIR 1992 SC 1213; B.R. Kapur v. State of Tamil Nadu & Anr., AIR 2001 SC 3435; The Mor Modern Co-operative Transport Society Ltd. v. Financial Commissioner and Secretary to Govt., Haryana & Anr., AIR 2002 SC 2513; Arun Singh v. State of Bihar & Ors., AIR 2006 SC 1413; Hari Bansh Lal v. Sahodar Prasad Mahto & Ors., AIR 2010 SC 3515; and Central Electricity Supply Utility of Odisha v. Dhobei Sahoo & Ors., (2014) 1 SCC 161).

16. Another important requirement of public appointment is that of transparency. Therefore, the advertisement must specify the number of posts available for selection and recruitment. The qualifications and other eligibility criteria for such posts should be explicitly provided and the schedule of recruitment process should be published with certainty and clarity. The advertisement should also specify the rules under which the selection is to be made and in absence of the rules, the procedure under which the selection is likely to be undertaken. This is necessary to prevent arbitrariness and to avoid change of criteria of selection after the selection process is commenced, thereby unjustly benefiting someone at the cost of others.

17. Thus, the aforesaid decisions are an authority on prescribing the limitations while making appointment against public posts in terms of Articles 14 and 16 of the Constitution. What has been deprecated by this Court time and again is "backdoor appointments or appointment dehors the rules".

18. In State of U.P. & Ors. v. U.P. State Law Officers Association & Ors., (1994) 2 SCC 204 this Court while dealing with the back-door entries in public appointment observed as under: (SCC pp. 217-18, para 19)

> "19....The method of appointment is indeed not calculated to ensure that the meritorious alone will always be appointed or that the

> appointments made will not be on the considerations other than merit. In the absence of guidelines, the appointment may be made purely on personal or political consideration and be arbitrary. This being so those who come to be appointed by such arbitrary procedure can hardly complain if the termination of their appointment is equally arbitrary. Those who come by the back-door have to go by the same door....From the inception some engagements and contracts may be the product of the operation of the spoils system. There need be no legal anxiety to save them."
>
> (Emphasis added)

19. In Som Raj & Ors. v. State of Haryana & Ors., AIR 1990 SC 1176, this Court held as under: (SCC pp.658-59, para 6)

> "6.....The absence of arbitrary power is the first postulate of rule of law upon which our whole constitutional edifice is based. In a system governed by Rule of Law, discretion when conferred upon an executive authority must be confined within clearly defined limits. The rules provide the guidance for exercise of the discretion in making appointment from out of selection lists which was prepared on the basis of the performance and position obtained at the selection. The appointing authority is to make appointment in the order of gradation, subject to any other relevant rules like, rotation or reservation, if any, or any other valid and binding rules or instructions having force of law. If the discretion is exercised without any principle or without any rule, it is a situation amounting to the antithesis of Rule of Law. Discretion means sound discretion guided by law or governed by known principles of rules, not by whim or fancy or caprice of the authority."

"30. In today's system, daily labourers and casual labourers have been conveniently introduced which are followed by attempts to regularise them at a subsequent stage. Therefore, most of the times the issue raised is about the procedure adopted for making appointments indicating an improper exercise of discretion even when the rules specify a particular mode to be adopted. There can be no doubt that the employment whether of Class IV, Class III, Class II or any other class in the High Court or courts subordinate to it fall within the definition of "public employment". Such an employment, therefore, has to be made under rules and under orders of the competent authority.

31. In a democratic set up like ours, which is governed by rule of law, the supremacy of law is to be acknowledged and absence of arbitrariness has been consistently described as essence of rule of law. Thus, the powers have to be canalised and not unbridled so as to breach the basic structure of the Constitution. Equality of opportunity in matters of employment being the constitutional mandate has always been observed. The unquestionable authority is always subject to the authority of the Constitution. The higher the dignitary, the more objectivity is expected to be observed. We do not say that powers should be curtailed. What we want to say is that the power can be exercised only to the width of the constitutional and legal limits. The date of retirement of every employee is well known in advance and therefore, the number of vacancies likely to occur in near future in a particular cadre is always known to the employer. Therefore, the exercise to fill up the vacancies

at the earliest must start in advance to ensure that the selected person may join immediately after availability of the post, and hence, there may be no occasion to appoint any person on ad-hoc basis for the reason that the problem of inducting the daily labourers who are ensured of a regular appointment subsequently has to be avoided and a fair procedure must be adopted giving equal opportunity to everyone."

7. A learned Division Bench of this Court (of which I was one of the Member) in ***Lal Singh*** *versus* ***H.P. State Co-operative Milk Producers Federation Limited, LPA No.282 of 2010,*** decided on 17th November, 2015, dealt with a question as to whether the adhoc appointment/temporary arrangement/stop-gap arrangement will not create any right, title or interest and it was held :-

"15. The Apex Court, in a series of cases, has considered the question as to whether ad hoc appointment/temporary arrangement/stop gap arrangement will create any right, title, equity or interest.

16. The Apex Court in a case titled as **Director, Institute of Management Development, U.P. versus Smt. Pushpa Srivastava,** reported in **AIR 1992 Supreme Court 2070,** held that a person, who was appointed on ad hoc basis or without following the due process, cannot claim any right for his regularization. It is apt to reproduce paras 22 and 23 of the judgment herein:

"22. In dealing with this, at page 577 (of 1990 (1) Supp SCR 562) : (at p. 2238 of AIR 1990 SC 2228), the Court observed:

"If any person who does not possess the requisite qualifications is appointed under the said clause, he will be liable to be replaced by a qualified person. Clause (iii) of Rule 9 states that a person appointed under clause (i) shall, as soon as possible, be replaced by a member of the service or an approved candidate qualified to hold the post. Clause (e) of Rule 9, however, provided for regularisation of service of any person appointed under clause (1) of sub-rule (a) if he had completed continuous service of two years on December 22, 1973, notwithstanding anything contained in the rules. This is a clear indication that in the past the Government also considered it Just and fair to regularise the services of those who had been in continuous service for two years' period to the cut-off date. The spirit underlying this treatment clearly shows that the Government did not consider it just, fair or reasonable to terminate the services of those who were in employment for a period of two or more years' period to the cut-off date. 'This approach is quite consistent with the spirit of the rule which was intended to be invoked to serve emergent situations which could not brook delay. Such appointments were intended to be stop-gap temporary appointments to serve the stated purpose and not long term ones. The rule was not intended to fill a large number of posts in the service but only those which could not be kept vacant till regular appointments were made in accordance with the rules. But once the appointments continued for long, the services had to be regularised if the incumbent

> possessed the requisite qualifications as was done by sub-rule (e). Such an approach alone would be consistent with the constitutional philosophy adverted to earlier. Even otherwise, the rule must be so interpreted, if the language of the rule permits, as will advance this philosophy of the Constitution. If the rule is so interpreted it seems clear to us that employees who have been working on the establishment since long, and who possess the requisite qualifications for the job as obtaining on the date of their employment, must be allowed to continue on their jobs and their services should be regularised."
>
> 23. In the instant case, there is no such rule. The appointment was purely ad hoc and on a contractual basis for a limited period. Therefore, by expiry of the period of six months, the right to remain in the post comes to an end."

17. The Apex Court in another case titled as **State of Karnataka and others versus P.M. Bhaskara Gowda and others,** reported in **AIR 2004 Supreme Court 317,** laid down the same principle.

18. In the cases titled as **Chief Commissioner of Income-tax, Bhopal & Ors. versus M/s. Leena Jain & Ors.,** reported in **2006 AIR SCW 6066, Accounts Officer (A & I), APSRTC & Ors., versus K.V. Ramana & Ors.,** reported in **2007 AIR SCW 1185,** and **Rajasthan Krishi Vishva Vidhyalaya, Bikaner versus Devi Singh,** reported in **2008 AIR SCW 1383,** held that an employee cannot claim regularization merely on the basis of long rendition of service.

19. This question again arose for consideration before the Apex Court in the case titled as **State of U.P. & Anr. versus Ram Adhar,** reported in **2008 AIR SCW 5479,** wherein it has been held that a person appointed in a temporary capacity has no right to continue till regular selection is made. It is apt to reproduce para 5 of the judgment herein:

> "5. It may be mentioned that there is no principle of law that a person appointed in a temporary capacity has a right to continue till a regular selection Rather, the legal position is just the reverse, that is, that a temporary employee has no right to the post vide State of U.P. v. Kaushal Kishore, (1991) 1 SCC 691. Hence, he has no right to continue even for a day as of right, far from having a right to continue till a regular appointment."

20. We have laid down our hands on a judgment, which has arisen from the judgment rendered by a learned Single Judge of this Court in **Ravinder Singh versus State of H.P. & ors.,** reported in **2006 Lab. I.C. 1409.** In terms of the said judgment, the learned Single Judge of this Court directed the State Government to consider the case of an employee, who was appointed on daily rated basis, for regularization, which came up for consideration before the Apex Court in the case titled as **State of Himachal Pradesh & Anr. versus Ravinder Singh,** reported in **2009 AIR SCW 452** and the judgment of this Court was set aside. It is profitable to reproduce paras 8 and 9 of the judgment herein:

> "8. In addition it has to be noted that the Labour Court had observed that the name of the respondent claimant was not

> sponsored by the employment exchange; there was no appointment order; the requirements relating to procedure to be followed at the time of recruitment were also not fulfilled. There was a mere back-door entry. It was further noted that they were not selected in the manner as applicable to regular employees who are liable to be transferred and are subject to disciplinary proceedings to which daily-rated workers are not subjected to.
>
> 9. In the background of what has been stated above the directions given for regularization in the post of clerk being indefensible are set aside. However, undisputedly the appellants had regularized the services of the respondent as a Chowkidar in July, 1997 which the respondent had refused. If the respondent is so advised, he may accept the order in that regard by submitting the requisite documents within six weeks from today. If not so done, the respondent shall not be entitled to any relief in terms of the High Court s impugned order which as noted above we have set aside."

8. In view of the exposition of law, it can safely be held that the petitioners who were appointed through the backdoor must leave from the same door.

9. Learned counsel for the petitioners would then argue that the respondents should not be permitted to out source the services against which they are working as the same is against the law and as per the judgment of the Hon'ble Supreme Court in ***Rattanlal and others etc. etc.*** *versus* ***State of Haryana and others AIR 1987 SCC 478***.

10. I have considered the aforesaid submissions in light of the judgment cited by the learned counsel for the petitioners and find that the precedent as sought to be relied upon is not at all applicable to the facts of the present case. In ***Rattanlal's case*** (supra), the teachers were being appointed on adhoc basis for years together and were being illegally and arbitrarily hired and fired and taking into consideration these facts, the State of Haryana was directed to make regular appointments of teachers and also consider sympathetically the cases of the adhoc teachers for relaxing the age prescribed for appointment to these posts. Whereas, in the instant case, the services of the petitioners were availed off in exigency of service when the respondent-College became partially operational in the year 2012. The appointment of the petitioners was neither through the Employment Exchange nor through some method consistent with Article 14 of the Constitution. It is only on the basis of applications submitted by the petitioners and thereafter walk-in-interview conducted by the respondents that the petitioners came to be engaged on consolidated salaries that too for three months.

11. The other issue raised in CWP No.618 of 2014 to the effect that the services of the petitioner should not have been dispensed with by appointing another person in her place in the subsequent selection has been rendered academic in view of the stand now taken by the respondents wherein it has been categorically mentioned that the services against which the petitioner had been appointed are to be out sourced.

12. Insofar as the question of out sourcing is concerned, the same is the sole discretion of the respondents being a matter of policy. It is more than settled that policy decision can be interfered with on very limited ground and only if it is proved that the policy is arbitrary or malafide or manifestly contrary to public interest. The individual grievance of the petitioners cannot partake the form of public interest and 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 policy is wise or a better public policy could have been evolved. The Courts

are not inclined to strike down the policy at the behest of the petitioners merely because it is urged that a different policy would have been fairer or wiser, more scientific or more logical. Therefore, unless the policy or action is inconsistent with the Constitution and the laws are arbitrary or irrational or abuse of the power, the Court will not interfere with such matters.

13. In view of the aforesaid discussion, there is no merit in these petitions and the same are accordingly dismissed, leaving the parties to bear their own costs. Pending application(s), if any also stand disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters. Interim orders dated 24.01.2014, 29.05.2014 and 05.06.2014 are vacated.

****

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

State of H.P. and others .....Appellants.
versus
Naresh Lal .....Respondent.

LPA No.333 of 2010
Reserved on: 05.11.2015.
Pronounced on: 01.12.2015.

Constitution of India, 1950- Article 226- Petitioner was appointed as a Constable who was dismissed from the service after conducting an inquiry- he approached the Director General of Police for granting compassionate allowance which was granted w.e.f. 24th March, 1994- petitioner made a reference that he was entitled to allowance from 30.10.1982 which was rejected- held, that compassionate allowance is one of the kind of pensions specified in CCS (Pension) Rules, 1972- pension is payable from the date when an employee ceases to be in the employment and not from any other date- order of dismissal/removal will be effective from the date of removal or dismissal from the service; hence, compassionate allowance will be payable from the date of dismissal- therefore, writ Court had rightly held that writ petitioner is entitled to compassionate allowance with effect from the date of the dismissal- petition dismissed. (Para-3 to 13)

Cases referred:
Punjab Dairy Development Corporation Ltd. and another vs. Kala Singh and others, (1997) 6 Supreme Court Cases 159
L.S. Thakur vs. Punjab National Bank & Ors., 2011(2) Him L.R. 647
Mahinder Dutt Sharma vs. Union of India and others, (2014) 11 Supreme Court Cases 684

For the appellants: M/s Romesh Verma & Anup Rattan, Addl.A.Gs., and J.K. Verma, Dy.A.G.
For the respondent: Mr.Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.:

This appeal is directed against the judgment, dated 14th September, 2010, passed by a learned Single Judge of this Court in CWP(T) No.4101 of 2008, titled Naresh Lal

vs. State of H.P. and others, whereby the writ petition, filed by the petitioner (respondent herein), came to be allowed and the writ respondents (appellants herein) were directed to grant Compassionate Allowance to the writ petitioner w.e.f. 30th October, 1982, with interest at the rate of 7% per annum, (for short, the impugned judgment).

2. Heard learned counsel for the parties and gone through the writ record.

3. The writ petitioner was appointed as Constable, was dismissed from service after conducting an inquiry, on 30th October, 1982. Thereupon, he approached the Director General of Police, Himachal Pradesh for grant of Compassionate Allowance, was granted vide order dated 18th April, 1994 w.e.f. 24th March, 1994, constraining him to make a representation to the Director General of Police, Himachal Pradesh praying that he was entitled to the said Allowance right from 30th October, 1982, the date of his dismissal, instead of 24th March, 1994, was rejected constraining him to file the writ petition.

4. The questions involved in this appeal are – i) Whether Naresh Lal, writ petitioner, was entitled to Compassionate Allowance w.e.f. 24th March, 1994, the date when the order for granting Compassionate Allowance came to be made by the Authority, or on 30th October, 1982, the date on which the petitioner was dismissed from service; ii) Whether the Compassionate Allowance can be termed as Pension in terms of Central Civil Services Pension Rules, 1972, (for short, the Rules).

5. In order to determine the questions supra, we may refer to Rule 41 of the Rules ibid, which deals with Compassionate Allowance. It is apt to reproduce Rule 41 hereunder:

> ***"41. Compassionate allowance***
>
> *(1) A Government servant who is dismissed or removed from service shall forfeit his pension and gratuity :*
>
> *Provided that the authority competent to dismiss or remove him from service may, if the case is deserving of special consideration, sanction a compassionate allowance not exceeding two-thirds of pension or gratuity or both which would have been admissible to him if he had retired on compensation pension.*
>
> *(2) A compassionate allowance sanctioned under the proviso to sub-rule (1) shall not be less than the amount of Rupees three thousand five hundred per mensem."*

6. Thus, Rule 41 of the Rules gives power to the competent Authority to sanction Compassionate Allowance in favour of a employee, who stands dismissed or removed, as the case may be, from service, provided the Allowance does not exceed two-thirds of the pension or gratuity or both.

7. We may also refer to Government of India's Decision No.2, dated 23rd April, 1977, under Rule 41 of the Rules, that the Compassionate Allowance is a pension. It is apt to reproduce Decision No.2 hereunder:

> ***"2) Commutation of Compassionate Allowance permissible.*** *- A question has been raised whether Government servants drawing Compassionate Allowance under Rule 41 of the Central Civil Services (Pension) Rules, 1972, are entitled to commute a part of such Compassionate Allowance as in the case of other kinds of pension or not. The matter has been considered and it is clarified that the Compassionate Allowance is one of the various kinds of pensions enumerated in the CCS (Pension) Rules, 1972, and as such the CCS (Commutation of Pension) Rules, 1981, would apply to the Compassionate Allowance in the same manner as in respect of any other class of pension.*

[G.I., M.F., O.M. No. F.14 (3)-E. V (A)/76, dated the 23rd April, 1977.]"

8. Thus, from a perusal of Rule 41 of the Rules ibid, read with Government of India's Decision No.2, supra, one comes to an inescapable conclusion that the Compassionate Allowance is *"one of the various kinds of pensions enumerated in the CCS (Pension) Rules, 1972".*

9. Pension is always payable from the date an employee ceases to be in the employment and not from any other date. It is also well settled principle of law that pension is a property and not a bounty and the person entitled for it cannot be deprived of it from the date he is entitled to it.

10. The Apex Court in **Punjab Dairy Development Corporation Ltd. and another vs. Kala Singh and others, (1997) 6 Supreme Court Cases 159** held that dismissal order would relate back to the date on which the order was passed by the Management and would not be operative from any other date. It is apt to reproduce paragraph 2 of the said decision hereunder:

> *"2. In view of the aforesaid decisions and in view of the findings recorded by the Labour Court, we are of the considered opinion that the view expressed in Desh Raj Gupta's case (AIR 1990 SC 2174) is not correct. It is accordingly overruled. Following the judgment of the Constitution Bench, we hold that on the Labour Court's recording a finding that the domestic enquiry was defective and giving opportunity to adduce the evidence by the Management and the workman and recording of the finding that the dismissal by the management was valid, it would relate back to the date of the original dismissal and not from the date of the judgment of the Labour Court."*

11. This Court in case **L.S. Thakur vs. Punjab National Bank & Ors., 2011(2) Him L.R. 647,** has held that the order of dismissal or removal of an employee from service would be effective from the day on which he/she was removed or dismissed from service. Terming the Compassionate Allowance as pension, it was further held that employee would be entitled to pension from the date of dismissal or removal from service. It is apt to reproduce paragraph 4 of the said decision hereunder:

> *"4. It is pertinent to mention that the Scheme was notified w.e.f. 1.11.1999. The stand of the Bank is that the petitioner retired from service on 26.12.1989 and, therefore, is not covered by the Scheme. Shri P.P.Chauhan contended that the order of compulsory retirement was passed on 11.11.1997 after the Scheme came into force. This submission in my view cannot be accepted because though the order of compulsory retirement may have been passed on 11.11.1997 it will be effective from 26.12.1989 i.e. the day on which he was removed from service. The order of compulsory retirement only replaced the order of removal and therefore will have effect from the said date and it has to be effective from 26-12-1989.*
>
> *5. In **P.H Kalyani** Vs. **Air France, (1964)2 SCR 104** a Constitution Bench of the Apex Court held that when a Labour Court/ Industrial Tribunal finds that the domestic enquiry was defective and gives the party an opportunity to again lead evidence and thereafter another displinary order is passed and that order is held to be valid, then the subsequent order relates back to the date when the original order of dismissal was passed. Following the laid down by the Constitution Bench, the Apex Court in **Punjab Dairy Development Corporation Limited and another** Vs**. Kala Singh & Others (1997)6 Supreme Court Cases 159** also took the same view . Thus it is apparent that the order of compulsory retirement passed in the year 11-11-1997 would relate back to 26-12-1989 when the original order of dismissal was passed."*

12. The Apex Court in its latest decision in case titled as **Mahinder Dutt Sharma vs. Union of India and others, (2014) 11 Supreme Court Cases 684,** while dilating upon Rule 41 of the Rules ibid, has laid down certain parameters for grant of Compassionate Allowance. It is apt to reproduce paragraphs 14 and 15 of the said decision hereunder:

> *"14. In our considered view, the determination of a claim based under Rule 41 of the Pension Rules, 1972, will necessarily have to be sieved through an evaluation based on a series of distinct considerations, some of which are illustratively being expressed hereunder:-*
>
> > *14.1 (i) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of moral turpitude? An act of moral turpitude, is an act which has an inherent quality of baseness, vileness or depravity with respect to a concerned person's duty towards another, or to the society in general. In criminal law, the phrase is used generally to describe a conduct which is contrary to community standards of justice, honesty and good morals. Any debauched, degenerate or evil behaviour would fall in this classification.*
> >
> > *14.2 (ii) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act of dishonesty towards his employer? Such an action of dishonesty would emerge from a behaviour which is untrustworthy, deceitful and insincere, resulting in prejudice to the interest of the employer. This could emerge from an unscrupulous, untrustworthy and crooked behaviour, which aims at cheating the employer. Such an act may or may not be aimed at personal gains. It may be aimed at benefiting a third party, to the prejudice of the employer.*
> >
> > *14.3 (iii) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, an act designed for personal gains, from the employer? This would involve acts of corruption, fraud or personal profiteering, through impermissible means by misusing the responsibility bestowed in an employee by an employer. And would include, acts of double dealing or racketeering, or the like. Such an act may or may not be aimed at causing loss to the employer. The benefit of the delinquent, could be at the peril and prejudice of a third party.*
> >
> > *14.4 (iv) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, aimed at deliberately harming a third party interest? Situations hereunder would emerge out of acts of disservice causing damage, loss, prejudice or even anguish to third parties, on account of misuse of the employee's authority to control, regulate or administer activities of third parties. Actions of dealing with similar issues differently, or in an iniquitous manner, by adopting double standards or by foul play, would fall in this category.*
> >
> > *14.5 (v) Was the act of the delinquent, which resulted in the infliction of the punishment of dismissal or removal from service, otherwise unacceptable, for the conferment of the benefits flowing out of Rule 41 of the Pension Rules, 1972? Illustratively, any action which is considered as depraved, perverted, wicked, treacherous or the like, as would disentitle an employee for such compassionate consideration.*
>
> *15. While evaluating the claim of a dismissed (or removed from service) employee, for the grant of compassionate allowance, the rule postulates a window for hope, " if the*

case is deserving of special consideration ". Where the delinquency leading to punishment, falls in one of the five classifications delineated in the foregoing paragraph, it would ordinarily disentitle an employee from such compassionate consideration. An employee who falls in any of the above five categories, would therefore ordinarily not be a deserving employee, for the grant of compassionate allowance. In a situation like this, the deserving special consideration, will have to be momentous. It is not possible to effectively define the term "deserving special consideration" used in Rule 41 of the Pension Rules, 1972. We shall therefore not endeavour any attempt in the said direction. Circumstances deserving special consideration, would ordinarily be unlimited, keeping in mind unlimited variability of human environment. But surely where the delinquency leveled and proved against the punished employee, does not fall in the realm of misdemeanour illustratively categorized in the foregoing paragraph, it would be easier than otherwise, to extend such benefit to the punished employee, of course, subject to availability of factors of compassionate consideration."

13. Applying the tests to the facts of the instant case, we are of the considered view that the Writ Court has rightly made the discussion and has rightly held that the writ petitioner was entitled to Compassionate Allowance from the date he was dismissed from service. Thus, the impugned judgment is legal one, needs no interference.

14. Accordingly, we hold that there is no merit in the instant appeal and the same is dismissed, alongwith pending CMPs, if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

State of Himachal Pradesh ....Appellant/Petitioner

Versus

Laiq Ram son of Shri Bhim Dutt & others ....Respondents/Non-petitioners

Cr.MP(M) No. 1170 of 2015
Date of Order 1st December 2015

Code of Criminal Procedure, 1973- Section 378(3)- 500 grams charas was recovered from the vehicle of the accused- accused was acquitted by the trial Court on the ground that two views were possible- held, that where two views are appearing on the record, the one in favour of the accused has to be preferred- there were material improvements and contradictions due to which testimonies of police officials had become doubtful- thus, it would not be expedient to grant leave to appeal- application dismissed. (Para-9 and 10)

Cases referred:

Shashi Pal and others vs. State of H.P., 1998(2) SLJ 1408
State of H.P. vs. Sudarshan Singh, 1993(1) SLJ 405,
Mulak Raj vs. State of Haryana, SLJ 1996(2) 890 Apex Court
State of H.P. vs. Hanchoo alias Stewart, Latest HLJ 2004 HP 642 (DB)
State of H.P. vs. Manohar Lal, Latest HLJ 2010 (HP) 705
State of H.P. vs. Man Singh, Latest HLJ 2009 (HP) 774
State of H.P. vs. Bhangi Ram, Latest HLJ 2009(HP) 835
Mohammad Rafik vs. State of H.P., 2014(3) Him.L.R. (DB) 1391

State of H.P. vs. Deen Mohammad, Latest HLJ 2010(HP) 1386
State of H.P. vs. Sangat Ram and another, 2013(2) Shim.LC 1043
Sonu vs. State of H.P., Latest HLJ 2006(HP) 256

For the Petitioner: Mr. J.S. Guleria, Assistant Advocate General.
For the Non-petitioner: None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Order under Section 378(3) of Code of Criminal Procedure 1973:-

Present petition is filed under Section 378 (3) of Code of Criminal Procedure for grant of leave to appeal against judgment of acquittal dated 31.3.2015 passed by learned Special Judge-I Shimla District Shimla in Sessions trial No. 15-S/7 of 2010 titled State of H.P. vs. Laiq Ram and others under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act 1985.

Brief facts of the case

2. It is alleged by prosecution that on 14.2.2009 at about 5.15 PM at place Sandoha on Shimla Sunni Public road within the jurisdiction of P.S. Dhalli District Shimla police party headed by SI Keshav Singh and consisting of ASI Chet Ram, ASI Mohinder, HC Hemant, C. Dalip Kumar, C. Rajinder, C. Rajesh Kumar, C. Sushil Kumar and C. Govind Ram were on patrolling duty in government vehicle. It is alleged by prosecution that Max-pickup jeep bearing No. HP-09A-1315 came at the spot which was driven by accused namely Amar Chand and remaining accused namely Laiq Ram, Amar Singh and Partap Singh were sitting inside the jeep. It is further alleged by prosecution that accused could not produce the documents of vehicle and accused persons became perplexed. It is alleged by prosecution that on suspicion the vehicle was searched and consent memo Ext.PW1/A was prepared. It is alleged by prosecution that after search one bag was found containing eight hides(skin) of leopard and one another polythene bag was found containing 500 grams of charas. It is alleged that two samples of charas 25 grams each were separated and thereafter recovered charas and sample of charas were sealed in two separate parcels Ext.P1 and Ext.P3 which were took into possession vide seizure memo Ext.PW1/E and said memo Ext.PW1/E was signed by independent witnesses Narayan Singh and Tajinder Singh along with accused persons. It is further alleged that recovered hides (skin) of leopard were handed over to Forest Guard Hira Lal vide memo Ext.PW1/E. It is further alleged by prosecution that Investigating Officer clicked photographs of spot Ext.PW11/A to Ext.PW11/D and personal search of accused persons was conducted vide memos Ext.PW17/B to Ext.PW17/E and spot ruka Ext.PW17/F was sent to police station Dhalli and thereafter FIR Ext.PW1/G was registered against accused persons. It is alleged by prosecution that NCB form Ext.PW17/K was duly filled and sample of seal impression 'C' was obtained on separate piece of cloth Ext.PW17/A. It is further alleged by prosecution that thereafter on 17.7.2009 PW10 HC Shiv Kumar handed over one sealed parcel to C. Parma Nand for carrying the same to FSL Junga vide RC No. 36 of 2009 Ext.PW10/B and thereafter on 24.4.2010 MHC PW10 Shiv Kumar also handed over two parcels to PW4 C. Anil Kumar for carrying the same to FSL Junga vide RC No. 70 of 2010 Ext.PW10/B. It is alleged by prosecution that reports of FSL Junga Ext.PW17/L-1 and Ext.PW17/L-2 were obtained and thereafter statements of prosecution witnesses recorded as per their versions. It is alleged by prosecution that thereafter police prepared separate challan regarding recovery of hides of leopard and presented the same in Court.

3. Charge was framed against accused persons vide order dated 10.5.2012 under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act 1985. Accused persons did not plead guilty and claimed trial.

4. Prosecution examined seventeen witnesses as mentioned in annexed Form-A with judgment and also tendered documentary evidence as mentioned in annexed Form-B with judgment. Statements of accused under Section 313 Cr.P.C. recorded. Accused persons examined one witness in defence.

5. Learned Special Judge Shimla acquitted the accused persons qua offences under Sections 20 and 29 of NDPS Act 1985 after giving them benefit of doubt.

6. Feeling aggrieved against the judgment passed by learned trial Court State of H.P. filed present appeal against acquittal and sought permission for grant of leave to appeal.

7. We have heard learned Assistant Advocate General appearing on behalf of the petitioner and also perused the record.

8. Following points arise for determination in present petition:-

1. Whether it is expedient in the ends of justice to grant leave to appeal under Section 378(3) of Code of Criminal Procedure 1973 against judgment of acquittal dated 31.3.2015 passed by learned Special Judge Shimla in Sessions trial No. 15-S/7 of 2010 titled State of H.P. vs. Laiq Ram and others as alleged in memorandum of grounds of petition?
2. Final Order.

Findings on Point No.1 with reasons

9. We have carefully perused the judgment passed by learned Special Judge Shimla placed on record. It is the case of prosecution that charas measuring 500 grams was found from exclusive and conscious possession of accused. Seizure memo of charas was prepared in presence of independent witnesses namely Narayan Singh and Tajinder Singh. We are of the opinion that seizure memo of contraband is a substantial document of evidence in NDPS cases. In present case independent witness namely PW15 Narayan Singh did not support the prosecution story as alleged by prosecution. PW15 independent witness has stated in positive manner that no incriminating substance i.e. charas was recovered from possession of accused in his presence. On contrary police officials have stated that charas was recovered from conscious and exclusive possession of accused in their presence. Learned Special Judge Shimla has acquitted the accused on the ground of two views theory. It is well settled law that when two contradictory views are possible as per testimonies of eye witnesses then view favourable to accused should be adopted by Court. Learned trial Court has specifically held in judgment that there is material improvement and contradiction in testimonies of police officials. It is well settled law that if two views have emerged in the prosecution case then view favourable to the accused has to be taken into consideration. ***See: 1998(2) SLJ 1408, titled Shashi Pal and others vs. State of H.P. See: 1993(1) SLJ 405, titled State of H.P. vs. Sudarshan Singh. Also see SLJ 1996(2) 890 Apex Court titled Mulak Raj vs. State of Haryana.*** It was held in case reported in ***Latest HLJ 2004 HP 642 (DB) titled State of H.P. vs. Hanchoo alias Stewart*** that if in NDPS case independent witness did not support prosecution then benefit of doubt should be given to accused.

10. In view of the fact that learned Special Judge Shimla has acquitted the accused persons on the concept of two views theory and in view of the fact that PW15

Narayan Singh independent witness of seizure memo did not support the prosecution and did not incriminate the accused persons and in view of the fact that learned Special Judge has relied upon rulings reported in ***Latest HLJ 2010 (HP) 705 titled State of H.P. vs. Manohar Lal, Latest HLJ 2009 (HP) 774 titled State of H.P. vs. Man Singh, Latest HLJ 2009(HP) 835 titled State of H.P. vs. Bhangi Ram, 2014(3) Him.L.R. (DB) 1391 titled Mohammad Rafik vs. State of H.P., Latest HLJ 2010(HP) 1386 titled State of H.P. vs. Deen Mohammad, 2013(2) Shim.LC 1043 titled State of H.P. vs. Sangat Ram and another and Latest HLJ 2006(HP) 256 titled Sonu vs. State of H.P.*** we are of the opinion that it is not expedient in the ends of justice to grant leave to appeal against judgment of acquittal passed by learned Special Judge Shimla. Point No.1 is answered in negative.

Point No.2 (Final Order)

11. In view of our findings on point No.1 petition filed under Section 378 (3) of Code of Criminal Procedure 1973 against the judgment of acquittal is dismissed and it is held that there are no sufficient grounds for grant of leave to appeal against judgment of acquittal. Cr.MP(M) No. 1170 of 2015 is disposed of.

****

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

Suresh Chander Chauhan .....Appellant

Versus

Himachal Pradesh State Electricity Board ....Respondent.

LPA No.132 of 2009.
Judgment reserved on 5.11.2015.
Date of decision: 1st December, 2015.

Constitution of India, 1950- Article 226- Writ Court had allowed the writ petition but had not granted the back wages for a period of three years- held, that arrears can be restricted only for three years prior to filing of writ petition- petitioner had approached the Court for redressal of his grievances in the year 1989, though, right had accrued to him in the year 1978 – therefore, arrears were rightly restricted for a period of three years by Writ Court. (Para-5 to 11)

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: Ms. Sunita Sharma, Advocate.
For the respondent: Mr. Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this Letters Patent Appeal is to the judgment and order dated 24.3.2009, made by the learned Single Judge of this Court in CWP(T) No. 2534/2008, (OA

No. 1283/1996) titled *Suresh Chander Chauhan versus H.P.S.E.B.,* for short "the impugned judgment", whereby the writ petition came to be partly allowed with direction to the respondent to consider the petitioner's case for promotion to the post of UDC w.e.f. 30.3.1989, on the basis of his seniority and pay consequential benefits for a period of three years prior to the filing of the petition, on the grounds taken in the memo of appeal.

2. Respondent-Board has not questioned the impugned judgment. Thus, the impugned judgment has attained finality so far as the same relates to it.

3. The petitioner has questioned the impugned judgment only to the extent that the Writ Court has fallen in an error in restricting the back-wages to three years, prior to filing of the writ petition.

4. Heard.

5. The learned counsel for the appellant has argued that the petitioner was entitled to arrears right from the date he was entitled to promotion, i.e., w.e.f. 30.3.1989 but the respondent, without any rhyme or reason, has not considered his case for promotion despite the fact that the petitioner has made so many representations and was projecting his case regularly and ultimately order Annexure A3 dated 24.4.1996, came to be passed, was subject matter of the writ petition and which stands quashed by the Writ Court. Hence, the petitioner cannot be deprived of his right on the ground of limitation. The argument though attractive, is devoid of any force, for the following reasons.

6. 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.

7. 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]*

8. In the case in hand, which was subject matter of the above writ petition, the petitioner had approached for the redressal of his grievances in the month of March, 1989 though his right has accrued in the year 1978, thus, the arrears was rightly restricted only for a period of three years prior to filing of the writ petition.

9. The 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....

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."

10. 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]

11. Having said so, the Writ Court has rightly made the impugned judgment, needs no interference.

12. Accordingly, the appeal is dismissed along with pending applications, if any.

****

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

Indra Devi. .....Petitioner.

Versus

State of H.P. & ors. ..... Respondents.

CWP No. 1640 of 2015.
Date of decision: December 2, 2015

Constitution of India, 1950- Article 226- Petitioner, respondent No.5 and other candidates had applied for the post of teacher Political Science- they were interviewed by Selection Committee- petitioner contended that she was more meritorious from academic point of view and was entitled to be selected against the post in question- however, respondent No. 5 was selected on extraneous considerations to defeat the claim of petitioner- respondent contended that marks were awarded on the basis of criteria laid down in Recruitment and Promotion Rules- merit was not sole criteria for appointment- record shows that petitioner is more meritorious than respondent No. 5- her ranking was higher as compared to respondent No. 5 as far as the educational qualification is concerned- she was adjudged equally by two members of the Board- one Member had given 10 marks to respondent No. 5 while 2 marks were awarded to the petitioner- awarding 10 marks has vitiated the selection - the possibility of awarding the marks on extraneous considerations cannot be ruled out- further, the member awarding the highest marks was only middle pass and was not competent to assess the ability and fitness of candidates having post graduate qualification for the post of Graduate Teacher – petition allowed and direction issued to advertise the post afresh and to make selection thereafter. (Para-6 to 9)

For the petitioner : Mr. Rajesh Verma, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. Virender Verma, Additional Advocate General for respondents No. 1 to 3.

Mr. Raj Negi, Advocate, vice Mr. Narender Thakur, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

This petition has been filed with the following prayers:-

"(i) That entire record pertaining to the present case, may kindly be summoned and examined.

(ii) That the selection of the respondent No. 5 may kindly be quashed and set-aside and petitioner may kindly be allowed to be appointed against the post of PGT in Govt. Sr. Sec. School Bughar, Tehsil Arki, Distt. Solan, HP being a meritorious candidate."

2. One post of Post Graduate Teacher in the subject of Political Science was lying vacant in Govt. Senior Secondary School, Bughar, Tehsil Arki, District Solan, Himachal Pradesh. The post was proposed to be filled up through School Management Committee under the policy framed by the respondents-State for appointment of teachers through School Management Committees. Petitioner and respondent No. 5 alongwith other candidates had applied for the post in question. They were interviewed by a Selection Committee comprising SDM, Arki, President School Management Committee and Principal-cum-Member Secretary, Govt. Senior Secondary School, Bughar on 6th December, 2014. The criteria for distribution of marks to assess the merit of a candidate to the post is Annexure P-1. The evaluation sheet Annexure P-1 reveals that so far as the academic qualification is concerned, the petitioner being B.A., B.Ed. and Post Graduate also was higher in merit as compared to respondent No. 5 and for that matter other candidates, who appeared in the interview because out of 50 marks prescribed for academic qualification, her score is 27.5 followed by the score of respondent No. 5, which is 26.1. The Selection Committee, more particularly President of the School Management Committee-respondent No. 4 has awarded 10 marks out of 10 to respondent No. 5, whereas only two marks to the petitioner. As regards the remaining two members, while the Chairman i.e. SDM, Arki has awarded 8 marks to the petitioner, 9 to respondent No. 5 and the Principal of the School 8 marks each to the petitioner and respondent No. 5. It is writ large from the face of record that on account of 10 marks out of 10 awarded in personal interview by respondent No. 4 to respondent No. 5, he ultimately succeeded to top the merit list and secured the appointment against the post in question.

3. The complaint is that the petitioner being more meritorious from academic point of view in all fairness was entitled to be selected against the post in question. However, it is on account of extraneous consideration and political reasons the Selection Committee particularly President of respondent No. 4 has favoured respondent No. 5 and awarded marks to which he was not entitled. Also that the respondent No. 4 has given 10 marks out of 10 to respondent No. 5 and thereby defeated her legitimate claim.

4. In reply to the writ petition filed on behalf of respondents-State, its stand is that all the members have awarded the marks to the candidate appeared in the interview and also that only requirement under the Recruitment and Promotion Rules qua essential qualification was that the candidate should possess 50% marks in Post Graduate. The stand of the respondents-State , therefore, is that the merit was not the criteria and rather it is the condition of 50% marks in Post Graduate the only requirement for selection against the post in question.

5. Respondent No. 4 has not opted for putting appearance. As regards respondent No. 5 on his behalf, the reply to the writ petition filed on behalf of respondents-State has been adopted as stated by Learned Counsel at the Bar. It is urged that selection of the said respondent is in accordance with the Rules and as such, he has rightly been appointed against the post in question.

6. There cannot be any dispute so far as the merit of the petitioner is concerned because on academic side she is more meritorious as compared to respondent No. 5. As a matter of fact, a teacher should be proficient on academic side. The ranking of the petitioner was higher as compared to respondent No. 5 so far as the educational qualification is

concerned. Even in personal interview also she has been adjudged equally by two members out of three and it is the 3rd member i.e. President of the School Management Committee who has given 10 marks out of 10 to respondent No. 5 whereas 2 marks to the petitioner. The awarding of 10 marks out of 10 in personal interview to respondent No. 5 has vitiated the entire selection proceedings. The possibility of the President of School Management Committee having awarded such marks to respondent No. 5 due to some extraneous consideration or for oblique motive cannot be ruled out. Otherwise also, the President of respondent No. 4-Committee being only middle pass was not at all competent and qualified to assess the ability and fitness of a candidate having Post Graduate qualification for the post of Lecturer. The respondent No. 4, therefore, has definitely helped respondent No. 5 out of way with a view to enable him to get selected and oust the petitioner who was more meritorious. The selection process, therefore, is vitiated and as such the appointment of respondent No. 5 is not legally sustainable.

7. Anyhow, the said respondent stands appointed. However, in terms of the interim order passed in CMP No. 2814 of 2015, his appointment is subject to the outcome of the writ petition, meaning thereby that his appointment as Post Graduate Teacher in the subject of Political Science in the school not confer any legitimate right upon him to continue as such any further.

8. In view of what has been said hereinabove, this writ petition succeeds and the same is accordingly allowed. Consequently, the selection of respondent No. 5 as Post Graduate Teacher in the subject of Political Science in Govt. Senior Secondary School, Bughar is quashed and set aside. There shall be a direction to respondent No. 1 to arrange for initiating selection process afresh in terms of the policy and to ensure that fair selection is made. The 2nd respondent to advertise the post afresh and make selection thereafter. The selection process be completed within three months from the date of receipt of certified copy of this judgment.

9. Before parting, it is expected from the respondents-State to consider in the larger public interest that a person having middle standard as his qualification should be made as part of the selection process to be initiated under the Scheme for making selection of the candidates having Post Graduation as their qualification for the post of Lecturer.

10. The writ petition is accordingly disposed of. Pending application(s), if any, also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sh. Krishan Lal S/o Sadhu Ram ....Revisionist.

Versus

Golf Link Finance and Resorts Pvt. Ltd. ....Non-revisionist.

Cr. Revision No. 224 of 2014
Decided on: 2.12.2015.

Code of Criminal Procedure, 1973- Section 401- Matter has been compromised- an amount of Rs.50,000/- paid to non-revisionist- hence, sentence of imprisonment imposed by the trial Court as affirmed by Appellate Court set aside.

For the revisionist : Mr. Vipan Rajta, Advocate.
For the non-revisionist : Ms. Seema K. Guleria, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocates appearing on behalf of the parties submitted that compromise has been executed inter-se the parties and permission to compound the case be granted and present revision petition be disposed of accordingly. Statements of revisionist and learned Advocate appearing on behalf of the non-revisionist recorded and placed on record. Court is satisfied that lawful compromise executed inter-se the parties hence permission to compound the case is granted in the ends of justice. Learned Advocate appearing on behalf of the revisionist submitted that compensation of Rs. 50,000/- (Rupees fifty thousand) already paid to the non-revisionist. Learned Advocate appearing on behalf of the non-revisionist submitted that compensation amount received. Learned Advocate appearing on behalf of non-revisionist submitted that sentence of imprisonment imposed by learned trial Court and affirmed by appellate Court be set aside. In view of the above stated facts sentence of imprisonment imposed by learned trial Court and affirmed by appellate Court set aside. Judgment and sentence passed by learned trial Court and affirmed by learned first appellate Court are modified to this extent only. Statements of revisionist and learned Advocate appearing on behalf of non-revisionist shall form part and parcel of this order. Compounding fee will be deposited by revisionist before learned trial Court within fortnight. Record of learned trial Court be sent back forthwith along with certified copy of this order. Criminal Revision Petition No. 224 of 2014 is disposed of. Pending application if any also disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP Nos. 1853 & 2659 of 2015
Judgment reserved on: 17.11.2015.
Decided on: December 2, 2015

1. **CWP No. 1853 of 2015**
Nisha Kanwar ...Petitioner
Versus
State of Himachal Pradesh and others ...Respondents
2. **CWP No. 2659 of 2015**
Master Shourya Thakur ...Petitioner
Versus
State of Himachal Pradesh and others ...Respondents

Constitution of India, 1950- Article 226- Respondent No. 3 had refused to admit the minor son of the petitioner in +1 class Non-Medical Stream, on account of his performance in the matriculation examination- petitioner pleaded that his son was studying in School from K.G. Class- therefore, he was entitled to be admitted in +1 class automatically - respondent No. 3 stated that as per norms laid down by it children should have scored 80% in science and mathematics and 70% in commerce stream- held, that school may give the stream/course that may appear to be most suitable to child on the basis of the prescribed cut-off marks-

hence, school had not committed any error in declining admission to minor son of the petitioner. (Para-2 to 11)

Right of Children to Free and Compulsory Education Act, 2009- Section 13- Petitioner approached respondent No.4 for admitting his younger child in class 3, but the admission was declined on the ground that the child had not made the grade and could not be selected- petitioner claimed that school is situated at the distance of 75 meters and the child has an unfettered right to be admitted in the school- school pleaded that son of the petitioner had competed with other children but had failed to make the grade and, therefore, could not be granted admission- held, that every child of the age of 6 to 14 years shall have right to free and compulsory education in a neighborhood school till the completion of elementary education- however, this does not give any right to child of the parents to pick and choose a particular school- private aided recognized school has a right to autonomy- petition dismissed. (Para-12 to 20)

Cases referred:

Principal, Kendriya Vidyalaya and others versus Saurabh Chaudhary and others (2009) 1 SCC 794

T.M.A. Pai Foundation and others Vs. State of Karnataka and others (2002) 8 SCC, 481

P.A. Inamdar & others Vs. State of Maharashtra & others (2005) 6 SCC 537

Pramati Educational and Cultural Trust (Registered) and others Vs. Union of India and others (2014) 8 SCC 1

Master Aarav Goswami (Minor) Vs. State of Himachal Pradesh and another, 2015 (1) Him.L.R. 499

For the Petitioner(s) : Ms.Ranjana Parmar, Senior Advocate with Mr. Mohit Thakur and Ms.Komal Kumari, Advocates.

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 and 2 in CWP No. 1852 of 2015 and for respondents Nos. 1 to 3 in CWP No. 2659 of 2015.

Mr.K.D. Sood, Senior Advocate with Mr.Sanjeev Sood, Advocate, for respondent No. 3 in CWP No. 1853 of 2015.

Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate, for respondent No. 4 in CWP No. 2659 of 2015.

Mr.Rahul Mahajan, Advocate, for respondents No. 5 and 6 in CWP No. 2659 of 2015.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J,

Both these petitions relate to admission of students in non-aided private school and were, therefore, taken up together for hearing. However, since the question involved in these petitions is not common, therefore, the same shall be dealt with and adjudicated upon by recording separate reasons.

CWP No. 1853 of 2015

2. By medium of this writ petition, the petitioner has called in question the action of respondent No.3 whereby it has refused to admit the minor son of the petitioner in

+1 Class, the Non-Medical Stream, on account of his performance in the matriculation examination.

3. It is not in dispute that the petitioner's son has been studying in respondent No.3-School from the beginning i.e. from K.G. Class. Thus, according to the petitioner, it is not a case of fresh admission, but a case of promotion to the higher class and being a promotion, the same is automatic and, therefore, the ward of the petitioner was automatically, apart from legitimately, entitled to be admitted in +1 Class (Non-Medical Stream) i.e. stream of his choice.

4. Respondent No.3 has opposed the claim of the petitioner by filing reply wherein it is stated that it is an unaided minority institution and has framed guidelines to Class 11 (Senior Secondary Course) which are also printed in the school diary. Part-2 thereof deals with the admission procedure and it is for the school to lay down its norms. As per norms laid down by respondent No.3, a student should have consistent score of 80% in Science and Mathematics and 70% for Commerce Stream.

5. In view of the pleadings of the parties, the only question which falls for consideration is as to whether the son of the petitioner is required to be simply promoted to Class 11 and given a stream of his choice on the ground that the same is neither a fresh admission nor re-admission but a promotion or that respondent No.3-School is well within its right to lay down the criteria for admission depending upon the score and ranking of the child.

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

6. Both the learned counsel for the parties in support of their respective submissions have relied upon the judgment of the Hon'ble Supreme Court in ***Principal, Kendriya Vidyalaya and others versus Saurabh Chaudhary and others (2009) 1 SCC 794***.

7. In order to appreciate the controversy it is, therefore, necessary that we understand clearly as to what was the issue before the Hon'ble Supreme Court in the aforesaid case. The student, Saurabh Chaudhary, after having appeared in Class 10th examination held by CBSE for the academic year 2007-08 had sought admission in Class 11 in the same school, but was declined the same because his marks were lower than the cut-off fixed for admission to Class 11 in the admission guidelines of the school. This led to his filing a petition before the Madras High Court which upheld his claim and directed the school to admit him in Class 11.

8. This order of the Madras High Court was assailed before the Hon'ble Supreme Court by Kendriya Vidyalaya and the same came to be dismissed. The Hon'ble Supreme Court while dismissing the appeal filed by the school rejected its stand regarding the school-authority having an absolute right to grant/non-grant admission and infact it was observed that even the school must share atleast some responsibility for the poor performance of its students and should help them in trying to do better in the next class.

9. However, insofar as the question of right of the student to opt for the course of his choice, irrespective of his performance is concerned, the same was negated and it was held that the school may give the stream/course that may appear to be most suitable to the student on the basis of the prescribed cut-off marks.

10. This would be clearly evident from the following observations of the Hon'ble Supreme Court:-

> *"**18**. One can have no objection to a school laying down cut off marks for selection of suitable stream/course for a student giving due regard to his/her aptitude as reflected from the class X marks where there are more than one stream. But it would be quite unreasonable and unjust to throw out a student from the school because he failed to get the cut off marks in the class X examination. After all the school must share at least some responsibility for the poor performance of its student and should help him in trying to do better in the next higher class. The school may of course give him the stream/course that may appear to be most suitable for him on the basis of the prescribed cut off marks.*
>
> ***19.** In the present case it would have been perfectly open to the appellants to offer admission to the boy Saurabh Chaudhary in class XI in streams/courses other than science stream with Mathematics on the basis of the prescribed cut off levels of marks, had such courses been available in Central School No.2, AFS, Tambram. But this school has only science stream with Mathematics for classes XI and XII. The decision in Payal (1995) 5 SCC 512 forbids the school from turning down a student because he/she failed to get the cut off level of marks for admission to class XI. As a result of this fortuitous circumstance the boy must get admission in class XI in Central School No.2, AFS, Tambram in science stream with Mathematics." (emphasis supplied by us)*

11. Now what is discernible from the aforesaid decision is that though the right of the petitioner's son to be admitted in respondent No.3-School cannot be questioned and infact has not been questioned, but then he (petitioner's son) does not have an unfettered right to seek admission in any of the streams of his choice, rather the same would be dependent upon the cut-off marks fixed by the school for admission to different streams as has otherwise been held by the Hon'ble Supreme Court (supra).

In view of the aforesaid discussion, we find no merit in this petition and the same is dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

CWP No. 2659 of 2015

12. The main issue that arises for consideration in this writ petition is whether private unaided schools have the autonomy to admit the student or children through their parents have unfettered right to choose a school, in which they wish to study?

13. The brief facts of the case are that the petitioner approached respondent No. 4 school for admitting his younger child in class 3, but was denied the admission on the ground that the child did not make a grade and therefore, could not be selected. The petitioner claimed that respondent No. 4 school is hardly at a distance of 75 meters from his residence and as per the Right of Children to Free and Compulsory Education Act, 2009, his child has an unfettered right to be admitted in the school and the respondents have no discretion whatsoever to deny him admission.

14. The officials respondents have filed their reply, wherein it has been stated that vide letter dated 22.9.2015 directions have been issued to the school authorities to make all admissions from 1st to 8th class, according to Section 13 of the Act in future, failing which strict action as per Act and law would be initiated.

15. The respondent-School has filed its separate reply, wherein it averred that it is a non-aided school and that the admissions made by it are strictly in conformity with the Act. It is further averred that the son of the petitioner had competed with the other children

who were desirous of being admitted in class 3, but failed to make a grade and therefore, could not granted admission.

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

16. The learned counsel for the petitioner in order to claim an indefeasible right of admission to the school has placed heavy reliance on Sections 2 (n)3, 10, 12 and 13 of the Act, which read thus:-

> *"2(n)"school" means any recognized school imparting elementary education and includes:-*
>
> *(i) a school established, owned or controlled by the appropriate Government or a local authority;*
>
> *(ii) an aided school receiving aid or grants to meet whole or part of its expenses from the appropriate Government or the local authority;*
>
> *(iii) a school belonging to specified category; and*
>
> *(iv) an unaided school not receiving any kind of aid or grants to meet its expenses from the appropriate Government or the local authority;*
>
> *3* ***Right of child to free and compulsory education :****(1) Every child of the age of six to fourteen years, including the child referred to in clause (d) or clause (e) of section 2, shall have a right to free and compulsory education in the neighborhood school till completion of elementary education.*
>
> *(2) For the purpose of sub-section (1), no child shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing the elementary education.*
>
> *Provided that a child suffering from disability, as defined in clause (i) of section 2 of the Persons with Disabilities (Equal Opportunities, Protection and Full Participation) Act, 1996, shall have the right to pursue free and compulsory elementary education in accordance with the provisions of Chapter V of the said Act.*
>
> *(3) A child with disability referred to in sub-clause (A) of clause (ee) of section 2 shall, without prejudice to the provisions of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, and a child referred to in sub-clauses (B) and (C) of clause (ee) of section 2, have the same rights to pursue free and compulsory elementary education which children with disabilities have under the provisions of Chapter V of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995: 1 of 1996*
>
> *Provided that a child with "multiple disabilities" referred to in clause (h) and a child with "severe disability" referred to in clause (o) of section 2 of the National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 may also have the right to opt for home-based education.*
>
> *10.* ***Duty of parents and guardian:*** *It shall be the duty of every parent or guardian to admit or cause to be admitted his or her child or ward, as the case may be, to an elementary education in the neighborhood school.*

12. ***Extent of school's responsibility for free and compulsory education****: (1) For the purposes of this Act, a school,-*

(a) specified in sub-clause (i) of clause (n) of section 2 shall provide free and compulsory elementary education to all children admitted therein;

(b) specified in sub-clause (ii) of clause (n) of section 2 shall provide free and compulsory elementary education to such proportion of children admitted therein as its annual recurring aid or grants so received bears to its annual recurring expenses, subject to a minimum of twenty-five per cent.;

(c) specified in sub-clauses (iii) and (iv) of clause (n) of section 2 shall admit in class I, to the extent of at least twenty-five per cent. of the strength of that class, children belonging to weaker section and disadvantaged group in the neighborhood and provide free and compulsory elementary education till its completion:

Provided further that where a school specified in clause (n) of section 2 imparts pre-school education, the provisions of clauses (a) to (c) shall apply for admission to such pre-school education.

(2) The school specified in sub-clause (iv) of clause (n) of section 2 providing free and compulsory elementary education as specified in clause (c) of sub-section (1) shall be reimbursed expenditure so incurred by it to the extent of per-child-expenditure incurred by the State, or the actual amount charged from the child, whichever is less, in such manner as may be prescribed:

Provided that such reimbursement shall not exceed per-child-expenditure incurred by a school specified in sub-clause (i) of clause (n) of section 2:

Provided further that where such school is already under obligation to provide free education to a specified number of children on account of it having received any land, building, equipment or other facilities, either free of cost or at a concessional rate, such school shall not be entitled for reimbursement to the extent of such obligation.

(3) Every school shall provide such information as may be required by the appropriate Government or the local authority, as the case may be.

13. ***No capitation fee and screening procedure for admission:****(1) No school or person shall, while admitting a child, collect any caption fee or subject the child or his or her parents or guardian to any screening procedure.*

(2) Any school or person, if in contravention of the provisions of sub-section (1).—

(a) receives capitation fee, shall be punishable with fine which may extend to ten times the capitation fee charged;

(b) Subjects a child to screening procedure, shall be punishable with fine which may extend to twenty-five thousand rupees for the first contravention and fifty thousand rupees for each subsequent contraventions."

17. We have considered the aforesaid provisions and are of the considered opinion that the language incorporated in Section 3 of the Act is being misinterpreted by the petitioner. What Section 3(i) of the Act provides is that every child of the age of six to

fourteen years shall have right to free and compulsory education in a neighborhood school till completion of elementary education. Object sought to be achieved through this provision is to effectuate Article 21-A of the Constitution of India, thereby ensuring that a school is available in the neighborhood and free and compulsory education in neighborhood school is available to every child of the age group to which statute applies. But then this provision, in no manner gives a right to the child or parents to pick and choose a particular school, which falls under Section 12 of the Act, except to the extent of the provisions contained in this Section read with Section 2(n) of the Act.

18. Apart from the above, in case respondent school is directed to admit the student belonging to non minority, then the same would lead to an invasion of its right guaranteed under Article 19(1)(g) of the Constitution. The private unaided recognized School Management has a fundamental right under the aforesaid Article to maximum autonomy in day to day administration including their rights to admit students. This right of private unaided schools has been recognized by eleven Judges Bench decision of the Hon'ble Supreme Court in ***T.M.A. Pai Foundation and others Vs. State of Karnataka and others*** (2002) 8 SCC, 481. Subsequently a Constitution Bench of the Hon'ble Supreme Court in ***P.A. Inamdar & others Vs. State of Maharashtra & others*** (2005) 6 SCC 537 held that even non-minority un-aided institutions have an unfettered fundamental right to device the procedure to admit students, subject to the said procedure being fair, reasonable and transparent. Thereafter, another Constitution Bench of the Hon'ble Supreme Court in ***Pramati Educational and Cultural Trust (Registered) and others Vs. Union of India and others*** *(2014) 8 SCC 1* reiterated that the content of the right under Article 19(1)(g) of the Constitution to establish and administer private educational institutions includes the right to admit students of their choice and autonomy of administration. Similar preposition has been laid down by this Bench in ***Master Aarav Goswami (Minor) Vs. State of Himachal Pradesh and another***, *2015 (1) Him.L.R. 499.*

19. The schools responsibility for free and compulsory education is governed by Section 12 of the Act and sub-section 1(c) thereof provides the extent to which provisions have to be made in favour of the weaker section, disadvantaged group etc., but right to free and compulsory education in a neighborhood school does not include the right to insist on any school of choice under the Act.

20. In view of the aforesaid discussion, there is no merit in this petition and the same is accordingly dismissed.

****

BEFORE HON'BLE MR.JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Ramesh Kumar ...Petitioner.

Versus

State of H.P. and Ors. ...Respondents.

CWP No.3082 of 2015.
Decided on: 02.12.2015

Code of Criminal Procedure, 1973- Section 432 and 433- Petitioner was convicted of the commission of offences punishable under Sections 376 and 302 of IPC and was sentenced to

undergo imprisonment for life- he has completed 27 years 9 months and 29 days in jail- he applied for remission, but his claim was rejected- held, that a person does not get right to be released after completion of 14 years of imprisonment- his case is to be considered by the State Government – petitioner had jumped the parole and had committed other penal misdemeanors inside and outside the Jail, which weighed with the State for rejection of his claim- held that the authorities had applied the mind to the relevant material and the rejection of the claim was proper- petition dismissed. (Para-2 to 4)

For the petitioner: Mr.Praveen Chandel, Advocate.
For the respondents: Mr.M.A.Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The petitioner was convicted for committing offences punishable under Sections 376 and 302 of the Indian Penal Code whereupon sentence of life imprisonment was imposed upon him. The petitioner in sequel to his being sentenced to undergo life imprisonment, has completed 27 years 9 months and 29 days in Jail. On completion of the aforesaid period in Jail, the petitioner had applied to the Himachal Pradesh State Sentence Review Board to (hereinafter referred to as 'the Board') after affording him the benefits of remissions or commutations envisaged under the relevant provisions engrafted in Sections 432 and 433 of the Code of Criminal Procedure, 1973 pre-maturely release him from Jail. The Board (respondent No.3) vide Annexures R-3, R-4 and R-5 rejected the claim ventilated by the petitioner before it for his being prematurely released from prison. The Board, while rejecting the claim of the petitioner for his being prematurely released from prison had applied its mind to Para 3.1 of the Policy Guidelines manifested in Annexure R-1 governing the premature release of life convicts from prison on theirs completing 14 years of imprisonment. The application of mind by the Board to the apposite policy guidelines governing the pre-mature release of life convicts from prison on their completing 14 years of imprisonment is incisive and in depth besides does not suffer from any legal fallibility of non application of mind by it qua their application to the factual scenario qua the petitioner for hence warranting displacement by this Court of the opinion adverse to the petitioner formed thereon by the Board. The provisions envisaged in Sections 432 and 433 of the Code of Criminal Procedure empowering the Government concerned to exercise powers of remissions or commutations of sentence of imprisonment imposed upon life convicts on theirs completing 14 years of imprisonment is not an un-trammeled power nor would a life convict *ipso facto* on his completing 14 years imprisonment stand entitled to claim the statutory benefit engrafted therein of remissions or commutations of sentence rather is a power whose exercise stands governed by the mandate of Annexure R-1 whereto for reasons afore-stated apposite reverence stands meted by the Board besides by a rendition of the Hon'ble Apex Court of 9.7.2014 modified on 23.7.2015 enjoining for reverence by the State Governments, the herein-after extracted prescriptions:-

(i) Where life sentence has been awarded specifying that-

(a) The convict shall undergo life sentence till the end of his life without remission or commutation;

(b) The convict shall not be released by granting remission or commutation till he completes a fixed term such as 20 years or 25 years or like;

(c) Where no application for remission or commutation was preferred or considered *suo motu* by the concerned State Governments / authorities;

(d) Where the investigation was not conducted by any Central investigating Agency like the Central Bureau of Investigation; and

(e) Where the life sentence is under any central law or under Section 376 of the Indian Penal Code, 1860 or any other similar offence."

Concomitantly the State Governments while exercising powers of remissions or commutations of sentence conferred upon them under Sections 432 and 433 of the Code of Criminal Procedure qua life convicts are encumbered with a legal obligation to when a sentence of life imprisonment stands imposed upon a convict for commission of an offence under Section 376 of the Indian Penal Code or any other similar offence even on the life convict completing 14 years in prison refuse remissions or commutations to him.

2. Furthermore, a perusal of the afore-stated prescriptions enjoined upon the State Governments by a rendition of the Hon'ble Apex Court of 23.7.2015 on whose occurrence the restraint imposed by the Hon'ble Apex Court under its rendition of 9.7.2014 qua the exercise of powers of remissions or commutations of sentence of life imprisonment conferred upon them by Sections 432 and 433 of the Code of Criminal Procedure was yet operable upsurges the factum of the restraint or embargo imposed by the Hon'ble Apex Court under its rendition of 9.7.2014 though standing modification subsequently in its rendition of 23.7.2015 yet remaining intact qua prescription (e) herein-above extracted for reiteration on whose occurrence hence the State Governments were debarred from exercising their powers of remissions or commutations conferred upon them under Sections 432 and 433 of the Code of Criminal Procedure qua life convicts. Necessarily when the petitioner is a life convict and stands sentenced to undergo life imprisonment for committing offences under Section 376 of the Indian Penal Code and under Section 302 of the Indian Penal Code, obviously given the satiation of the herein-above extracted prescription (e) qua him its rigour comprised in the rendition of the Hon'ble Apex Court of 9.7.2014 restraining the State Governments besides debarring them from affording the benefit of remission or commutation of sentence under Sections 432 and 433 of the Code of Criminal Procedure qua life convicts stood squarely attracted qua him. Obviously for reiteration, when the bar or restraint envisaged in the rendition of the Hon'ble Apex Court against the exercise by the State Governments of powers of remissions or commutations under Sections 432 and 433 of the Code of Criminal Procedure stood attracted qua the petitioner given his being meted a sentence under Section 376 IPC besides a sentence for life under Section 302 IPC, as a corollary, the rejection of the case of the petitioner by the Board for his pre-mature release from prison was legally warranted.

3. Dehors the above, a perusal of the reply furnished by the respondents to the writ petition unveiling the factum of the petitioner having on numerous occasions jumped parole besides his having committed other penal misdemeanors both inside and outside the Jail rendered his conduct to be not warranting any affording to him of the benefit as asked for by him especially moreso when his conduct despite his prolonged incarceration remained incorrigibly uncorrected, hence defeating the begetting of the salutary purpose of his reformation during his imprisonment concomitantly constituting it to be a grave deterrent which tenably weighed with the Board while rejecting his claim for his pre-mature release from prison. Consequently, the rejection of the case of the petitioner by the Board for his premature release from prison was not beyond the purview of the rendition of the Hon'ble Apex Court of 9.7.2014 nor it suffers from any non application of mind by it to the apposite material devolving upon the conduct of the petitioner, which for reasons afore-stated warranted rejection of his application.

In view of the above discussion, the writ petition merits dismissal and is accordingly dismissed. Pending application(s), if any, also stand dismissed. No costs.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sachin son of Shri Vinod Verma ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 1644 of 2015
Order Reserved on 18th November 2015
Date of Order 2nd December 2015

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 354 and 451 of IPC and Section 8 of Protection of Children from Sexual Offences Act, 2012 – accused had sexually assaulted minor prosecutrix- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- allegations against the petitioner are serious- Courts are under legal obligation to protect the interest of minor- assault upon minor girl is most hated crime and violates the right to life- petitioner would threaten the witnesses in case of release on bail- petition dismissed. (Para- 6 to 9)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
State vs. Captain Jagjit Singh, AIR 1962 SC 253
Bodhisattwa Gautam vs. Miss Subhra Chakraborty) , AIR 1996 SC 922

For the Petitioner: Mr. Amit Sharma, Advocate.
For the Non-petitioner: Mr. M.L. Chauhan and Mr. Rupinder Singh Additional Advocate Generals.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail in connection with FIR No. 199 of 2015 dated 25.09.2015 registered under Sections 354, 451 IPC and under Section 8 of POCSO Act 2012 in P.S. Nalagarh District Solan (H.P.)

2. It is pleaded that petitioner did not commit any offence and has been falsely implicated in present case. It is pleaded that petitioner was not present at place of incident and was present at Jallandhar. It is pleaded that false FIR registered against the petitioner. It is pleaded that FIR registered against the petitioner for extraneous reasons. It is pleaded that petitioner will not tamper with prosecution witnesses in any manner and will abide by all terms and conditions of bail order. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report FIR No. 199 of 2015 dated 25.9.2015 registered against the petitioner under Sections 451, 354 IPC and under Section 8 of POCSO Act 2012 at P.S. Nalagarh District Solan (H.P.). There is recital in police report that on 25.9.2015 minor prosecutrix along with her mother came in police station. There is recital in police report that prosecutrix is minor and her age is 12 years and she is a student of 6th class. There is further recital in police report that mother of minor prosecutrix is residing at New Nalagarh along with minor prosecutrix. There is recital in police report that on 24.9.2015 at 3.30 PM when mother of minor prosecutrix came to her residential house she found that minor prosecutrix was in very depressed condition and minor prosecutrix did not consume food and started weeping. There is recital in police report that when mother of minor prosecutrix inquired about reason of weeping from minor prosecutrix then minor prosecutrix told that when minor prosecutrix came to her residential house from school then petitioner Sachin came in her residential house and misbehaved with minor prosecutrix and also committed sexual assault upon minor prosecutrix with intent to outrage her modesty. There is also recital in police report that thereafter minor prosecutrix raised voice and her relative Varun came. There is further recital in police report that when relative of minor prosecutrix came thereafter petitioner Sachin left the place of incident. During investigation Investigating Officer recorded statements of witnesses under Section 161 Cr.P.C. and statement of minor prosecutrix under Section 164 Cr.P.C. got recorded before Additional Chief Judicial Magistrate Nalagarh.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the non-petitioner and also perused the record.

5. Following points arise for determination in bail application:-

1. Whether anticipatory bail application filed under Section 438 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of anticipatory bail application?
2. Final Order.

Findings on Point No.1 with reasons

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any criminal offence cannot be decided at this stage. Same fact will be decided when case shall be disposed of on merits after giving due opportunity to both the parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of the petitioner that petitioner was not present at the place of incident as alleged by prosecution and petitioner was present at Jallandhar and on this ground anticipatory bail application be allowed is rejected for the reasons hereinafter mentioned. *Alibi* plea of petitioner cannot be decided at this stage. *Alibi* plea of petitioner would be decided by learned trial Court when case shall be disposed of on merits after giving due opportunities to both the parties to lead evidence in support of their case.

8. Another submission of learned Advocate appearing on behalf of petitioner that any condition imposed by Court will be binding upon petitioner and on this ground anticipatory bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and***

others Vs. State (Delhi Administration) Also see AIR 1962 SC 253 titled State vs. Captain Jagjit Singh. In the present case allegations against the petitioner are very heinous and grave in nature. Allegations against the petitioner are that petitioner assaulted upon the minor prosecutrix with intent to outrage her modesty. Courts are under legal obligation to protect the interest of minors. It is well settled law that every minor girl has legal right to live in society with dignity and honour. Assault upon minor girl with intent to outrage her modesty is most hated crime. It is the crime against basic human rights and it violates the right to life. ***(See AIR 1996 SC 922 titled Bodhisattwa Gautam vs. Miss Subhra Chakraborty)*** It is well settled law that bail in non-bailable criminal case is not a matter of right. In present case positive overt act has been attributed against the petitioner by minor prosecutrix relating to use of criminal force with intent to outrage the modesty of minor prosecutrix. Allegations against the petitioner are grave in nature qua commission of criminal offence relating to sexual assault under Protection of Children from Sexual Offence Act 2012. Protection of Children from Sexual Offence Act 2012 is a spectial Act enacted with object to protect the minor girls from sexual assault. Even as per Section 30 of POCSO Act 2012 there is presumption of culpable mental state unless rebutted in accordance with law. Presumption of culpable mental state by petitioner would be rebutted when the case will be decided by learned trial Court after giving due opportunities to both the parties to lead evidence in support of their case. Court is of the opinion that case is at the initial stage of investigation and if anticipatory bail is granted to petitioner at this stage then investigation of case would be adversely effected. Court is of the opinion that it is not expedient in the interest of State and general public to grant anticipatory bail to petitioner at initial stage of investigation.

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if bail is granted to petitioner then petitioner will induce, threat and influence the prosecution witnesses and on this ground bail application be declined is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of the Court that if anticipatory bail is granted to the petitioner then petitioner will induce and threat the prosecution witnesses. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final Order)

10. In view of my findings on point No.1 bail application filed by petitioner under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of bail application filed under Section 438 of Code of Criminal Procedure 1973. All pending application(s) if any also disposed of. Bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Shyam Lal ...Petitioner

Vs.

HIMUDA and anr ...Respondents.

CWP No. 3921 of 2015
Judgment reserved on: 16.11.2015
Decided on: 2.12.2015

Constitution of India, 1950- Article 226- Petitioner wanted to submit his tender for the works advertised by the respondent but he was denied the tender document in view of condition No.1-(C) providing that the tender forms will not be issued to those contractors/firms who have delayed the already awarded works more than 50% time of the contractual obligation- petitioner complained that the work could not be completed by him on account of acts attributable to the respondent and for reasons beyond the control of the petitioner- respondent claimed that petitioner had failed to complete the previous work within the stipulated time- held, that Government and their undertaking must have a free hand in settling terms of tender- Court cannot interfere with the tender, merely because it feels that some other terms in the tender would have been fairer, wiser or logical- Clause 1(C) is reasonable because it shows that a person delaying the contract does not have capability or capacity to execute the work- petitioner was aware of vagaries of the weather and cannot take the same as an excuse for not executing the works within the stipulated period- petition dismissed. (Para-6 to 11)

Cases referred:
Michigan Rubber (India) Ltd Vs. State of Karnataka & ors (2012) 8 SCC 216
Sandeep Bhardwaj Vs.State of HP & ors, AIR 2015 HP 117

For the Petitioner : Mr. Suneet Goel, Advocate.
For the Respondents : Mr. C.N. Singh, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J,

The petitioner has sought a writ of mandamus directing the respondents to consider his bid for the work in question, i.e. Name of work: Govt. Degree College at Haripur, District Kullu, HP (SH:- C/o Boundary Wall and Main gate around the complex) E/Cost: Rs.15,75,414/- E/Money 31, 135. Time Six months and Cost of Form: Rs.1,000/-, as detailed in at serial No.3 of the notice inviting tender (Annexure P-2) on merits after allowing him to submit the same.

2. Respondent No.2 invited sealed item rate tenders from the approved contractors enlisted with HIMUDA/HPPWD in appropriate class for various works detailed in the said notice and the last date of issuance of tender document was 10.9.2015, whereas last date for submission of a bid was 14.9.2015. Petitioner intended to submit his tender for the works detailed above, but was denied the same without assigning any reasons for which he lodged protest in writing on 10.9.2015 itself. On further inquiry, petitioner came to know that he had been denied the tender documents in view of work already allotted in his favour having not been completed within the stipulated period by invoking condition No. 1 (c) of the tender form which reads thus:

> "The tender forms will not be issued to those contractors/firms who have delayed the already awarded works more than 50% time of the contractual obligation."

3. The petitioner claims that such action on the part of the respondents was totally illegal and uncalled for as the earlier works allotted to him pertaining to construction of Panchayat Bhawan at Manali and thereafter construction work of Ayurvedic Hospital at Katrian, District Kullu could not be completed within the stipulated time solely on account

of acts attributable to the respondents and for reasons beyond his control as there was heavy snowfall.

4. Respondents have filed reply wherein it has been stated that the petitioner had miserably failed to complete the work of construction of Panchayat Bhawan at Manali within one year from 10.7.2009 as was stipulated in the contract agreement and the said building came to be completed on 26.12.2013 in a time gap of four years five months. The petitioner was even levied compensation @ 10% of the tendered amount which was subsequently reduced to 1% by taking lenient view under clause 2 of the agreement for which recovery of Rs.40,048/- was made from the petitioner in the 10th running bill of the said work.

5. It is further stated that another construction work of Ayurvedic Hospital building at Katrian, District Kullu was also awarded to the petitioner vide letter dated 24.9.2012 and the time allowed for completion as one year to be reckoned from the 15th day of issue of award letter, which meant that the work was required to be completed on or before 7.10.2013, but the petitioner had failed to complete the work within the stipulated period, rather he stopped the execution abruptly. It is further averred that as against the award work of Rs.44,78,680.00 the petitioner had executed the work of Rs.22,96,606.00 in a time span of more than two years. Despite issuance of repeated letters/notices, petitioner did not start and complete the work. Consequently, by invoking clause 2 of the contract agreement an opportunity was given to the petitioner to complete work within one month from the receipt of the notice dated 5.9.2014, but again petitioner did not re-start and complete the work within the stipulated time resulting in imposition of compensation @ 10% of the tendered cost vide letter dated 7.4.2015. But despite this, petitioner did not re start and complete the work in question, resultantly the work stands rescinded on 3.6.2015 under clause 3 (a) of the contract agreement along with forfeiture of security deposit of Rs.1,24,271.00.

6. The grievance of the petitioner is twofold. Firstly, that the condition No. 1 (c) (supra) is illegal, arbitrary and unconstitutional and secondly even if such condition is held to be valid, the same is not applicable to his case.

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

7. It is more than settled that the government and their undertakings must have a free hand in setting terms of the tender and only if it is arbitrary, discriminatory, malafide or actuated by bias, the courts would interfere. The courts cannot interfere with the terms of tender prescribed only because it feels that some other terms in the tender would have been fairer, wiser or logical (refer **Michigan Rubber (India) Ltd Vs. State of Karnataka & ors (2012) 8 SCC 216, CWP No. 4897 of 2014, titled Mahalakshmi Oxyplants Pvt Ltd Vs.State of HP & anr, CWP No. 4112 of 2014, titled Minil Laboratories Ltd Vs. State of HP & anr, CWP No.1756 of 2014 titled M/s Andritz Hydro Pvt Ltd Vs Himachal Pradesh Power Corporation Ltd, CWP No. 765 of 2014 titled Namit Gupta Vs. State of HP & ors and CWP No. 1007 of 2015 titled Sandeep Bhardwaj Vs.State of HP & ors, reported in AIR 2015 HP 117).**

8. What would be the scope of judicial review in such like matters, has been succinctly laid down by the Hon'ble Supreme Court in Michigan Rubber (supra) in the following terms:

"23 From the above decisions, the following principles emerge:

> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
>
> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
>
> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.
>
> 24 Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"; and
>
> (ii) Whether the public interest is affected. If the answers to the above questions are in negative, then there should be no interference under Article 226."

9. The only argument advanced by the petitioner to assail condition No.1 (c) of the tender is that the same has no legal basis as it seeks to give unfettered powers to the respondents to reject anybody's claim and indirectly amounts to blacklisting the petitioner as he would be debarred from participating in any of the tenders floated by the respondents henceforth only on the basis of impugned condition.

10. We are not impressed by such arguments, merely because the petitioner has been debarred from participating in the tender notice by invoking clause 1 (c), it does not mean that the petitioner has been blacklisted. There has to be a specific order of blacklisting which has to be preceded by a show cause notice as blacklisting is described as 'civil death' of a person who is foisted with the order of blacklisting. Such an order is

stigmatic in nature and debars such a person from participating in government tenders which means precluding him from the award of government contracts. Admittedly, there is no such order whatsoever passed by the respondents. Rather, as per the petitioner himself, he was denied participation in the tender only on the basis of an oral instructions and there is no written order whatsoever to this effect. Once there is no written order, the petitioner is free to participate in all other tenders, save and except, wherein clause similar to clause 1 (c) is contained in the terms and conditions of the tender document.

11. Now, in so far as the clause 1 (c) being illegal, arbitrary or in any manner discriminatory is concerned, the objects sought to be achieved by the clause is clearly discernible from the language in which it is couched. As against the time limits of one year, if the contractor like petitioner herein delays the work and completes the same in four years or leaves the work halfway by partly executing the same, it clearly indicates that such contractor does not have either the capability or the capacity or the will to execute the work. Moreover, the petitioner was well aware of the vagaries of the weather and the same cannot, therefore, be taken as an excuse for not executing the works within the stipulated period.

12. In view of the aforesaid discussion, there is no merit in the petition and the same is accordingly dismissed leaving the parties to bear the costs.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Solan District Truck Operators Transport Cooperative Society ....Petitioner

Versus

Harjinder Singh son of Shri Ram Rattan & others ....Non-petitioners

CWP No. 1841 of 2015
Order Reserved on 5th November, 2015
Date of Order 2nd December 2015.

Constitution of India, 1950- Article 226- Petitioner No.1 had sold his truck to co-respondent No. 1 in the year 2010- however, society had not granted fresh token to respondent No. 1 – reference was made by him to Assistant Registrar Cooperative Societies which was allowed- it was held that society had not adopted proper procedure for expulsion of respondent No.1 – it was further held that society had adopted method of pick and choose while allotting new tokens to some members- society was directed to allot new token to respondent No.1- appeal and revision preferred by the society were dismissed- writ petition was filed in which Special Secretary (Cooperation) was directed to decide the case on merits who upheld the order of Assistant Registrar Cooperative Society- bye-laws of the society do not provide that member would be deemed to be expelled automatically after sale of vehicle- an amendment was carried out subsequently to this effect but amendment was not approved by 2/3rd members of the society – amendment was also not registered under H.P. Cooperative Societies Act and therefore, will have no effect – petition dismissed.

(Para-5 to 17)

For the Petitioner: Mr. Sunil Mohan Goel, Advocate.
For Non-petitioner No.1: Mr. Neeraj Gupta, Advocate.
For Non-petitioners Nos.2 to 5: Mr. M.L. Chauhan Additional

Advocate General & Mr.R.S.Thakur, Additional Advocate General and Mr.J.S. Rana Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India with prayer to issue a writ of certiorari quashing order dated 22.7.2011 passed by Assistant Registrar Cooperative Societies Solan H.P. and quashing order dated 2.4.2012 passed by Deputy Registrar (Consumer) Cooperative Societies Himachal Pradesh and quashing order dated 6.10.2012 passed by Additional Registrar (Administration) Cooperative Societies H.P. and quashing order dated 31.12.2014 passed by Special Secretary (Cooperation) to the Government of H.P. whereby abovesaid authorities have directed the petitioner society to issue token for plying trucks in favour of non-petitioner No.1 namely Harjinder Singh.

2. Brief facts of the case as pleaded are that non-petitioner No.1 Shri Harjinder Singh son of Ram Rattan resident of village Palech P.O. Kandaghat Tehsil Kandaghat District Solan sold truck No. HP-13-274 with token in the year 2004. In the year 2010 co-respondent No.1 namely Harjinder Singh filed a reference petition under Section 72 of H.P. Cooperative Societies Act 1972 before Assistant Registrar Cooperative Societies Solan District Solan against petitioner society on the ground that he was not granted fresh token by the petitioner society. Thereafter on 22.7.2011 petition filed by Harjinder Singh was allowed by Assistant Registrar Cooperative Societies vide order dated 22.7.2011 and held that Society had not adopted the proper procedure for explusion of membership of Shri Harjinder Singh and also held that Society had adopted pick and choose method by way of allotting new token to some members who have also sold their vehicles with token numbers. Thereafter Assistant Registrar Cooperative Society Solan District Solan H.P. directed the petitioner to allot new token to Harjinder Singh and provide work to his vehicle on priority basis. Thereafter Solan District Truck Operators Transport Cooperative Society filed appeal which was dismissed by Deputy Registrar (Consumer) Cooperative Societies Himachal Pradesh on 2.4.2012. Thereafter Solan District Truck Operators Transport Cooperative Society filed revision petition against order dated 2.4.2012 which was dismissed by Additional Registrar (Administration) Cooperative Societies Himachal Pradesh vide order dated 6.10.2012. Thereafter Solan District Truck Operators Transport Cooperative Society filed revision/review petition which was dismissed by Special Secretary (Cooperation) to the Government of H.P. vide order dated 14.2.2013. Thereafter CWP No. 4294 of 2013 was also filed by Solan District Truck Operators Transport Cooperative Society, which was decided on 21.11.2014. Hon'ble High Court in CWP No. 4294 of 2013 held that revisional authority (Special Secretary Cooperation) has not touched the merits of case. Hon'ble High Court of H.P. in CWP No. 4294 of 2013 remanded case and directed Special Secretary (Cooperation) to decide the case on merits and parties were directed to appear before Special Secretary (Cooperation) on 1.12.2014. Thereafter again Special Secretary (Cooperation) to the Government of H.P. upheld the order of Assistant Registrar Cooperative Society dated 22.7.2011.

3. Court heard learned Advocate appearing on behalf of the petitioner and learned Advocate apeparing on behalf of non-petitioner No.1 and Additional Advocate General appearing on behalf of the non-petitioners Nos. 2 to 5 and Court also perused the entire record carefully.

4. Following points arise for determination in this civil writ petition:-

Point No.1

Whether civil writ petition filed by petitioner under Article 226 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of civil writ petition?

Point No.2

Final order.

Findings upon point No.1 with reasons

5. It is proved on record that Solan District Truck Operators Transport Cooperative Society framed byelaws and applied for registration of Society under H.P. Cooperative Societies Act 1968. It is further proved on record that thereafter Assistant Registrar Cooperative Societies Solan exercising the powers of Registrar Cooperative Society H.P. registered the society under H.P. Cooperative Societies Act 1968 and issued registration certificate placed on record.

6. It is held that after registration of petitioner society under H.P. Cooperative Society Act 1968 petitioner society is governed under H.P. Cooperative Society Act 1968. Membership bye-law of Society as mentioned in byelaws of society are quoted in toto.

"Bye-law 5 membership of society. Subject to the provisions of Bye-laws any individual shall be admitted as a member of the society if he is.

(i) Over 18 years in age and of sound mind.

(ii) Of good charactors.

(iii) Subject to the provisions of Act and Rules and Bye-Laws is owner of truck carrier and is hereditary resident of area of operations, having ancestral land and also duly recommended by the truck operators union in the Area of the society.

(iv) The numbers of the trucks per member should be at most three Trucks.

6-A No individual shall be eligible for admission as a member of the Society if:-

(i) He has applied for bankrupcy, or

(ii) He has been declared as an insolvent, or

(iii) He has been sentenced for any offence involving dishonesty or moral turpitute 5 years preceeding the date of his admission as member.

6-B Applications for the admission as member shall be disposed of by the Managing Committee subject to the approval of General body. If the managing committee or the General body refused to admit a person, it shall record its reasons for such refusal and communicate to the persons concerned. Any person who has been refused admission shall have the right of an appeal to registrar and such appeal shall binding on the society and applicant/appellant.

6-C No member shall be admitted during 15 days preceeding to date fixed for any general body meeting of the society for which office bearers are to be elected.

6-D Every member on admission shall sign his

name or made his thumb mark in the register of members and shall pay an admission fee Rs.100/-.

6-E (i) Every member of the society shall nominate

a person or persons to whom his shares of interest or such sums out of shares or interest as may be specified by the member shall on the death of the member be transferred or paid as laid down in the bye-laws.

(ii) Such nomination may from time to time be revoked or modified by the nominator.

(iii) The number of persons who may be nominated by a member shall not exceed the number of the shares held by the members.

(iv) When a member of the society nominates more than one persons. He/She shall do so as practicable specify the amount to be paid or transfer to each nominee interest of the whole shares and the interest accruing thereon.

(v) The record of the nomination shall be kept by the society in such manner as may be laid down by the registrar from time to time.

6-F. No shares shall be withdrawn but shares may

be transferred to members or to a person duly qualified for membership and approved by managing committee.

6-G The value of the shares transferred shall in no

case be more than the sum received by the

society in payment thereof.

6-H <u>Bye-law relating to explusion of member from society</u>

(a) A member may be expelled for one or

more of the following reasons:-

(i) Ceasing to reside in the area of operation of the society.

(ii) Failure to pay the share money or operation of the society.

(iii) Conviction of criminal offence involving dishonesty or moral turpitude.

(iv) An application for bankrupcy.

(v) An action which may be held by the general body on account of dishonesty or contrary to the interest reputation and stand objects of the society.

(b) A person shall cease to be member of the society in one or more of the circumstances:-

(i) Death.

(ii) Ceasing to hold at least one share.

(iii) Withdrawal after six months notice to the secretary of the society provided the share/shares held by the member are disposed of it accordance with by law 11 & 12.

(iv) Permanent insanity.

(v) Declaration of bankrupcy."

7. Thereafter vide resolution No. 8 dated 5.12.2008 a resolution was passed by society in the meeting of general house wherein 482 members were present out of 1135 members to the effect that any member of society if sells his vehicle and becomes vehicleless then his membership in the society would be deemed to be cancelled.

8. Court has carefully perused the membership provision mentioned in byelaws of society. Court has also carefully perused bye-laws 13(a) (b) of society relating to termination of membership of society. There is no provision in bye-laws 13 (a) (b) of society that member would be deemed to be expelled automatically after sale of vehicle. Society amended bye-law vide resolution No. 8 dated 5.12.2008 placed on record to the effect that member would be expelled automatically if member of society would sell his vehicle and is become ownerless of vehicle.

9. Bye-law 46 of Society deals with amendment of byelaws. Operative part is quoted in toto:-

> "46. No amendment of these by laws shall be carried out save in accordance with the resolution passed at a general meeting of which due notice of the intention to discuss the amendment has been given provided that no such resolution shall be valid unless it is passed by majority of the members present at the general meeting at which not leass than two-third of the memebrs for the time being of the society are present. Provided further that modle by laws or amendments previously approved by the Registrar may be adopted by a majority at a general meeting with an ordinary quorum.

10. As per bye-law 46 of society amendment in bye-laws of society could be effected only in general house meeting when 2/3rd members of society are present. In present case only 482 members of society were present out of 1135 members and resolution No. 8 dated 5.12.2008 is not approved by 2/3rd members of society as mentioned in bye-law 46 of society. Hence it is held that resolution No. 8 dated 5.12.2008 is void abinitio as per mandatory provision of bye-law 46 of society.

11. It is held that as peritioner is registered under H.P. Cooperative Societies Act 1968. Petitioner society is governed under H.P. Cooperative Societies Act 1968. As per Section 11 of H.P. Cooperative Societies Act 1968 amendment in byelaws of cooperative society would be operative only after approval of registrar society. Till date resolution No. 8 dated 5.12.2008 is not approved by Registrar of Society. Operative part of Section 11 of H.P. Cooperative Society Act 1968 relating to amendment of bye-laws of Cooperative Society is quoted.

12. Section 11 of H.P. Cooperative Societies Act 1968. <u>Amendment of bye-laws of cooperative society.</u>

No amendment of any bye-law of cooperative society shall be valid unless approved by resolution of a general meeting and registered under H.P. Cooperative Society Act 1968 for whose purpose three copies of amendment shall be forwarded to the Registrar Societies as prescribed. If the Registrar is satisfied that proposed amendment (1) Is not contrary to the provision of H.P. Cooperative Societies Act 1968. (2) Does not conflict with cooperative principles. (3) Will promote the economic or social interest of member of society. (4) Is not in consistent with principles of social justice he may register amendment. (5) An amendment of bye-laws of Cooperative Society shall come into operation on the day on which it is registered by Registrar.

13. As per Section 11 of H.P. Cooperative Societies Act 1968 three copies of amendment of byelaws of society should be forwarded to the Registrar. In present case there is no prima facie evidence on record that three copies of amended of byelaws of society were forwarded to Registrar Society as per mandatory provison of Section 11 of H.P. Cooperative Societies Act 1968. There is no recital in resolution No. 8 dated 5.12.2008 that three copies of resolution No. 8 dated 5.12.2008 were sent to Registrar Societies for approval as per mandatory provision of Section 11 of H.P. Cooperative Societies Act 1968.

14. As per Section 11 of Cooperative Societies Act 1968 amendment in bye-laws of society would come into operation on the date on which it is registered by Registrar Societies under Section 11 of H.P. Cooperative Societies Act 1968. There is no evidence on record that amendment of byelaw framed by society vide resolution No. 8 dated 5.12.2008 has been registered by Registrar Societies under Section 11 of H.P. Cooperative Societies Act 1968. Hence it is held that unless amended byelaw vide resolution No. 8 dated 5.12.2008 is not registered by Registrar Societies under Section 11 of H.P. Cooperative Societies Act 1968 the amended byelaw vide resolution No. 8 dated 5.12.2008 would not come into operation. There is no certificate placed on record that Registrar Societies has registered the amended byelaw dated 5.12.2008 under Section 11 of H.P. Cooperative Societies Act 1968.

15. There is no original byelaw of society that vehicle could not be sold with token number by a member of society. There is no original byelaw of society as of today that new token number would not be granted to member of society even after the purchase of new vehicle.

16. It is proved on record that till date non-petitioner Shri Harjinder Singh is member of society. It is held that member of society is legally entitled for all privileges enjoyed by other members of society as per Article 14 of Constitution of India because equality before law is basic concept of Constitution of India as per Article 14 of Constitution of India. It is well settled law that everyone is governed by Constitution of India and no one can be allowed to act contrary to Constitution of India. Constitution of India is binding upon all authorities throughout the country including societies. Name of non-petitioner namely Harjinder Singh still figures in list of share transfer fund at Serial No. 51 as on 31.3.2011 placed on record prepared by Solan District Truck Operators Cooperative Transport Society Ltd. Darlaghat. Even name of non-petitioner Shri Harjinder Singh is also listed in final voter list of members of society of Solan District Truck Operators Cooperative Transport Society Ltd. Darlaghat at Sr. No. 13 placed on record dated 4.3.2011.

17. In view of the fact that non-petitioner Shri Harjinder Singh is still member of society and in view of the fact that resolution No. 8 dated 5.12.2008 is contrary to bye-law 46 of society and in view of the fact that amended byelaw of society is not approved till date in accordance with Section 11 of H.P. Cooperative Societies Act 1968 by Registrar of Societies point No.1 is answered in negative.

Point No. 2 (Final Order)

18. In view of findings upon point No.1 petition filed under Article 226 of Constitution of India is dismissed. No order as to costs. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

****

BEFORE HON'BLE MR.JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Dinesh Kumar ...Petitioner.
Versus
State Information Commission & Ors. ...Respondents.

CWP No.4519 of 2015.
Decided on: 03.12.2015

Right to Information Act, 2005- Section 19- Petitioner sought information from Public Information Officer – incomplete information was supplied to him on which an appeal was preferred by the petitioner- Appellate Authority directed to supply the complete information- however, no costs were imposed for supplying incomplete information- petitioner preferred a further appeal- the State Information Commission imposed a cost of Rs.250/- for the delay- petitioner preferred a writ petition against this order- held, that period spent in appeal is to be excluded while calculating the delay – the precise nature of the information sought was not specified- therefore, respondent cannot be penalized for the delay- writ petition dismissed. (Para-2 and 3)

For the petitioner: Mr.Sanjeev K.Suri, Advocate.
For the respondents: Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma & Mr.Anup Rattan, Additional A.G. & Mr.J.K.Verma, Deputy A.G., for the respondent-State.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge (Oral)

The petitioner herein had under Annexure P-1 on the subject detailed therein concerted to elicit information from the Public Information Officer-cum-Tehsildar, Amb, District Una. Under Annexure P-4, the Tehsildar-cum-Public Information Officer, Amb purveyed to the petitioner herein the information as concerted to be elicited under Annexure P-1 from him by the petitioner herein. The petitioner herein standing aggrieved by the factum of Annexure P-4 purveying to him incomplete information qua the subject comprised in Annexure P-1 took to prefer an appeal therefrom on 7.11.2013 before the State Information Commission, Himachal Pradesh. The latter, however under Annexure P-5 transferred the appeal preferred before it by the petitioner herein to the 1st Appellate Authority-cum-Sub Divisional Officer (Civil), Amb, District Una. On the 1st Appellate Authority-cum-Sub Divisional Officer (Civil), Amb being hence seized of the appeal preferred by the petitioner herein against Annexure P-4, whereupon the latter stood aggrieved by its purveying to him incomplete information qua the subject comprised in Annexure P-1, proceeded to under Annexure P-6 direct respondent No.4 herein, who stood impleaded as respondent before it, to purvey to the petitioner herein within 7 days the complete information as sought by the latter on the subject constituted in Annexure P-1. Since under Annexure P-6, the 1st Appellate Authority had not imposed any costs upon respondent No.4, who stood impleaded as a respondent before it, for the delay, if any, in his purveying to the petitioner herein the complete information, rather his having omitted to impose costs upon respondent No.4 herein on the score of the petitioner herein having disclosed before it qua his waiving imposition of costs upon respondent No.4 herein for the delay, if any, as stood occurred in the purveying of complete information to the petitioner on the subject embodied

in Annexure P-1, which occurrence of a ground in Annexure P-6 for Sub Divisional Officer (Civil), Amb not imposing costs upon respondent No.4 herein stood contested by the petitioner herein of its being bereft of veracity besides false. The petitioner herein, hence standing aggrieved by the occurrence in Annexure P-6 authored by the Sub Divisional Officer (Civil), Amb of the factum of a disclosure by the petitioner herein before the latter of his having waived imposition of costs upon respondent No.4 arising from delay, if any, as stood occurred in the belated purveying of incomplete information to him. In sequel, he was led to institute an appeal before the State Information Commission, Himachal Pradesh. The latter under Annexure P-12 disposed of the appeal with an imposition of a penalty upon Ramesh Chand, Senior Assistant in the office of Tehsildar, Amb @ Rs.250/- for a delay of 21 days, which it concluded to have occurred in the delayed purveying of information to the petitioner herein by respondent No.4 herein.

2. The petitioner is aggrieved by Annexure P-12 and prays for its being quashed and set aside. The petitioner also prays for respondents No.3 and 4 being penalized for the delay of 107 days as stands occurred since 6.8.2013 upto 17.12.2013, whereat in sequel to renditions of the Sub Divisional Officer (Civil), Amb, comprised in Annexure P-6, the complete information by respondent No.4 stood purveyed to the petitioner herein. The petitioner herein though has concerted to impeach the legality of the findings recorded by the State Information Commission, Himachal Pradesh in Annexure P-12 qua Ramesh Chand, Senior Assistant in the office of Tehsildar Amb being responsible for the delay as stood occurred in the purveying of information to the petitioner herein by respondent No.4 herein, rather the said responsibility being fastenable upon respondent No.4 herein especially in face of respondent No.4 herein being the Principal Information Officer, the liability for the occurrence of any delay in the purveying of information to him was hence fastenable upon him. However, the aforesaid ground as agitated before this Court by the learned counsel for the petitioner herein is bereft of any legal succor inasmuch as with a perusal of paragraph 3 of Annexure P-12 unraveling the factum of Ramesh Chand, Senior Assistant having admitted his lapse of his inadvertently marking Annexure P-1 to Field Kanungo Chururu Ram, besides concomitantly the said admission of Ramesh Chand, Senior Assistant of his having inadvertently marked Annexure P-1 to Field Kanungo, Chururu Ram having aroused the delay in the purveying of information to the petitioner herein rendered him to be solitarily responsible for it besides imposition of costs upon him by the State Information Commission, Himachal Pradesh in Annexure P-12 standing unvitiated. Resultantly, there is no strength in the contention of the learned counsel for the petitioner herein of any liability for delay in the purveying of the information to the petitioner being fastenable upon respondent No.4 herein nor is there any vigour in his contention of costs being hence imposable upon respondent No.4 herein. Though the learned counsel for the petitioner herein has concerted to canvass qua the impugned rendition of the State Information Commission, Himachal Pradesh, comprised in Annexure P-12 being infirm constituted in the fact of its having erroneously computed the delay as stood occurred in the purveying of information to the petitioner herein by respondent No.4, whereas the delay as stood occurred in its purveying was computable from 6.8.2013, whereat Annexure P-1 stood instituted before the Public Information Officer concerned upto 17.12.2013, whereat the information embodied in Annexure P-1 stood supplied to him. However, the aforesaid contention has no force nor any merit as: (1) the computation of the period of delay in the manner as done by the learned counsel for the petitioner herein untenably takes within its ambit the period since 12.9.2013 whereupon under Annexure P-4 the information as embodied in Annexure P-1 stood purveyed to him upto 17.12.2013, whereupon under Annexure P-6 the complete information as embodied in Annexure P-1 stood purveyed to him by respondent No.4 herein, especially when the period since 12.9.2013 uptill 17.12.2013 stood consumed in the processing of and rendition of an adjudication under

Annexure P-6 by Sub Divisional Officer (Civil), Amb upon an appeal of the petitioner herein preferred before the State Information Commission against Annexure P-4 on its standing transferred under Annexure P-5 to the former by the latter. The time consumed in the rendition of an adjudication by the competent authority constituted under the Right to Information Act upon the appeal preferred by the petitioner herein against Annexure P-4 obviously cannot stand included in the reckoning of the period of delay in the purveying of complete information to the petitioner herein. If the said time consumed since the institution of an appeal by the petitioner herein against Annexure P-4 till the rendition of an adjudication thereupon by the competent authority constituted under the Right to Information Act stands also reckoned to have aroused the delay in purveying of complete information to the petitioner herein, besides if it stands included in the reckoning of the aforesaid period of delay, it would tantamount to fastening an untenable liability upon the Sub Divisional Officer (Civil), Amb, even when he was enjoined by law to exhaust all procedures before proceeding to render an adjudication on the appeal of the petitioner. Apart there-from, if any responsibility for any delay on the part of the Sub Divisional Officer (Civil) in rendering an adjudication upon the appeal preferred before it by the petitioner herein stands fastened upon him, it would only sequel its abuse by a cantankerous litigant for availing imposition of costs even upon the adjudicatory authority constituted under the Right to Information Act. Any vindication of the aforesaid endeavour on the part of a cantankerous litigant warranting imposition of costs upon the adjudicatory authority constituted under the Right to Information Act would preclude it from diligently discharging its public duties besides would render it vulnerable to onslaughts by ill advised litigants. Moreover, it would also sequel the consequence of the adjudicatory authority constituted under the Right to Information Act to merely for obviating delays short-circuiting procedures which would beget the natural consequence of gross injustice.

3. Dehors the above, even when the petitioner attributes to the respondent No.4 herein of the latter having purveyed to him incomplete information on 12.9.2013, which complete information stood belatedly purveyed to him on 17.12.2013, nonetheless it is not apparent from the annexures appended to the writ petition qua the incompleteness gripping the information purveyed to him by respondent No.4 under Annexure P-4 or its being not within the scope or domain of the subject embodied in Annexure P-1 whereof information was concerted to be elicited by the petitioner herein from respondent No.4 herein. The incompleteness hence with which Annexure P-4 was gripped with per se appears to have been conjured subsequently by the petitioner herein, arising from his legal adroitness to detect lacunas or shortcomings in Annexure P-4 besides arising from the factum of the subject embodied in Annexure P-1 whereupon information was desired by the petitioner herein from the Public Information Officer, Amb, being not precisely worded for eliciting from the latter the precise information with exactitude, which infirmity, however was subsequently concerted to be cured by the petitioner herein in his appeal preferred before the State Information Commission, Himachal Pradesh, which stood transferred for adjudication under Annexure P-5 to the Sub Divisional Officer (Civil), Amb. Even the petitioner herein has not in the grounds of appeal constituted in the appeal preferred by him portrayed therein with clarity the incompleteness with which Annexure P-4 stood gripped. It appears that for shortcomings in Annexure P-1 qua the narrations on the subject qua which information was sought by the petitioner herein from Tehsildar, Amb, whereupon information was concerted to be purveyed to him by the Public Information Officer-cum-Tehsildar, Amb, hence, sequelled the purveying to him of the purported incomplete information by the concerned under Annexure P-4. Consequently, for the aforesaid omissions on the part of the petitioner herein, he cannot also contend of there being any delay on the part of respondent No.4 herein to belatedly purvey to him complete information qua the subject constituted in Annexure P-1.

In view of the above discussion, the writ petition merits dismissal and is accordingly dismissed. Pending application(s), if any, also stand dismissed. No costs.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Hari Dass son of Shri Fateh Chand ....Petitioner

Versus

State of H.P. through Chief Secretary & others ....Non-petitioners

CWP No. 8828 of 2012
Order Reserved on 30th October 2015
Date of Order 3rd December 2015.

Constitution of India, 1950- Article 226- NHPC entered into an agreement with State of Himachal Pradesh for execution of Hydro Electric Project on river Parbati- a scheme for resettlement and rehabilitation of project affected families was notified by Financial Commissioner-cum-Secretary Revenue- a list of eligible land oustees for providing employment in NHPC under Resettlement and Rehabilitation Plan Scheme was drawn in which name of petitioner was also included- however, no employment was provided to the petitioner- respondent pleaded that there is no recruitment in the category of skilled/semi-skilled/unskilled workmen and the employment would be provided as and when fresh recruitment would be undertaken- it was further pleaded that compensation for acquisition of the land has already been paid- an additional amount of Rs. 54,000/- was paid to the petitioner for falling in the category of landless person- the scheme specifically provided that employment would be provided in the category of skilled/semi-skilled/unskilled workmen subject to requisite qualification as and when any fresh recruitment is conducted- hence, General Manager, Parbati Hydro Electric Project directed to give first chance to the petitioner for appointment in the category of skilled/semi-skilled/unskilled workmen, as and when any fresh recruitment would be conducted. (Para-7 to 11)

For the Petitioner:	Mr. Jitender Ranote, Advocate.
For Non-petitioners Nos.1 and 2:	Mr. M.L. Chauhan and Mr.Rupinder Singh Additional Advocate General with Mr. Puneet Razta Deputy Advocate General.
For Non-petitioners Nos.3 to 5:	Mr. Y.S. Thakur Advocate vice Mr.Rajnish Maniktala Advocate.

The following judgment of the Court was delivered:

P.S. Rana, Judge

Present civil writ petition is filed under Article 226 of the Constitution of India directing non-petitioners to provide employment under Resettlement and Rehabilitation Plan Scheme to the petitioner who belongs to project affected family of Parbati Hydro Electric Project Behali P.O. Larji District Kullu (H.P.)

2. Brief facts of the case as pleaded are that on 20.11.1998 National Hydro Electric Power Corporation Ltd. entered into an agreement with State of H.P. for execution of Hydro Electric Project on river Parbati in District Kullu H.P. On 27.4.2006 Financial

Commissioner-cum-Secretary Revenue to the Government of H.P. notified a scheme for resettlement and rehabilitation of project affected families of Parbati Hydro Electric Project vide notification No. Rev(PD)F(5)-1/1999. In the year 2006 list of eligible land oustees for providing employment in NHPC under Resettlement and Rehabilitation Plan Scheme was drawn in which name of petitioner was also included. Thereafter petitioner along with other oustees represented the matter to Deputy Commissioner Kullu H.P. for providing employment but till date no employment is provided to the petitioner in accordance with Resettlement and Rehabilitation Scheme. Prayer for acceptance of civil writ petition sought.

3. Per contra response filed on behalf of non-petitioners Nos. 1 and 2 pleaded therein that list of oustees of Parbati Hydro Electric Project-III eligible for employment from the Land Acquisition Officer was received on 26.3.2008 and name of petitioner was included in the list. It is pleaded that after approving the name of petitioner non-petitioner No.2 i.e. Deputy Commissioner Kullu District Kullu (H.P.) recommended the name of petitioner to the General Manager Parbati Hydro Electric Project-III for employment under Resettlement and Rehabilitation Scheme vide letter dated 7.4.2008.

4. Per contra separate response filed on behalf of non-petitioners Nos. 3, 4 and 5 pleaded therein that there is no recruitment in the category of skilled/semi-skilled/unskilled workmen and present petition is devoid of any merit. It is pleaded that as and when fresh recruitment would be undertaken it would be ensured that land oustees eligible for employment as mentioned in Clause 3.1 of R&R Scheme would be given first chance and normal recruitment would be conducted only if no candidate is available from project affected family. It is pleaded that there is no fresh recruitment since 2006 in the category of skilled/semi-skilled/unskilled workers. It is pleaded that land of petitioner was acquired for public purpose vide notification No. Vidyut-chh(5)19/2003 dated 7.3.2003 under Land Acquisition Act. It is pleaded that compensation for acquisition of said land already stood paid and further pleaded that matter would be dealt in accordance with R&R Scheme 2006. It is pleaded that petitioner was paid additional amount of ` 54,000/- (Rupees fifty four thousand only) towards landless amount under Relief and Rehabilitation Grant. Prayer for dismissal of civil writ petition sought.

5. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General apeparing on behalf of non-petitioner No.1 and 2 and learned Advocate appearing on behalf of the non-petitioners Nos. 3 to 5 and Court also perused the entire record carefully.

6. Following points arise for determination in this civil writ petition:-

Point No.1

Whether civil writ petition filed by petitioner under Article 226 of Constitution of India is liable to be accepted as mentioned in memorandum of grounds of civil writ petition?

Point No.2

Relief.

Findings upon point No.1 with reasons

7. It is prima facie proved on record that on 26/27th April 2006 notification No. Rev(PD)F(5)-1/1999 was issued by Government of H.P. Operative part of notification is quoted in toto:-

Government of Himachal Pradesh

Department of Revenue (Project Cell)

No.Rev(PD)F(5)-1/1999 Dated Shimla 26/27.4.2006

NOTIFICATION

The Governor Himachal Pradesh is pleased to notify the Scheme for the Resettlement and Rehibilitation of Project affected families of Parbati Hydro Electric Project as per Annexure-A.

By order
Sd/-
FC-cum-Secretary (Revenue)
to the Government of H.P. .....

8. Court has also perused entire scheme for Resettlement and Rehabilitation of project affected families of Parbati Hydro Electric Project placed on record. There is provision of employment to project affected families rendered landless as per Clause 3.1 of the Scheme. Clause 3.1 of Resettlement and Rehabilitation Scheme of project affected families of Parbati Hydro Electric Project is quoted in toto:-

> 3.1 One member of each Project Affected Family rendered landless will be provided employment by the Project Authority in the category of skilled/semiskilled/unskilled workmen subject to fulfilling the requisite criteria/qualification and as and when any fresh recruitment is done in these categories it would be ensured that land oustees eligible for employment as mentioned above are given chance first and normal recruitment would be made only if none are available from amongst them. However persons who are allotted shops shall not be eligible for benefit of employment and vice versa. The following criteria will be adhered to by the Deputy Commissioner concerned for providing of preference while sponsoring the names for employment.
>
> (i) Affected families whose entire land has been acquired.
>
> (ii) Affected families who have become landless on account of acquisition of land by the Project.
>
> (iii) Others.
>
> Within these categories preference will be given on the basis of quantum of land acquired. Those who lose more land will come first.

9. There is positive recital in Clause 3.1 that Project Affected Families who rendered landless would be provided employment by project authority in the category of skilled/semiskilled/unskilled workmen subject to requisite qualification as and when any fresh recruitment is conducted.

10. Land Acquisition Officer Parbati Project Larji has submitted the list of eligible land oustees Project Affected Families for providing employment in NHPC under R&R Scheme whose land has been acquired for construction of Parbati Hydro Electric Project-III as per notification No. Rev.(PD)F(5)-1/1999 dated 26/27.4.2006 placed on record and name of petitioner is recorded at Sr. No. 11. In view of recital in notification No. Rev.(PD)F(5)-1/1999 dated 26/27.4.2006 and in view of condition No. 3.1 of R&R Scheme of Project Affected Families of Parbati Hydro Electric Power Corporation Ltd. it is held that petitioner is entitled for recruitment as and when any fresh recruitment would be conducted by National Hydro Electric Power Corporation Ltd. Point No. 1 is decided accordingly.

Point No. 2 (Relief)

11. In view of findings upon point No.1 non-petitioner No. 3 i.e. The National Hydro Electric Power Corporation Ltd. and non-petitioner No. 4 i.e. General Manager Parbati Hydro Electric Project-III Nagwain District Mandi are directed to give first chance to petitioner for appointment in the categories of skilled/semiskilled/unskilled workmen in near future subject to fulfilling requisite criteria/qualification strictly as per condition No. 3.1 of notification No. Rev.(PD)F(5)-1/1999 dated 26/27.4.2006 as and when fresh recruitment would be conducted. No order as to costs. Petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sh. Rakesh Kashyap S/o Sh. Hari Dass & others ....Petitioners

Versus

State of H.P. & others. ....Non-Petitioners.

CWP No. 1453 of 2015
Order reserved on 20.11.2015.
Date of Order: 3.12.2015

Constitution of India, 1950- Article 226- Petitioners have been appointed on contract basis- they were given fictional breaks at the end of each session and were re-engaged – their services were not regularized- respondents pleaded that posts of the petitioners are to be filled up through direct recruitment- earlier petitions filed by the petitioner were dismissed- record shows that writ petition was disposed of with a direction to create regular posts and to fill them in accordance with Law- direction was issued in another Writ Petition that petitioners would apply for relaxation of age limit and if such representation is made then appropriate authority would decide the same expeditiously- instead of approaching respondents, petitioners approach the High Court by filing writ petition, which was dismissed – again a fresh writ petition was filed - held, that present writ petition is barred by principles of res-judicata- petition dismissed with the direction to dispose of the application for relaxation of the age limit, if any, pending. (Para-9 to 13)

For petitioners: Mr. S.D. Gill, Advocate.
For Non-Petitioners No. 1 & 2: Mr. M.L. Chauhan & Mr. Rupinder Singh Thakur, Additional Advocates General.
For Non-Petitioners No.3 & 4. Mr. Ashok Sharma, ASGI.

The following order of the Court was delivered:

P.S. Rana, Judge

Present Civil Writ Petition is filed under Article 226 of the Constitution of India with prayer that non-petitioners be directed to regularize the services of the petitioners after completion of six years of service with all consequential benefits as per State Government Policy. Additional relief sought to allow petitioners to sit in the test/interview in case any regular post is to be filled up by way of relaxation in age.

Brief facts of the case:

2. That on dated 17.6.2004 petitioner No.1 has qualified his diploma in PET. The post of PTI was vacant in Cantonment Board Middle School Kasauli District Solan H.P.

and name of petitioner No.1 was duly sponsored by the Employment Exchange. Petitioner No.1 was duly interviewed and was appointed as PTI on contract basis in Cantonment Board Middle School Kasauli in the year 2006. Petitioner No.1 is working as PTI till date on contract basis.

3. That petitioner No.2 has qualified his diploma in Art & Craft in the year 2006. The post of Art & Craft teacher in Cantonment Board Middle School Kasauli District Solan H.P. was advertised and the name of petitioner No.2 was duly sponsored by the Employment Exchange and petitioner No.2 was duly interviewed and was appointed as Art & Craft teacher on contract basis. Petitioner No.2 is working as Art & Craft teacher till date on contract basis.

4. That petitioner No.3 has qualified her graduation in Sanskrit in May, 2003 and post of Sanskrit Teacher was lying vacant in Cantonment Board Middle School Kasauli and the name of petitioner No.3 was duly sponsored by the Employment Exchange. Petitioner No.3 was duly interviewed and appointed on contract basis in Cantonment Board Middle School Kasauli in the year 2006 and petitioner No.3 is working on contract basis till date.

5. That on 14.7.2010 petitioners were given fictional breaks in the end of each session and thereafter petitioners were re-engaged. It is pleaded that petitioners are working as teachers since the year 2006 and now they have crossed the age of appointment fixed by the State Government. It is further pleaded that employees of Cantonment Board are entitled to pay and allowances as applicable to the State Government. It is further pleaded that services of the petitioners are not regularized till date and they have completed six years of service. Prayer for acceptance of writ petition sought.

6. Per contra response filed on behalf of non-petitioners No. 1 and 2 that i.e. State of Himachal Pradesh and Director of Elementary Education H.P. pleaded therein that Cantonment Board Middle School Kasauli District Solan is not under the control of non-petitioners No. 1 and 2. It is further pleaded that grievances of the petitioners are to be redressed by non-petitioners No. 3 and 4 i.e. Chief Executive Officer Kasauli Cantonment Board Middle School Kasauli District Solan and GOC-in-Chief Western Command Chandimandir Panchkula Haryana.

7. Per contra separate response filed on behalf of non-petitioners No. 3 and 4 i.e. Chief Executive Officer Cantonment Board Middle School Kasauli District Solan and GOC-in-Chief Western Command Chandimandir Panchkula Haryana pleaded therein that posts of petitioners are to be filled up through direct recruitment as provided under Rule 5 B (1) of Cantonment Fund Servants Rules 1937. It is further pleaded that petitioners have filed CWP No. 4615 of 2013-B which was disposed of by the Hon'ble High Court of H.P. vide order dated 24.9.2013. It is further pleaded that another CWP No. 9535 of 2013 was filed by the petitioners on the same cause of action which was also dismissed by the Hon'ble High Court of H.P. vide order dated 12.12.2013 with costs of Rs. 10,000/-. It is further pleaded that petitioners are misusing the process of Court and it is further pleaded that present writ petition is not maintainable. Prayer for dismissal of writ petition sought.

8. Court heard learned Advocates appearing on behalf of the petitioners and non-petitioners and also perused the entire record carefully. Following points arise for determination:-

1) Whether Civil Writ Petition filed under Article 226 of the Constitution of India is liable to be accepted as mentioned in the memorandum of grounds of writ petition?

2) Relief.

Findings upon point No.1 with reasons:

9. It is proved on record that LPA No. 178 of 2010 titled Chief Executive Officer Kasauli vs. Rakesh Kashyap & others was filed. It is also proved on record that LPA No. 178 of 2010 was disposed of by the Division Bench of Hon'ble High Court of H.P. on 17.6.2013 with direction that regular posts to be created in the stated schools if any would be filled up in accordance with law.

10. It is proved on record that thereafter another CWP No. 4615 of 2013-B titled Rakesh Kashyap & others vs. State of H.P. & others was filed by the petitioners and the same was disposed of on 24.9.2013 by the Division Bench of Hon'ble High Court with observations that policy of the State Government would not be applicable upon petitioners because petitioners are governed by the Central Legislation. Hon'ble Division Bench of H.P. High Court in CWP No. 4615 of 2013-B observed that as per Rule 5 B(1) and 5 B (2) of the Cantonment Fund Servants Rules 1937, no person aged below 18 years and more than 25 years would be appointed to any post under the Board. Hon'ble Division Bench of the High Court further held that Chief Executive Officer Cantonment Board Middle School Kasauli and GOC-in-Chief Western Command Chandimandir Panchkula Haryana are bound by the stipulation mentioned in Rules 5 B(1) and 5 B (2) of the Cantonment Fund Servants Rules 1937. Hon'ble Division Bench further held that petitioners would apply for relaxation of age limit specified in Rule 5 B (2) of Rule 1937 and if such representation would be made then appropriate authority would decide the same expeditiously and if relaxation would be granted then petitioners would participate in the selection process.

11. Thereafter petitioners again filed CWP No. 9535 of 2013 titled Rakesh Kashyap and others vs. State of H.P. and others which was decided by the Division Bench of Hon'ble High Court on 12.12.2013. The Division Bench held that petitioners have no right for being considered for regularization against the sanctioned posts. Hon'ble Division Bench further held that Hon'ble Division Bench in CWP No. 4615 of 2013-B directed the petitioners to approach non-petitioners No. 3 and 4 for relaxation of age but instead of approaching non-petitioners, petitioners have filed CWP No. 9535 of 2013 with a prayer for framing the policy for their regularization. Hon'ble Division Bench of High Court in CWP No. 9535 of 2013 held that petitioners have no legal enforceable right warranting any interference and dismissed the writ petition with costs quantified at Rs. 10,000/- (Ten thousand).

12. Thereafter again petitioners have filed present writ petition No. 1453 of 2015-F on the same grounds. It is held that in view of the findings of Division Bench of Hon'ble High Court in CWP No. 4615 of 2013-B titled Rakesh Kashyap & others vs. State of H.P. & others decided on 24.9.2013 and in view of the findings of Hon'ble Division Bench in CWP No. 9535 of 2013 titled Rakesh Kashyap & others vs. State of H.P. & others decided on 12.12.2013 present writ petition is barred by the concept of *res-judicata*. It is well settled law that concept of *res-judicata* is applicable in writ Courts. In view of the above stated facts point No.1 is decided in negative against the petitioners.

Point No.2 (Relief):

13. In view of the findings upon point No.1 above CWP No. 1453 of 2015 titled Rakesh Kashyap & others vs. State of H.P. & others is dismissed. However if any application of petitioners for relaxation of age limit is pending under Rule 5 (B) (2) of Rules of 1937 before Non-petitioners No. 3 and 4 same will be disposed of within one month in accordance with law. No order as to costs. Pending applications if any also disposed of. Petition is disposed of.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

CMPMO No. 254 of 2015 &
CMPMO No. 255 of 2015
Decided on: 3.12.2015.

1.	**CMPMO No. 254 of 2015**	
	Sh. Raman Jain	....Petitioner.
	Versus	
	Raj Kumar Mehra & another.	....Non-Petitioners.
2.	**CMPMO No. 255 of 2015**	
	Sh. Raman Jain	....Petitioner
	Versus	
	Raj Kumar Mehra & another.	....Non-Petitioners

Code of Civil Procedure, 1908- Order 18- With the consent of the parties order passed by Rent Controller set aside and one opportunity granted to cross examine PW-5 subject to payment of cost.

For the Petitioners : Mr Vivek Sharma, Advocate.
For the Non-Petitioners : Ms. Naresh Sharma, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

CMPMO No. 254 of 2015 and CMPMO No. 255 of 2015 were consolidated by the order of Court because both the CMPMOs filed in same case pending before the learned Rent Controller. With the consent of learned Advocates following order passed:-

i) Order dated 20.4.2015 passed by learned Rent Controller in case 65/2 of 2014/2012 titled Raj Kumar Mehra & another vs. Raman Jain is set aside and one opportunity is granted to Sh. Raman Jain to cross-examine of PW-5 namely Sh. Mohit Mehra subject to costs of Rs. 1000/- (Rupees one thousand).

ii) CMPMO No. 255 of 2015 titled Raman Jain vs. Raj Kumar Mehra & others is dismissed as withdrawn.

iii) Parties are directed to appear before learned Rent Controller on **28.12.2015**. Record of learned Rent Controller be sent back forthwith along with certified copy of this order for compliance.

iv) Statement of learned Advocate appearing on behalf of the petitioners recorded separately will form part and parcel of this order.

v) Certified copy of order be placed in file No. CMPMO No. 255 of 2015.

2. CMPMO No. 254 of 2015 and CMPMO No. 255 of 2015 are disposed of accordingly. Pending applications if any also disposed of. Dasti copy.

****

BEFORE HON'BLE MR.JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. & Ors. ...Appellants.
Versus
Gian Singh ...Respondent.

LPA No.194 of 2015.
Reserved on: 26.11.2015.
Decided on: December 3, 2015.

Constitution of India, 1950- Article 226- Appellants challenged the order of the writ court whereby the services of the respondent were ordered to be regularized as he fulfilled all the conditions-held that the respondent has worked for 240 days in a year for 8 years and the right to be considered for the regularization had accrued to him and the writ Court has rightly rendered the directions for the regularization of the respondent- Appeal dismissed. (Para 1 & 2)

For the Appellants: M/s.V.S.Chauhan, Anup Rattan & Romesh Verma, Addl.AGs with Mr.J.K.Verma, Dy.A.G.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Letters Patent Appeal is directed against the judgment of the learned Single Judge of this Court whereby a direction was rendered to the respondents-appellants herein to regularize the services of the petitioner with effect from 1.1.2000 with all consequential benefits of pay, seniority and fixation of pension besides therein a direction was rendered to the respondents-appellants herein of the services of the petitioner while having come to be untenably superannuated on his completing 58 years in age whereas with the hitherto daily wage service of the petitioner as a Beldar under the appellants herein was enjoined by the mandate fastened upon the appellants herein constituted in Annexure R-1 to be regularized from 1.1.2000 when hence stood infringed necessarily ensuably with the apposite amendment to the fundamental Rules 2001 carried out in 10.5.2001 restricting the age of superannuation of daily waged workers to 58 years was held to be inapplicable qua the respondent herein given his engagement by the appellants herein as a daily wage worker on 1.1.1992 whereat it hence obviously being inapplicable qua him especially when it had effect onwards 2001 than with retrospectivity from 1992. In sequel, the learned Single Judge of this Court held qua from 58 years till 60 years the respondent herein being deemed to be in service with the concomitant effect of the appellants herein being enjoined to defray to him all consequential monetary benefits. The issue at hand before this Court though concerted to be convoluted yet is simple. The entire controversy at hand rests upon the applicability by the appellants herein qua the respondents herein of Annexure R-1 appended to CWP No.7140 of 2012 with a clear stipulation therein of the appellants herein being enjoined to regularize the services of all daily wagers who had completed 8 years or more of continuous services as daily wagers on 31.3.2000. For a daily wager to foist on its anvil a claim for regularization in service in the capacity whereat hitherto he was rendering service under his employer on a daily wage basis he was also enjoined to manifest the factum of his having rendered a minimum of 240 days of work in each of the calendar years of his

continuous service under his employer from the date of his engagement till his having completed the requisite period of 8 years. Uncontrovertedly, with the respondent herein having stood engaged by the appellants herein as a daily wage Beldar on 1.1.1992 in which capacity there onwards he unintermittently rendered service besides completed 240 days of work in each of the 8 years of his intermittent rendition of service under his employer as a daily wage Beldar up to 31.3.2000 fastened in him an inherent tenable claim to under Annexure R-1 seek regularization of his service in his hitherto capacity as a daily wage Beldar with effect from 31.3.2000. Though, the appellants herein concede to the factum of theirs having issued Annexure R-1 nonetheless they have yet in infraction thereof inasmuch as whereas in consonance therewith the respondent herein stood entitled to stake a claim for regularization in service in his hitherto capacity as a daily wage Beldar w.e.f. 1.1.2000 given his having completed 8 years of un-intermittent service as a daily wage Beldar besides with a minimum of 240 days of service in each of the calendar years of his service as a daily wager commencing from 1.1.1992 up to 31.12.1999, the appellants herein rather bestowed or conferred the benefit of regularization in service upon the respondent herein from his hitherto capacity as a daily wage Beldar under them w.e.f. 1.1.2002. The aforesaid infraction by the appellants herein of the mandate of Annexure R-1 appended to CWP No.7140 of 2012 when undone by a well reasoned judgment of the learned Single Judge of this Court cannot hence warrant any interference rather merits deference by this Court. In sequel, the argument propounded before this Court by the learned counsel for the appellants qua the learned Single Judge having mis-applied qua the respondent Annexure R-1 appended to the writ petition besides his having not appositely applied the decisions encapsulated in the grounds of appeal taken in the Letters Patent Appeal cannot merit its being countenanced by this Court. Furthermore, with there being no emphatic material on record qua any of the conditions embodied in annxure R-1 having remained unsatiated by the respondent herein for in-eligiblizing him to stake a claim for regularization in service under the appellants in his hitherto capacity as daily wage Beldar emaciates the vigour of the contention of the learned counsel for the appellants herein of the learned Single Judge of this Court having untenably bestowed upon the respondent herein the benefit of regularization in service from his hitherto capacity as a daily wage Beldar w.e.f. 1.1.2000 whereat he had for reasons aforestated acquired the legal liverage for conferment thereat its benefit in consonance therewith. It appears that the appellants herein had taken to by misconstruing the spirit, tone and tenor of Annexure R-1 miscomputed the satiation of conditions enshrined therein on 1.1.2002 and it being the apposite year whereat they stood satiated qua the respondent herein. The misconstruction placed by the appellants upon Annexure R-1 has led it to commit a fallacy in theirs conferring the benefit of regularsiation in service upon the respondent herein in his hitherto capacity as a daily wage Beldar w.e.f.1.1.2002 whereas given the satiation earlier of the parameters enshrined therein the respondent herein was rather foisted with a right to seek a claim for regularization in service w.e.f. 1.1.2000 as afforded by the learned Single Judge of this Court. Dehors the above the appellants herein have applied in part the mandate foisted upon them by annexure R-1 appended to the writ petition, whereas in case they had omnibusly applied qua the respondent herein the fiat recorded therein it would not have sequelled gross miscomputation by them qua the date or the year whereat the respondent herein had acquired the right to inconsonance therewith stake a claim for regularisiation of his service in his hitherto capacity as a daily wage Beldar under the appellants herein. The aforesaid reasons anvilled upon the interpretation of annexure R-1 appended to the writ petition outdo besides silence the effect if any of the judgements relied upon by the learned counsel for the appellants especially when they appear to be renditions upon entirely distinctive factual matrix vis.a.vis the factual matrix extantly existing. Moreover, with the engagement of the respondent herein as a daily wager in 1992 rendered inapplicable qua him the fetter

embodied in the apposite amendment carried out to the fundamental rules on 10.5.2001 whereby the age of superannuation of daily wagers was restricted at 58 years of age moreso when no retrospectivity stood accorded to the amendment aforesaid carried in fundamental rules 2001, for permitting it to take within its purview the induction into service of the respondent herein by the appellants herein as a daily wager in the year 1992 nor for reiteration hence the restriction embodied therein of the services of the petitioner suffering superannuation on his completing 58 years of age is concomitantly un-attractable to him. However, when the petitioner stood untenably superannuated from service on his completing 58 years of age whereas he was entitled to retire on his completing 60 years of age, the learned Single Judge of this Court did not err in directing the appellants herein to for two years from 58 years to 60 years whereupto he was entitled to continue in service under them treat him to be in deemed service and of the appellants herein being liable to pay him all consequential monetary benefits.

2. In view of the above discussion, the instant letters patent appeal stands dismissed being devoid of any merit. Pending application(s), if any, also stand dismissed. No costs.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Suresh Kumar .....Appellant.
Versus
State of H.P ....Respondent.

Cr. Appeal No. 306 of 2015
Reserved on: 27.11.2015
Decided on: 3rd December, 2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.620 kilograms of charas- accused had given his consent to search his bag- however, Investigating Officer had conducted the personal search of the accused- further, entry regarding the production of the case property in the Court was not made in the register due to which the case property produced in the Court is not linked to the case property recovered at the spot- held, that in these circumstances, prosecution case is not proved- accused acquitted. (Para-11 to 13)

For the Appellant: Mr. H.S Rangra, Advocate.
For the Respondent: Mr. P.M Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant appeal is directed against the impugned judgment rendered on 25.5.2015, by the learned Special Judge, Kinnaur Sessions Division at Rampur Bushehar, H.P. in Sessions Trial No. 0000001/2014, whereby the learned trial Court convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine in a sum of Rs.1,00,000/- (one lac) and in default of payment of fine to further undergo simple imprisonment for a period of one year for commission of offence

under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, for short "the Act".

2. Brief facts of the case are that on 7.10.2003, at about 4.15 PM, a police party headed by S.I. Gambhir Chand, SHO Police Station, Nirmand accompanied by ASI Mohan Singh, HC Sushil Kumar No.69, Constable Chand Mishra No.352 and Constable Diwan Chand No.93 left police Station, Nirmand, District Kullu, H.P. in a private vehicle equipped with alcohol sensor, drug kit and investigation kit for routine patrol duty towards Dev Dhank, Kedas etc. At about 5.30 PM, at Chambudhar Mod, the police officials spotted the accused coming on foot from Dev Dhank towards the main road carrying a backpack (Pithu) on his right shoulder. The accused on seeing the police party turned around and started running. He was chased, overpowered and apprehended by S.I. Gambhir Chand, after ascertaining the identity of the accused, disclosed his intention to conduct his personal search and search of the backpack (Pithu). Thereafter, the accused was apprised of his right to be searched either by a Gazetted Officer or a nearest Magistrate in terms of Section 50 of the Act and prepared consent memo. The accused exercised his option to be searched by the police officials present on the spot. S.I,. Gambhir Chand thereafter constituted a raiding party by associating two witnesses ASI Mohan Singh and HC Sushil Kumar No.69 and searched the backpack (pithu) being carried by the accused. On search of the backpack (Pithu) of the accused, it was found carrying one green carry bag tied with red ribbon on the top containing black coloured round shaped substance in the form of balls. Identification of the substance was conducted with the help of drug detection kit as Charas (cannabis). The contraband recovered from the conscious and exclusive possession of the accused was weighed along with carry bag and was found 1.620 kg. The weight of the carry bag was found 10 grams and that of Charas 1.610 kg. The recovered contraband was put into same carry bag and thereafter it was put in the backpack (Pithu), which was stitched and sealed in white cloth parcel by affixing 9 seals bearing impression 'H'. The sealed parcel thereafter was taken into possession vide seizure memo Ext.PW.1/D. Copy of seizure memo was also handed over to the accused free of costs. The sample of seal impression 'H' was taken on a separate piece of cloth for the purpose of record. S.I. Gambhir Chand thereafter filled NCB-I form in triplicate. Thereafter Rukka was sent through Constable Diwan Chand No.93 to police station, Nirmand and on the basis of which FIR No.81/2013, dated 7.10.2013 was registered against the accused under Section 20 of the Act. S.I. Ghambhir Chand thereafter prepared spot map and recorded the statements of witnesses under Section 161 Cr.P.C. The accused was arrested on 7.10.2013 at 7.30 PM on the spot. The sealed parcel along with other relevant documents were sent to State FSL, Junga through Constable Jiwa Chand No.216 for chemical examination. As per the FSL report, the exhibit under reference indicated the presence of cannabinoids including the presence of tetrahydrocannabinol. The microscopic examination indicated the presence of characteristic cytolithic hairs. The Charas is a resinous mass which on testing was found present in the exhibit. The exhibit was opined as extract of cannabis and sample of Charas. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court.

3. The trial Court charged the accused for his having committed an offence punishable under Section 20 of the Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 9 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused was given an opportunity to adduce evidence in defence, which he refused to avail.

5. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. Shri H.S Rangra, learned Advocate, has concerted to vigorously contend before this Court qua the findings of conviction, recorded by the learned trial Court, being not based on a proper appreciation of evidence on record by it, rather, theirs being sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

6. On the other hand, the learned Deputy Advocate General appearing for the State, 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 they do not necessitate interference, rather merit vindication.

7. 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.

8. Recovery of charas weighing 1.610 kg was effected under memo Ex. PW-1/D from the alleged conscious and exclusive possession of the accused while its being kept by him in a bag slung on his right shoulder. Even though the prosecution witnesses have deposed in tandem besides in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of circumstances, hence it stands argued qua when the prosecution case standing established, it would be legally unwise for this Court to acquit the accused.

9. Besides when the testimonies of the official witnesses, unravel the factum of theirs being bereft of any inter-se or intra-se contradictions hence, theirs enjoying credibility for sustaining thereupon findings of conviction recorded against the accused by the learned trial Court. Apparently, proof of the prosecution case is endeavored to be sustained on the strength of the unblemished testimonies of police witnesses. A close and studied perusal of the depositions of the police witnesses underscores the factum of theirs having therein neither rendered a version qua the factum of recovery of contraband from the exclusive and conscious possession of the accused inconsistent with the manner thereof recited in the F.I.R. Ext.PW-8/B for begetting a conclusion of hence their testimonies comprised in their respective examinations in chief being ridden with a vice of inter-se contradictions vis-à-vis their testimonies comprised in their respective cross-examinations nor when their depositions are afflicted with any vice of intra se contradictions rather when they have rendered a deposition qua the manner of recovery of charas from the alleged conscious and exclusive possession of the accused bereft of any disharmony or inconsistency, gives leverage to an inference of hence the prosecution succeeding in sustaining its charge against the accused of charas weighing 1.610 kg having stood recovered from his conscious and exclusive possession while its being kept by him in a bag Ex. P-2 slung on his right shoulder.

10. Even the factum of non-association of independent witnesses by the Investigating Officer in the apposite proceedings would not dilute the efficacy of the depositions of the official witnesses unveiling therein with intra-se harmony the factum of recovery of charas weighing 1.610 kg having stood effectuated under memo Ex. PW-1/D from the purported conscious and exclusive possession of the accused while his carrying it in a bag Ex. P-2 slung on his right shoulder. Now this court would not strip the efficacy of their testimonies underscoring the factum probandum aforesaid deposed with intra-se consistency by each of them, even if despite availability of eye witnesses at the site of

occurrence at a stage contemporaneous to the holding of apposite proceedings thereat by the Investigating Officer, no concerted efforts were purportedly made by the Investigating Officer for soliciting their participation therein.

11. In the face of Ex. PW-1/A reflective of the Investigating Officer having concerted to elicit from the accused his consent for his personal search and of its carrying a communication to him of his having a legal right to be searched before a Magistrate or a gazetted Officer, whereas in his written consent therein purveyed to the Investigating Officer his not empowering the Investigating Officer to hold his personal search, rather his having purveyed an empowerment to the Investigating Officer only holding search of his bag Ex. P-2 wherefrom charas weighing 1.610 kg was recovered renders for the reasons recorded hereinafter the recovery of charas Ex.P-5 under memo Ex.PW-1/D from the bag slung by the accused on his right shoulder to be suspect, hence eroding the genesis of the prosecution version (a) even when the accused under his consent comprised in PW-1/A had authorized the investigating officer to hold search of his bag nonetheless the Investigating Officer having proceeded to, beyond the aforesaid authorization purveyed under Ex.PW-1/A by the accused to him, hold a personal search of the accused, renders the holding of the personal search of the accused by the Investigating Officer to be grossly unwarranted, (b) With the holding of a personal search of the accused by the Investigating Officer suffering legal impairment, the implication thereof is of the Investigating Officer in sequel to Ex. PW-1/A on his holding a personal search of the accused his thereupon having effectuated recovery of charas weighing 1.610 kg whereafter he planted it in bag Ex. P-2 slung on the right shoulder of the accused. Amplifying impetus to the aforesaid inference is garnered by the factum of Ex. PW-9/A disclosing therein of besides items occurring at Sr. Nos. 1,2 and 4 of a recovery memo portraying effectuation of recovery of charas weighing 1.610 grams also having stood recovered by the Investigating Officer on the latter holding a personal search of the accused. As a corollary, the reflection in Ex. PW-9/A of a memo enunciative of the items recovered by the Investigating Officer on his holding a personal search of the accused especially of a recovery memo manifesting effectuation of recovery of charas weighing 1.610 kg is connotative of the investigating Officer having recovered charas weighing 1.610 kg in a manner distinct from the one as portrayed in recovery memo Ex. PW-1/D. Apart therefrom the inference which also stands galvanized is of the investigating officer even if assumingly having recovered charas weighing 1.610 kg on his holding a personal search of the accused nonetheless its recovery on his holding a personal search of the accused cannot render the accused to be penally liable, significantly in the face of memo of Ex.PW-1/A in pursuance whereof the investigating officer held a personal search of the accused suffering severe legal impairment besides invalidation aroused by the stark fact of the accused therein having permitted the investigating officer to only hold search of bag slung on his right shoulder preeminently when hence he forbade the investigating officer to hold his personal search any effectuation of recovery thereupon of recovery memo with a manifestation therein of effectuation of recovery of charas on the investigating officer holding his personal search is amenable to a deduction of its recovery being a well engineered invention on the part of the investigating officer rendering hence even if assumingly for reiteration any recovery of contraband by the investigating officer on his holding a personal search of the accused to be carrying no legal formidability nor any penal culpability against the accused being evincible therefrom. Necessarily when the investigating officer hence is to be construed to have prepared a recovery memo qua effectuation by him of recovery of charas and which effectuation of recovery of a memo aforesaid stood effectuated on his holding a personal search of the accused besides recovery whereof preceded the preparation of Ex. PW-1/D with a recital therein of contraband having stood recovered by the investigating officer from a bag Ex. P-2 slung by the accused on his right shoulder obviously renders the subsequent preparation of Ex.PW-1/D with recitals therein to acquire an ensuable taint of legal debility

engendered by a natural stain of invention imbuing it hence constituting the prosecution story to stand capsized besides it being incredible. In aftermath a contrived prevaricated or an engineered prosecution version cannot gain credence from this Court.

12. Be that as it may, it was also incumbent upon the prosecution to fortifyingly establish the factum probandum in as much as the case property produced before the trial Court being linkable to its recovery standing effectuation from the alleged conscious and exclusive possession of the accused in the manner espoused by the prosecution. The germane besides apt material for forming a conclusion qua the case property as produced in Court being linkable to the apposite stage of its recovery from the alleged conscious and exclusive possession of the accused in the manner propagated by the prosecution, stood embedded in the apposite descriptive entries qua it, recorded in the Malkhana register of the police station concerned. Imperatively at the stage contemporaneous to its production in Court by the learned PP for its being shown to the PWs (a) the former was enjoined to produce in Court either the abstract of the malkhana register personificatory of narrations or descriptions compatible or congruous to the one borne on Ex.PW-1/D as shown to the prosecution witnesses (b) or he was obliged to elicit from the PWs to whom the case property stood shown in Court by him communications portraying the factum of it being carried by them on its being handed over to them by an authorized official after its retrieval by the latter from the Malkhana concerned whereupon it stood handed over by them to the learned PP for facilitating on its production by him in Court emanation of apposite elicitations from them unveiling the factum of it being the case property as attributed by the prosecution to the accused (c) even in the face of the aforesaid omission the learned PP at the time of production of case property Ex.P-5 in Court, for its being shown to the PWs for theirs deposing qua it being the very same property as was recovered from the alleged conscious and exclusive possession of the accused in the manner as propagated by the prosecution to yet gain muscle was obliged to on its production in Court by him besides prior to its being shown to the PWs communicate before it the factum of his having received it from an empowered official after its retrieval by the latter from the Malkhana concerned.

13. However, a close and circumspect reading of the testimonies of PW-1 and PW-9 to whom the case property on its production in Court by the learned PP was shown omits to unfold (a) the factum of either at the stage contemporaneous to its production in Court by the learned PP for its being shown to the PWs aforesaid he divulged to the trial Court the factum of his having received it from an authorized officer on its retrieval by the latter from the Malkhana concerned (b) nor is there any emanation in the deposition of both PWs aforesaid of theirs having received it from an authorized official on it retrieval by the latter from the malkhana concerned, (c) besides there is no communication by both in their recorded depositions on oath of theirs carrying with them at the time of recording their depositions in court during course whereof the learned PP showed them case property Ex.P-5, the relevant abstract of the malkhana register wherefrom compatibility intra-se descriptions or narrations borne thereon on its comparison with the abstract of the malkhana register could stand either disinterred or fathomed, for as a corollary rendering a conclusion of the case property as produced in the Court being the one as stood recovered from the conscious and exclusive possession of the accused.

14. The summom bonum of the above discussion is of the omissions aforesaid countervailing the propagation of the prosecution of case property Ex.P-5 produced in Court by the learned PP for its being shown to PWs being relatable to the contraband recovered from the alleged conscious and exclusive possession of the accused under memo Ex. PW-1/D. The crux of the above discussion is of the prosecution having not adduced cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as

done by the learned trial Court suffers from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

15. In view of the above discussion, the instant appeal is allowed and the impugned judgment of 25.5.2015 rendered by the learned Special Judge, Kinnaur is set-aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

16. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of the jail concerned, in conformity with the judgment forthwith. Records be sent back forthwith.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Vikas alias Viku. .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 232 of 2015.
Reserved on: 27th November, 2015.
Date of Decision : 3rd December, 2015

Indian Penal Code, 1860- Section 376 read with Sec. 34- Prosecutrix carrying a bamboo stick, shivering and wet due to rain came to the house of the complainant-complainant noticed prosecutrix wearing salwar inside out and on making enquiries, it was learnt that two unknown persons after entering in the house of the prosecutrix had raped her and had caused injuries on various parts of her body- a purse carrying photographs of the accused and other material was found in the room of the prosecutrix under the bed during search made by the son of the prosecutrix- Appellant along with co-accused was held guilty of the commission of offence by the trial court- prosecutrix could not depose about the occurrence before the court on account of her death- PW1 & PW8 deposed that prosecutrix had not disclosed the name of the accused to them-statement u/s 164 Cr.P.C proved on the record by the Magistrate is not a substantive piece of evidence – there were contradictions regarding the place of recovery of the purse from the house of the prosecutrix- evidence of FSL is also not conclusive to connect the accused with the guilt-Trial court had not appreciated the evidence in the proper manner- appeal allowed. (Para 8 & 9)

For the Appellant: Mr. Vivek Singh Thakur,Advocate.
For the Respondent: Mr. M.A. Khan, Addl. Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment of the learned Additional Sessions Judge-III, Kangra at Dharamshala, District Kangra, Himachal Pradesh, rendered on 31.03.2015, in Session Trial No. 5-D/14, whereby the learned trial Court convicted the

accused/appellant for his having committed an offence punishable under Section 376 of the Indian Penal Code and sentenced him to undergo imprisonment for life and to pay a fine of Rs.20,000/- and in default of payment of fine, sentenced him to suffer rigorous imprisonment for one month.

2. The facts relevant to decide the instant case are that on the intervening night of 1.8.2013 and 2.8.2013, at about 11 PM, prosecutrix , her neighbourer came to the house of complainant Sureshena Devi and at that time she was having a bamboo stick in her hand and it was raining and she was wet and shivering. When the complainant saw prosecutrix, she was wearing Salwar inside out. Thereafter, prosecutrix told her that two boys had come inside her house and one had closed the room and other loosened the Salwar and did the sexual intercourse with her. During this, he had also hit her on her face and other body parts. Complainant checked the Salwar which prosecutrix was wearing and found that there was blood stains on her Salwar. The son of the prosecutrix namely Sawroop Chand had gone to his in-laws house, which was near the house of the complainant, therefore, complainant called her son telephonically and took prosecutrix to her house. The clothes of the prosecutrix were got changed by the complainant and she saw injuries on the private parts of the prosecutrix and there was fresh bleeding. The complainant and Swaroop Chand, when searched the room of the prosecutrix, they found the mattress of the bed of the prosecutrix stained with blood and under the mattress some black coloured purse along with documents, photographs of accused Vikas and currency note of Rs.50/- were found, which belong to accused Vikas. With the help of purse they came to know that this act has been committed by accused Vikas. This matter could not be reported to the police on the said night due to heavy rains. However, on the next day they reported the matter to the police through Ward Member, Banita Kumari and her husband Surinder in Police Post, Yol. The purse so recovered from the spot was handed over the police and the matter was reported to the police by the complainant Sureshna Devi vide her statement recorded under Section 154 Cr.P.C. on which rapat was made and thereafter FIR was registered. Medical examination of the prosecutrix was conducted at Zonal Hospital, Dharamshala and MLC was procured. During investigation the spot map was prepared and the Investigating Officer had also taken the photographs. During investigation also specimen seal impressions were taken on a piece of cloth. Both the accused were arrested and sealed samples were sent for chemical examination to RFSL and the report of the chemical examiner was obtained. Statements of witnesses were recorded. On conclusion of investigation, the challan was prepared and presented in the Court and accused were produced to face trial.

3. Accused was charged for his having committed an offence punishable under Section 376/34 of Indian Penal Code by the learned trial Court. In proof of the prosecution case, the prosecution examined 18 witnesses. On conclusion of recording of the prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure was recorded by the Court, in which the accused claimed innocence and pleaded false implication in the case and chose not to lead evidence in defence.

4. On appraisal of the evidence on record, the learned trial Court, returned findings of conviction against the accused/appellant.

5. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. The learned defence counsel has concerted to vigorously contend qua the findings of conviction recorded by the learned trial Court being not based on a proper appreciation of evidence on record, rather, theirs being 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 appellate jurisdiction and theirs being replaced by findings of acquittal.

6. On the other hand, the learned Additional Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the Court below being based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference, rather meriting vindication.

7. 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.

8. The prosecutrix as portrayed in Ext.PW-12/A was subjected to forcible sexual intercourse by the accused. The sole testimony of the prosecutrix is per se formidable to sustain findings of conviction against the accused significantly when she renders a version qua the ill-fated occurrence free from any taint of inter se contradictions besides free from any stain of embellishments or improvements arising from hers having testified a version qua it contrary to the one disclosed by her in the complaint lodged qua the occurrence. However, the prosecutrix remained unexamined hers not surviving at the stage when the case was fixed for the recording of the depositions of the prosecution witnesses. The non-recording of the deposition of the prosecutrix has precluded adduction of best evidence by the prosecution to sustain its charge against the accused. Nonetheless, the prosecution has strived to nail the guilt of the accused Vikas qua the offences for which he stood charged, tried, besides convicted and sentenced by the learned trial Court, on the anvil of Ext.PW-15/B, which records a version qua the incident narrated by the prosecutrix before the Judicial Magistrate concerned. With the Judicial Magistrate before whom the deceased prosecutrix recorded her version, comprised in Ext.PW-15/B qua the incident, having proved Ext.PW-15/B, an endeavour is made by the prosecution of its constituting credible evidence against the accused. However, the assay on the part of the prosecution to carry ahead its espousal harbored upon Ext.PW-15/B is legally emasculate predominantly in the face of its not constituting substantive evidence, which mantle it would have acquired only on the prosecutrix testifying qua the veracity of the narrations contained therein inclusive of its recording by the Magistrate concerned, being her volitional act. Obviously with the prosecutrix having not testified qua the veracity of the narrations comprised in Ext.PW-15/B though proven by the Magistrate concerned, before whom she recorded a statement under Section 164 Cr.P.C. renders its contents to be not comprising substantive evidence against the accused nor also its embodying probative evidence of efficacious value to found thereupon any conclusion of guilt qua the accused. Even otherwise with their being no graphic disclosure with vividity therein qua the identity of the accused fortifyingly enfeebles its probative tenacity. The identity of the accused remained undivulged by the prosecutrix to the prosecution witnesses. However, the factum of recovery of purse Ext.P-5 of accused Vikas Kumar under memo Ext.PW-1/B from the site of occurrence whose recovery thereunder stands proven by the recovery witnesses qua it besides with its enclosing three photographs Ext.P-6 to P-8 of accused Vikas Kumar besides his voter cards Ext.P-15 & P-16, is espoused by the prosecution to be evincing vigorous evidence against the accused qua his presence at the site of occurrence even when his identity remained undivulged to any of the prosecution witnesses by the prosecutrix. The recovery of purse Ext.P-5 from the site of occurrence though recited in the FIR lodged qua the occurrence by Sureshna Devi, to have been effectuated from underneath the mattress of a bed in the house of the prosecutrix. Nonetheless, when she stepped into the witness box she in diversion to the place of its recovery though disclosed in the FIR to be from underneath the mattress of a bed in the house of the prosecutrix, has unraveled therein the factum of its lying on the spot. Apparently with their being a palpable diversion in the

FIR qua its keeping and recovery, inasmuch as it having been recited therein to have been noticed lying underneath the mattress of a bed in the room of the prosecutrix vis-a-vis her recorded deposition on oath, wherein she has testified it having been found lying on the spot, renders the version in the FIR qua its keeping/recovery suffering contradiction arising from hers having contrarily in her deposition on oath testified its having been found lying on the spot. Obviously the contradiction aforesaid in the manner of its being noticed or recovered engenders an inference of hers embellishing or improving upon her previous statement recorded in writing qua the factum of its being noticed by her or hers having unearthed it from underneath the mattress of a bed in the house of the prosecutrix. Obviously the contradictions besides improvements vis-a-vis her recorded deposition on oath with her previous statement recorded in writing begets a concomitant inference of: (a) embellishments or improvements qua its keeping or unearthing, hence standing aroused rendering inefficacious recovery of purse Ext.P-5 under memo Ext.PW-1/B; (b) besides the aforesaid factum impinging upon the legal efficacy of recovery of purse Ext.P-5 under memo Ext.PW-1/B, the existence of an admission in the cross examination of PW-1, of the Investigating Officer in sequel to his arresting the accused having conducted his Jama Talashi, nurses an inference of recovery of purse Ext.P-5 under memo Ext.PW-1/B having stood effectuated by the Investigating Officer in pursuance thereto. In sequel, on an arousal of the aforesaid inference, hence an aura of or a spell of doubt engulfs the factum of recovery of purse Ext.P-5 under memo Ext.PW-1/B; (c) both PW-1 as well as PW-8 have in their respective depositions comprised in their respective cross examinations, disclosed therein of the prosecutrix having not disclosed to either of them the name of the accused. The said fact even stands borne in the statement of the prosecutrix comprised in Ext.PW-15/B recorded before the Judicial Magistrate concerned. The aforesaid disclosures in the cross examinations of PW-1 and PW-8 qua the non-revelation by the prosecutrix of the name of the accused renders him un-amenable to penal culpability. Predominantly when there exists a deposition in the cross examination of PW-1 of co-accused Vijay Kumar residing in close proximity to the house of the prosecutrix, the implication thereof is of the prosecutrix being empowered in case co-accused visited her house in the company of accused Vikas Kumar for committing the act alleged against both, to gather the identity of co-accused Vijay Kumar. However, despite the empowerment with the prosecutrix to gather the identity of co-accused Vijay Kumar, she omitted to disclose his identity to either PW-1 or PW-8, besides in her statement recorded before the Magistrate concerned under Section 164 Cr.P.C. comprised in Ext.PW-15/B, she has too remained reticent therein qua the identity of co-accused Vijay Kumar. Reticence at all stages by the deceased prosecutrix qua the identity of co-accused Vijay Kumar closes an inference of its eroding the genesis of the prosecution version of both having together visited the house of the deceased prosecutrix, especially when also she has maintained silence in Ext.PW-15/B qua recovery of purse Ext.P-5 under memo Ext.PW-1/B having stood effectuated in the manner recited therein, lends a boost to an inference of recovery of purse Ext.P-5 under memo Ext.PW-1/B being contrived besides it having been planted by the Investigating Officer to falsely implicate the accused. Ensuably, hence the espousal qua the recovery of purse Ext.P-5 under memo Ext.PW-1/B located at the residence of the prosecutrix being conclusive evidence qua the guilt of the accused founders.

9. The report of the FSL though relied upon by the prosecution is inconclusive qua the factum of human blood detected in Ext.2/B (pubic hair, Kanta Devi) and Ext.5/b (glans penis swab, Vikas) being relateable to the blood grouping of the accused or connecting the accused in the commission of the offence alleged against him. Apart therefrom with the existence of human blood in Ext.3 (Vaginal swabs, Kanta Devi) having stood opined therein being unrelateable to the blood grouping of any of the accused, also with semen having remained undetected in Ext.5C (urethral orfice slide, Vikas). In addition

with no semen having stood detected in Ext.5(C) and Ext.5 (D) conjunctively rendered reliance thereupon by the learned trial Court to be untenable. Consequently with the infirmities aforesaid gripping the report of the FSL comprised in Ext.P.A, the prosecution has obviously been unable to connect the accused with the alleged offences.

10. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court 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 the evidence on record.

11. For the foregoing reasons, the appeal is allowed and the judgment of the learned trial Court is set-aside. Accused/appellant is acquitted of the offences charged. He be set at liberty forthwith, if not required in any other case. Fine amount, if any, deposited by the accused/appellant, be refunded to him. Release warrant be prepared accordingly. Records be sent back.

****

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

Babita Devi & others ...Appellants

Versus

Sh. Roop Chand & others ...Respondents

FAO No. 392 of 2014
Decided on : 4.12.2015

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 38 years – respective ages of the claimants were 33 years, 11 years and 8 years- Tribunal had applied multiplier of '14', whereas, multiplier of '16' was applicable- income of the deceased was pleaded to be Rs.10,000/- per month – by guess work income of the deceased cannot be less than Rs.6,000/- per month- 1/3rd amount is to be deducted towards personal expenses and thus, claimants have lost dependency to the extent of Rs.4,000/- per month- hence, compensation of Rs. 4,000/- x 12 x 16= Rs. 7,68,000/- awarded under the head 'loss of dependency' and sum of Rs.10,000/- each awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'- total compensation of Rs. 8,08,000/- awarded along with interest. (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

For the Appellants : Mr. Rakesh Bharti, Advocate.

For the Respondents: Mr. Tarun Sharma, Advocate vice Ms. Anjali Soni Verma, Advocate, for respondent No. 1.
Mr. Ashok Kumar Thakur, Advocate, for respondent No. 2.
Mr. Narender Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Challenge in this appeal is to the award dated 30th June, 2014, made by the Motor Accidents Claims Tribunal (1), Kangra at Dharamshala (hereinafter referred to as "the Tribunal") in M.A.C. Petition (RBT) No. 51-K/II/13/10, titled Smt. Babita Devi & others versus Sh. Roop Chand & others, whereby compensation to the tune of Rs.6,03,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants-appellants herein and the insurer-appellant herein, was saddled with liability (for short, "the impugned award").

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

3. There is no dispute on issues No 1, 3 to 6. The only dispute viz-a-viz is on issue No. 2, that too, partly.

4. The only question to be determined in this appeal is –whether the award amount is just and adequate? The answer is in the negative for the following reasons.

6. The Tribunal has held that the age of the deceased was 38 years, at the time of accident, which is not in dispute. Accordingly, it is held that the age of the deceased was 38 years and the age of the claimants, i.e. Smt. Babita (widow), Anil Kumar (minor) and Abhay Kumar (minor) was 33 years, 11 years and 8 years, respectively, at the time of accident.

7. As per 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** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** read with the 2nd Schedule of the Motor Vehicles Act, the multiplier of '16' was applicable in this case, but the Tribunal has fallen in an error in applying the multiplier of '14'. Accordingly, it is held that the multiplier of '16' is just and appropriate, applied accordingly.

8. The claimants have pleaded and proved that the income of the deceased was 10,000/- per month. The Tribunal has fallen in an error in holding that the deceased was earning Rs.3,500/- per month and after making deductions held the claimants entitled to the tune of Rs. 5,250/- under the head 'loss of dependency', which is legally incorrect.

9. While making guess work and taking all the factors in view, it can safely be held that the income of the deceased was not less than Rs.6,000/- per month and after deducting 1/3rd towards the personal expenses of the deceased, the claimed have lost source of dependency to the tune of Rs.4,000/- per month.

10. In the given circumstances, the claimants are held entitled to compensation to the tune of Rs.4,000/- x 12 = Rs.48,000 x 16= Rs.7,68,000/- under the head 'loss of dependency'.

11. The Tribunal has fallen in an error in awarding compensation to the tune of Rs.5,000/- each, under the heads of 'conventional charges', 'loss of consortium' and funeral and transpiration charges'.

12. Keeping in view the recent judgments of the Apex Court, a sum of Rs.10,000/- each, is also awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses', in favour of the claimants.

13. Thus, a sum of Rs.7,68,000/- + Rs.40,000/- = Rs.8,08,000/- is awarded in favour of the claimants, with interest as awarded by the Tribunal, from the date of filing of the claim petition.

14. The amount of compensation is enhanced and the impugned award is modified, as indicated above. The appeal is accordingly disposed of

15. The enhanced amount, alongwith interest, be deposited by the insurer within a period of eight weeks from today and on deposit, the amount be released in favour of the claimants strictly in terms of the impugned award.

16. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Court on its own motion. ...Petitioner.

Versus

Kuldeep Chauhan. ...Respondent.

COPC No.888 /2015
Decided on: 4.12.2015

Contempt of Courts Act, 1971- Section 12- Court had issued direction to Chief Secretary to ensure that no vehicle attached to the Hon'ble Judges is unnecessarily stopped or challaned - no vehicle except the vehicle of His Excellency Governor of Himachal Pradesh, Hon'ble Chief Minister and Hon'ble Chief Justice and public utility vehicles shall ply between Shimla Club to Lift and between Railway Board Building to C.T.O.- permits/passes issued to ply the vehicles between Shimla Club to Lift and between Railway Board Building to C.T.O shall remain suspended- neither Additional District Magistrate nor Public Relation Officer, Shimla shall issue any permit to ply the vehicles either on sealed road or restricted road- a news item appeared in which it was misquoted that the Judges/Chief Minister and Governor were entitled to use the sealed roads- again a news item was published misquoting that judges were permitted to use the sealed road- a show cause notice to the local correspondent issued who appeared and filed an affidavit extending unconditional and unqualified apology- held, that press must take necessary precautions especially while reporting the court proceedings**-** oral observations made by the Advocate and Hon'ble Judges may not be carried in the news papers- inaccurate and incorrect news item is bound to prejudice the parties- the proceedings in the Court must be reported by the correspondents with legal background to avoid misquoting of court proceedings- judiciary cannot be immune from criticism, but when the criticism is based on obvious distortion or gross mis-statement and is made in a manner designed to lower respect for the judiciary and destroy public confidence, it cannot be ignored- judiciary can protect itself by invoking the power to punish for its contempt to secure public confidence and respect in the judicial process- Media should ensure that there should not be any trial by Media and the individual should

be free to defend itself- Court will not use its power of contempt to silence any criticism of judicial institution- judiciary must be magnanimous in accepting an apology when filed through an affidavit duly sworn- role of the court is to maintain the majesty of law and to permit reasonable criticism- un-conditional apology accepted with the warning that the respondent should be more careful and responsible by providing fair, accurate and impartial information- suggestions given to the State to prepare welfare scheme to improve the service conditions of the journalists and to create a corpus to pay pensionary benefits to those journalists, who had spent at least 30 years in journalism. (Paraa-5 to 55)

Cases referred:
Thornhill v. Alabama (1940) 310 US 88
Schneider vs. Irvington, (1939) 308 US 147 (16)
Attorney General v. Times Newspaper Ltd., (1973) 3 All ER 54
Speiser vs. Randall, (1958) 357 US 513 (530)
Cf. Walker vs. Birmingham, (1967) 388 US 307, U.S.
Conway vs. Johan, 331 US 367
McLeod vs. Aubyin, (1899) AC 549
Romesh Thappar vs. State of Madras, AIR 1950 SC 124
Maneka Gandhi vs. Union of India, (1978) 1 SCC 248
Express Newspapers (P) Ltd. v. Union of India, (1986) 1 SCC 133
S. Rangarajan vs. P. Jagjivan Ram, (1989) 2 SCC 574 hav
Secretary, Ministry of Information and Broadcasting, Government of India vs. Cricket Association of Bengal, (1995) 2 SCC 161
Union of India vs Motion Picture Association, 1999 (6) SCC 150
Narmada Bachao Andolan vs. Union of India (1999) 8 SCC 308
Radha Mohan Lal vs. Rajasthan High Court (Jaipur Bench), (2003) 3 SCC 427
M.P. Lohia vs State of W.B. and another, (2005) 2 SCC 686
Rajendra Sail vs. M.P. High Court Bar Association, (2005) 6 SCC 109
Government of Andhra Pradesh and others vs. P. Laxmi Devi, (2008) 4 SCC 720
Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi), (2010) 6 SCC 1
Indirect Tax Practitioners" Association vs. R.K. Jain, (2010) 8 SCC 281
Sanjoy Narayan, Editor-in-Chief, Hindustan Times and others vs. High Court of Allahabad, (2011) 13 SCC 155
Sahara India Real Estate Corporation Limited and others vs. Securities and Exchange Board of India and another, (2012) 10 SCC 603

For the Petitioner: Court on its own motion.
For the Respondent: Mr. N.B. Joshi and Mr. Vijay Arora, Advocates.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge (oral).

We had taken *suo motu* cognizance of the news item published in the daily Edition of the ***Tribune*** on 27.11.2015 whereby the notice was issued to the local correspondent Sh. Kuldeep Chauhan why contempt proceedings be not initiated against him.

2. The Court on 21.11.2015 had issued the following directions:

a) **The Chief Secretary is directed to ensure that no vehicle attached to the Hon'ble Judges is unnecessarily stopped or challened.**

b) **No vehicle except the vehicle of His Excellency Governor of Himachal Pradesh, Hon'ble Chief Minister and Hon'ble Chief Justice and public utility vehicles as provided under the Act shall ply between Shimla Club to Lift and between Railway Board Building to C.T.O.**

c) **Till further orders by this Court, the permits/passes issued to ply the vehicles between Shimla Club to Lift and between Railway Board Building to C.T.O shall remain suspended.**

d) **Neither Additional District Magistrate nor Public Relation Officer, Shimla shall issue any permit to ply the vehicles either on sealed road or restricted road. The permits issued by these authorities shall not be valid till further orders by this Court.**

3. Thereafter the matter was listed on 27.11.2015 whereby we had taken note of the news item, which appeared in the Tribune dated 22.11.2015 under the caption ***"Now, vehicles to keep off sealed roads in Shimla"*** and it was misquoted that the Judges/Chief Minister and Governor were entitled to use the sealed roads. The Court had categorically ordered on 21.11.2015 that the Governor, Chief Minister and Hon'ble Chief Justice only were entitled to use the sealed roads and the Judges of this Court were never permitted to use the sealed roads as quoted in the news item though clarified to some extent in the daily Edition dated 23.11.2015. The news item was published on 27.11.2015 under the caption ***"Harrowing time for commuters, others"*** and again it was misquoted that the Judges were permitted to use the sealed roads.

4. In view of this, show cause notice was issued to Mr. Kuldeep Chauhan, Local Correspondent of daily Edition of Tribune why contempt proceedings be not initiated against him.

5. Mr. Kuldeep Chauhan appeared before us and has filed an affidavit attested on 3.12.2015 extending unconditional and unqualified apology.

6. We were constrained to issue notice to the reporter of the Tribune for repeatedly committing mistakes by furnishing inaccurate and incorrect reports. The news items published by the medium of print have a great sway on the psyche of the public at large. The journalists must take necessary precautions, more particularly, while compiling the court proceedings. Ordinarily, oral observations made by the learned Advocate and Hon'ble Judges may not be carried in the news papers. We also hasten to add that Judges must accept healthy criticism of the judgments but the Judges should not be criticized. The inaccurate and incorrect news item is bound to prejudice the parties before the courts of law. Thus, reporting of the court proceedings of the pending cases before the courts of law commands utmost responsibility and sincerity. We are of the view that the proceedings in the courts of law must be reported by the correspondents with legal background and accredited to the Courts to avoid misquoting of court proceedings.

7. Section 2 of the Contempt of Courts Act, 1971, defines expressions "contempt of Court", "civil contempt" and criminal contempt" as under:

> "(a) "contempt of court" means civil contempt or criminal contempt;
>
> (b) "civil contempt" means willful disobedience to any judgment, decree, direction, order, writ or other process of a court or willful breach of an undertaking given to a court;

(c) "criminal contempt" means the publication (whether by words, spoken or written, or by signs, or by visible representation, or otherwise) of any matter or the doing of any other act whatsoever which :-

(i) scandalises or tends to scandalise, or lowers or tends to lower the authority of, any court;

or

(ii) prejudices, or interferes or tends to interfere with, the due course of any judicial proceeding; or

(iii) interferes or tends to interfere with, or obstructs or tends to obstruct, the administration of justice in any other manner;"

8. According to Sections 3, 4 and 5, innocent publication and distribution of matter may not amount to contempt, including fair and accurate reporting of the judicial proceedings and fair criticism of judicial act.

9. Article 129 of the Constitution of India reads as under:

"The Supreme Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

10. Article 215 of the Constitution of India reads as under:

"Every High Court shall be a court of record and shall have all the powers of such a court including the power to punish for contempt of itself."

11. ***Thomas Jefferson*** stated as under:-

"Were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."

12. ***George Washington*** stated as under:

"For my part I entertain a high idea of the utility of periodical publications; insomuch as I could heartily desire, copies of ... magazines, as well as common Gazettes, might be spread through every city, town, and village in the United States. I consider such vehicles of knowledge more happily calculated than any other to preserve the liberty, stimulate the industry, and ameliorate the morals of a free and enlightened people.-

13. ***Article One, Bill of Rights of the United States Constitution, 1789*** reads as under:

"Congress shall make no law ... abridging the freedom of speech or of the press... -Article One, Bill of Rights of the United States Constitution, 1789."

14. ***Henry Steel Commager***, preface to a history of the *New York Times*, 1951 reads as under:

Here is the living disproof of the old adage that nothing is as dead as yesterday's newspaper... This is what really happened, reported by a free press to a free people. It is the raw material of history; it is the story of our own times. -

15. In Renaissance Europe handwritten newsletters were circulated privately among merchants, passing along information about everything from wars and economic conditions to social customs and "Human Interest" features. The first printed forerunners of the newspaper appeared in Germany in the late 1400's in the form of news pamphlets or broadside.

16. The first newspaper in India was circulated in 1780 under the editorship of James Augustus Hickey. On May 30, 1826 ***Udant Martand***, the first Hindi language newspaper was published in India from Calcutta. The Urdu language newspaper ***Urda Akhbar*** was published in 1836.

17. In the book " ***A Treatise On the Constitutional Limitations***" by T.M. Colley, 1st Indian Edition 2005, the Author has defined "freedom of speech and press" to mean'

> **"The constitutional liberty of speech and of the press, as we understand it, implies a right to freely utter and publish whatever the citizen may please, and to be protected against any responsibility for the publication, except so far as such publications, from their blasphemy, obscenity or scandalous character, may be a public offence, or as by their falsehood and malice and they may injuriously affect the private character of individuals. Or, to state, the same thing in somewhat different words, we understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common law rules which were in force when constitutional guarantees were established". (Chapter XII – "Liberty of Speech and of the Press", page 422)."**

18. Author ***Dr. Durga Dass Basu*** in commentary on the Constitution of India, 8th Edition 2007 has illustrated the search for truth as under:

> **"The search for truth – Free speech is necessary to determine the truth. But what is truth, a postmodern skeptic might wonder. "The theory of our Constitution is that the best test of truth is the power of the thought to get itself accepted in the competition of the market. On this view, truth is whatever most people say is. While the market place of ideas may not always accurately filter that which is empirically verifiable as true from false", the critical question is not how well truth will advance absolutely in conditions of freedom, but how well it will advance in condition of freedom as compared with some alternative set of condition". Those who hold to the idea that truth is a knowable if not always verifiable concept are even most robust in their claim that free expression in critical to finding truth. Related to truth is the idea that free expression is necessary to develop moral virtue. In a world of extreme moral relativism this may be but a facet of the "market place of ideas" metaphor, but however our moral campass as calibrated our ability to make moral choices – to opt for good and reject evil – requires that we be free to choose. The process of moral deliberation often involves the expression of views, only to reconsider them when others reply or react to the expressed sentiments."**

19. The U.S. Supreme Court in ***Thornhill*** v. ***Alabama*** (1940) 310 US 88 has held as under:

> **"The safeguarding of these rights to the ends that men may speak as they think on matters vital to them and that falsehoods may be exposed through the processes of education and discussion in essential to free government. Those who won our independence had confidence in the power of free and fearless reasoning and communications of ideas to discover and spread political and economic truth. Noxious doctrines in those fields may be refuted and their evil averted by the courageous exercise of the right of free discussion. Abridgement of freedom of speech and of the press, however, impairs those opportunities for public education that are essential to effective exercise of the power of correcting error through the processes of popular government."**

20. In ***Schneider*** vs. ***Irvington***, (1939) 308 US 147 (16), the U.S. Supreme Court has held that freedom of speech is the foundation of free Government.

21. In ***Whitney*** v. ***California*** 247 US 214, it was observed as under:

> **"Those who won our independence believed that the final end of the state was to make men free to develop their faculties. They believed liberty to be the secret of happiness and courage to be secret of liberty. They believed that the freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile..... that public discussion is a political duty, and that this should be a fundamental principle of the American Government."**

22. In ***Attorney General*** v. ***Times Newspaper Ltd***., (1973) 3 All ER 54, it was observed as under:

> **"Freedom of expression, as learned writers have observed, has our broad social purposes to serve: (1) it helps individual to attain self fulfillment, (2) it assists in the discovery of truth (3) it strengthens the capacity of an individual in participating in decision-making; (4) it provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. All members of society should be able to form their own beliefs and communicate them freely to others. In sum, fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive a generous support from al those who believe in the participation of people in the administration."**

23. Historian ***Bury*** has observed that freedom of expression is "a supreme condition of mental and moral progress

24. U.S. Supreme Court in ***Speiser*** vs. ***Randall***, (1958) 357 US 513 (530) has held that it is absolutely indispensable for the preservation of a free society in which government is based upon the consent of an informed citizenry and is dedicated to the protection of the rights of all, even the most despised minorities.

25. In ***Cf. Walker*** vs. ***Birmingham***, (1967) 388 US 307, U.S. Supreme Court has held that in punishing contempt of Court, the State has to secure a balance between two equally important principles - need for freedom of expression and that for the independence and dignity of the judiciary and the due administration of justice.

26. In ***Conway*** vs. ***Johan***, 331 US 367, Justice Douglas and Justice Murphy have held as under:

> **"This was strong language, intemperate language, and we assume, an unfair criticism. But a Judge may not hold in contempt one who ventures to publish anything that tends to make him unpopular or to belittle him. The vehemence of the language used is not alone the measure of the power to punish for contempt. The fire which it kindles must constitute an imminent, not merely a likely threat to the administration of justice. The danger must not be remote or even probable; it must immediately imperil. But the law of contempt is not made for the protection of Judges, who may be sensitive to the winds of public opinion. Judges, are supposed to be men of fortitude, able to thrive in a hardy climate. Conceivably a campaign could be so managed and so aimed at the sensibilities of a particular Judge and the matter pending before him as to cross the forbidden line"**
>
> **In the same case, JUSTICE MURPHY, in his concurring opinion, said:**
>
> **A free press lies at the heart of our democracy and its preservation is essential to the survival of liberty. Any inroad made upon the constitutional protection of a free press tends to undermine the freedom of all men to print and to read the truth.**
>
> **In my view, the Constitution forbids a Judge from summarily punishing a newspaper editor for printing an unjust attack upon him or his method of dispensing justice. The only possible exception is in the rare instance where the attack might reasonably cause a real impediment to the administration of justice. Unscrupulous and vindictive criticism of the judiciary is regrettable. But Judges must not retaliate by a summary suppression of such criticism for they are bound by the command of the First Amendment. Any summary suppression of unjust criticism carries with it an ominous threat of summary suppression of all criticism. It is to avoid that threat that the First Amendment, as I view it, outlaws the summary contempt method of suppression.**
>
> **Silence and a steady devotion to duty are the best answers to irresponsible criticism and those Judges who feel the need for giving a more visible demonstration of their feelings may take advantage of various laws passed for that purpose, which do not impinge upon a free press. The liberties guaranteed by the First Amendment, however, are too highly prized to be subject to the hazards of summary contempt procedure.**

27. It was held in ***McLeod*** vs. ***Aubyin***, (1899) AC 549 that the limits of bona fide criticism are transgressed when improper motives are attributed to judges and this cannot be viewed with placid equanimity.

28. Their Lordships of the Hon'ble Supreme Court in ***Romesh Thappar*** vs. ***State of Madras***, AIR 1950 SC 124 have held as under:

> **[11] It is also worthy of note that the word "sedition" which occurred in Art. 13 (2) of the draft Constitution prepared by the Drafting Committee was deleted before the article was finally passed its Art.19 (2). In this connection it may be recalled that the Federal Court had, in defining sedition in Niharendu Dutt v. Emperor, 1942 F. C. R. 38 : (A. I. R. (29)**

1942 F. C. 22 : 43 Cr. L. J. 504) held that "the acts or words complained of must either incite to disorder or must be such as to satisfy reasonable men that that is their intention or tendency", but the Privy Council overruled that decision and emphatically reaffirmed the view expressed in Queen-Empress v. Bal Gangadhar Tilak, 22 Bom. 112 to the effect that

"the offence consisted in exciting or attempting to excite in others certain bad feelings towards the Government and not in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small" Emperor v. Sadashiv Narayan, 74 I. A. 89 : (A.I.R. (34) 1947 P.C. 82 : 48 Cr. L.J. 791)."

Deletion of the word 'sedition' from the draft Art.13 (2), therefore, shows that criticism of Government exciting disaffection or bad feelings towards it is not to be regarded as a justifying ground for restricting the freedom of expression and of the press, unless it is such as to undermine the security or tend to overthrow the State. It is also significant that the corresponding Irish formula of "undermining the public order or the authority of the State" (Art. 40 (6) (i) of the Constitution of Eire, 1937) did not apparently find favour wish the framers of the Indian Constitution. Thus, very narrow and stringent limits have been set to permissible legislative abridgement of the right of free speech and expression and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organisations, for without free political discussion no public education, so essential for the proper functioning of the processes of popular Government, is possible. A freedom of such amplitude might involve risks of a abuse. But the framers of the Constitution may well have reflected with Madison who was 'the leading spirit in the preparation of the First Amendment of the Federal Constitution", that "it is better to leave a few of its noxious branches to their luxuriant growth than, by pruning them away, to injure the vigour of those yielding the proper fruits" (Quoted in Near v. Minnesotta 283 U. S 607 at 717-8).

29. Their Lordships of the Hon'ble Supreme Court in ***Maneka Gandhi*** vs. ***Union of India***, (1978) 1 SCC 248 have held as under:

30. Now, it may be pointed out at the outset that it is not our view that a right which is not specifically mentioned by name can never be a fundamental right within the meaning of Article 19(1). It is possible that a right does not find express mention in any clause of Article 19(1) and yet it may be covered by some clause of that Article. Take for example, by way of illustration, freedom of press. It is a most cherished and valued freedom in a democracy: indeed democracy cannot survive without a free press. Democracy is based essentially on free debate and open discussion, for that is the only corrective of Governmental action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. Manifestly, free debate and open discussion, in the most comprehensive sense, is not

possible unless there is a free and independent press. Indeed the true measure of the health and vigour of a democracy is always to be found in its press. Look at its newspapers-do they reflect diversity of opinions and views, do they contain expression of dissent and criticism against governmental policies and actions, or do they obsequiously sing the praises of the government or lionize or deify the ruler. The newspapers are the index of the true character of the Government-whether if is democratic or authoritarian. It was Mr. Justice Potter Stewart who said : "Without an informed and free press, there cannot be an enlightened people". Thus freedom of the press constitutes one of the pillars of democracy and indeed lies at the foundation of democratic Organisation and yet it is not enumerated in so many terms as a fundamental right in Article 19(1), though there is a view held by some constitutional jurists that this freedom is too basic and fundamental not to receive express mention in Part III of the Constitution. But it has been held by this Court in several decisions, of which we may mention only three, namely, Express Newspapers' case, Sakal Newspapers case and Bennett Coleman & Co's case, that freedom of the press is part of the right of free speech and expression and is covered by Article 19 (1) (a). The, reason is that freedom of the press is nothing but an aspect of freedom of speech and expression. It partakes of the same basic nature and character and is indeed an integral part of free speech and expression and perhaps it would not be incorrect to say that it is the same right applicable in relation to the press. So also, freedom of circulation is necessarily involved in freedom of speech and expression and is part of it and hence enjoys the protection of Article 19(1) (a). Vide Ramesh Thappar v. State of Madras(1). Similarly, the right to paint or sing or dance or to write poetry or literature is also covered by Article 19(1) (a), because the common basic characteristic in all these activities is freedom of speech and expression, or to put it differently, each of these activities is an exercise of freedom of speech and expression. It would thus be seen that even if a right is not specifically named in Article 19(1), it may still be a fundamental right covered by some clause of that Article, if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. It is not enough that a right claimed by the petitioner flows or emanates from a named fwidamental right or that its existence is necessary in order to make the exercise of the named fundamental right meaningful and effective. Every activity which facilitates the exercise of a named fundamental right is not necessarily comprehended in that fundamental right nor can it be regarded as such merely because it may not be possible, otherwise to effectively exercise, that fundamental right. The contrary construction would lead to incongruous results and the entire scheme of Article 19(1) which confers different rights and sanctions different restrictions according to different standards depending upon. the nature, of the right will be upset. What is necessary to be seen is, and that is the test which must be applied, whether the right claimed by the petitioner is an integral part of a named fundamental right or partakes of the same basic nature and character as the named fundamental right so that the exercise of such right is in reality and substance nothing but an instance of the exercise of the named

fundamental right. If this be the correct test, as we apprehend it is. the right to, go abroad cannot in all circumstances be regarded as included in freedom of speech and expression. Mr. Justice Douglas said in Kent v. Dulles that "freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad. like travel within the country, ay be necessary for livelihood. It may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our Scheme of values." And what the learned Judge, said in regard to freedom of movement in his country holds good in our country as well. Freedom of movement has been a part of our ancient tradition which always upheld the dignity of man and saw in him the embodiment of the Divine. The Vedic seers knew no limitations either in the locomotion of the human body or in the flight of the soul to higher planes of consciousness. Even in the post-Upnishadic period, followed by the Buddhistic era and the early centuries after Christ, the people of this country went to foreign lands in pursuit of trade and business or in search of knowledge or with a view to shedding on others the light of knowledge imparted to them by their ancient sages and seers. India expanded outside her borders: her ships crossed the ocean and the fine superfluity of her wealth brimmed over to the East as well as to the West. He cultural messengers and envoys spread her arts and epics in South East Asia and her religious conquered China and Japan and other Far Eastern countries and spread westward as far as Palestine and Alexendria. Even at the end of the last and the beginning of the present century, our people sailed across the seas to settle down in the African countries. Freedom of movement at home and abroad is a part of our heritage and, as already pointed out, it is a highly cherished right essential to the growth and development of the human personality and its importance cannot be over emphasised. But it cannot be said to be part of the right of free speech and expression. It is not of the same basic nature and character as freedom of speech and expression. When a person goes abroad, he may do so for a variety of reasons and it may not necessarily and always be for exercise of freedom of speech and expression. Every travel abroad is not an exercise of right of free speech and expression and it would not be correct to say that whenever there is a restriction on the right to go abroad, ex necessitae it involves violation of freedom of speech and expression. It is no doubt true that going abroad may be necessary in a given case for exercise of freedom of speech and expression, but that does not make it an integral part of the right of free speech and expression. Every activity that may be necessary for exercise of freedom of speech and expression or that may facilitate such exercise or make it meaningful and effective cannot be elevated to the status of a fundamental right as if it were part of the fundamental right of free speech and expression. Otherwise, practically every activity would become part of some fundamental right or the other and. the object of making certain rights only as fundamental rights with different permissible restrictions would be frustrated.

30. In ***S. Mulgaokar*** , in re (1978) 3 SCC 339, their Lordships of the Hon'ble Supreme Court have held the judiciary cannot be immune from criticism, but, when that criticism is based on obvious distortion or gross mis-statement and made in a manner

which seems designed to lower respect for the judiciary and destroy public confidence in it, it cannot be ignored. Their Lordships have held as under:

> **[16] The judiciary cannot be immune from criticism, but, when that criticism is based on obvious distortion or gross mis-statement and made in a manner which seems designed to lower respect for the judiciary and destroy public confidence in it, it cannot be ignored. I am not one of those who think that an action for contempt of Court, which is discretionary, should be frequently or lightly taken. But at the same time, I do not think that we should abstain from using this weapon even when its use is needed to correct standards or behaviour in a grossly and repeatedly erring quarter. It may be better in many cases for the judiciary to adopt a magnanimously charitable attitude even when utterly uncharitable and unfair criticism of its operations is made out of bona fide concern for improvement. But, when there appears some scheme and a design to bring about results which must damage confidence in our judicial system and demoralize Judges of the highest court by making malicious attack, any one interested in maintaining high standards of fearless, impartial, and unbending justice will feel perturbed. I sincerely hope that my own undisguised perturbation at what has been taking place recently is unnecessary. One may be able to live in a world of Yogic detachment when unjustified abuses are hurled at one's self personally, but when the question is of injury to an institution, such as the highest Court of justice in the land, one cannot overlook its effects upon national honour and prestige in the comity of nations. Indeed, it becomes a matter deserving consideration of all serious minded people who are interested in seeing that democracy does not flounder or fail in our country.**
>
> **If fearless and impartial courts of justice are the bulwark of a healthy democracy, confidence in them cannot be permitted to be impaired by malicious attacks upon them. However, as we have not proceeded further in this case, I do not think it would be fair to characterize anything written or said in the India Express as really malicious or ill-intentioned and I do not do so. We have recorded no decision on that although the possible constructions on what was written there have been indicated above.**

31. Their Lordships of the Hon'ble Supreme Court in ***Express Newspapers (P) Ltd. v. Union of India,*** (1986) 1 SCC 133 have held as under:

> **[76] I would only like to stress that the freedom of thought and expression, and the freedom of the press are not only valuable freedoms in themselves but are basic to a democratic form of Government which proceeds on the theory that problems of the Government can be solved by the free exchange of thought and by public discussion of the various issues facing the nation. It is necessary to emphasize and one must not forget that the vital importance of freedom of speech and expression involves the freedom to dissent to a free democracy like ours. Democracy relies on the freedom of the press. It is the inalienable right of everyone to comment freely upon any matter of public importance. This right is one of the pillars of individual liberty - freedom of speech, which our Court has always unfailingly guarded. I wish to add that however precious and cherished the freedom of speech is under Art. 19**

(1) (a) , this freedom is not absolute and unlimited at all times and under all circumstances but is subject to the restrictions contained in Art. 19 (2). That must be so because unrestricted freedom of speech and expression which includes the freedom of the press and is wholly free from restraints, amounts to uncontrolled licence which would. lead to disorder and anarchy and it would be hazardous to ignore the vital importance of our social and national interest in public order and security of the State.

32. Their Lordships of the Hon'ble Supreme Court in ***S. Rangarajan vs. P. Jagjivan Ram,*** (1989) 2 SCC 574 have held as under:

[36] The democracy is a government by the people via open discussion. The democratic form of government itself demands its citizens an active and intelligent participation in the affairs of the community. The public discussion with Peoples participation is a basic feature and a rational process of democracy which distinguishes it from all other forms of government. The democracy can neither work nor prosper unless people go out to share their views. The truth is that public discussion on issues relating to administration has positive value. What Walter Lippmann said in another context is relevant here :

When men act on the principle of intelligence, they go out to find the facts. . When they ignore it, they go inside themselves and find out what is there. They elaborate their prejudice instead of increasing their knowledge.

33. Their Lordships of the Hon'ble Supreme Court in ***Secretary, Ministry of Information and Broadcasting, Government of India vs. Cricket*** Association of Bengal, (1995) 2 SCC 161 have held as under:

[43] We may now summarise the law on the freedom of speech and expression under Article 19 (1 (a) as restricted by Article 19 (2. The freedom of speech and expression includes right to acquire information and to disseminate it. Freedom of speech and expression is necessary, for self-expression which is an important means of free conscience and self-fulfilment. It enables people to contribute to debates on social and moral issues. It is the best way to find a truest model of anything, since it is only through it that the widest possible range of ideas can circulate. It is the only vehicle of political discourse so essential to democracy. Equally important is the role it plays in facilitating artistic and scholarly endeavours of all sorts. The right to communicate, therefore, includes right to communicate through any media that is available whether print or electronic or audio-visual such as advertisement, movie, article, speech etc. That is why freedom of speech and expression includes freedom of the press. The freedom of the press in terms includes right to circulate and also to determine the volume of such circulation. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach.

34. Their Lordships of the Hon'ble Supreme Court in ***Union of India*** vs ***Motion Picture Association***, 1999 (6) SCC 150 have held as under:

[13] Undoubtedly, free speech is the foundation of a democratic society. A free exchange of ideas, dissemination of information without restraints, dissemination of knowledge, airing of differing view points, debating and forming one's own views and expressing them, are the basic indicia of a free society. This freedom alone makes it possible for people to formulate their own views and opinions on a proper basis and to exercise their social, economic and political rights in a free society in an informed manner. Restraints on this right, therefore, have been jealously watched by the Courts. Article 19 (2) spells out the various grounds on which this right to free speech and expression can be restrained. Thus in Express Newspapers Pvt. Ltd. v. Union of India, (1986) 1 SCC 133 this Court stressed that, "freedom of thought and expression, and the freedom of the press are not only valuable freedoms in themselves but are basic to a democratic form of Government which proceeds on the theory that the problems of the Government can be solved by the free exchange of thought and by public discussion of the various issues facing the nation. . This right is one of the pillars of individual liberty-freedom of speech, which our Constitution has always unfailingly guarded. . however precious and cherished the freedom of speech is under Article 19 (1) (a) , this freedom is not absolute and unlimited at all times and all circumstances but is subject to the restrictions contained in Article 19 (2). " In S. Rangarajan v. P. Jagjivan Ram, (1989) 2 SCC 574 this Court again observed : "the democracy is a government by the people via open discussion. The democratic form of government itself demands of its citizens an active and intelligent participation in the affairs of the community. . The democracy can neither work nor prosper unless people go out to share their views. " The importance of freedom of speech and expression including freedom of the press has been repeatedly stressed by this Court in a number of decisions.

35. The right to know or right to information is basic facet of right to speech and expression. It is a fundamental right. However, reasonable restriction is always principled in the larger public interest. The right is required to be balanced. We would like to add a caveat that disclosure of information must be a rule and secrecy is an exception. We have now Right to Information Act, 2005

36. In the Indian Constitution liberty of speech and expression guaranteed under Article 19 (1) (a) brings within its ambit, the corresponding duty and responsibility and puts limitation on the exercise of the liberty.

37. In ***Narmada Bachao Andolan*** vs. ***Union of India*** (1999) 8 SCC 308, their Lordships of the Hon'ble Supreme Court have held as under:

[7] We wish to emphasise that under the cover of freedom of speech and expression no party can be given a licence to misrepresent the proceedings and orders of the Court and deliberately paint an absolutely wrong and incomplete picture which has the tendency to scandalise the Court and bring it into disrepute or ridicule. The right of criticising, in good faith in private or public, a judgment of the Court cannot be exercised, with malice or by attempting to impair the administration of justice. Indeed, freedom of speech and expression is "life blood of democracy" but this freedom is subject to certain qualifications. An

offence of scandalising the Court per se is one such qualification, since that offence exists to protect the administration of justice and is reasonably justified and necesary in a democratic society. It is not only an offence under the Contempt of Courts Act but is sui generis. Courts are not unduly sensitive to fair comment or even outspoken comments being made regarding their judgments and orders made objectively, fairly and without any malice, but no one can be permitted to distort orders of the Court and deliberately give a slant to its proceedings, which have the tendency to scandalise the Court or bring it to ridicule, in the larger interest of protecting administration of justice.

38. In ***Arundhathi Roy*** , in re (2002) 3 SCC 343, their Lordships of the Hon'ble Supreme Court have held that 'rule of law' is the basic rule of governance of any civilized policy. Everyone, whether individually or collectively, is unquestionably under the supremacy of law. Whoever the person may be, however, high he or she is, no one is above the law notwithstanding how powerful and how rich he or she may be. For the judiciary to perform its duties and functions effectively and true to the spirit with which it is sacredly entrusted, the dignity and authority of the courts have to be respected and protected all costs. The only weapon of protecting itself from the onslaught to the institution is the long hand of contempt of court left in the armoury of judicial repository which, when needed, can reach any neck howsoever high or far away it may be. The freedom of speech and expression, so far as they do not contravene the statutory limits as contained in the Contempt of Courts Act, are to prevail without any hindrance. The law of contempt has been enacted to secure public respect and confidence in the judicial process. Their Lordships have held as under:

"[1] 'Rule of Law' is the basic rule of governance of any civilised democratic policy. Our constitutional scheme is based upon the concept of Rule of Law which we have adopted and given to ourselves. Everyone, whether individually or collectively is unquestionably under the supremacy of law. Whoever the person may be, however high he or she is, no-one is above the law notwithstanding how powerful and how rich he or she may be. For achieving the establishment of the rule of law, the Constitution has assigned the special task to the judiciary in the country. It is only through the Courts that the rule of law unfolds its contents and establishes its concept. For the judiciary to perform its duties and functions effectively and true to the spirit with which it is sacredly entrusted, the dignity and authority of the Courts have to be respected and protected at all costs. After more than half a century of independence, the judiciary in the country is under a constant threat and being endangered from within and without. The need of the time is of restoring confidence amongst the people for the independence of judiciary. Its impartiality and the glory of law has to be maintained, protected and strengthened. The confidence in the Courts of justice, which the people possess, cannot, in any way, be allowed to be tarnished, diminished or wiped out by contumacious behaviour of any person. The only weapon of protecting itself from the onslaught to the institution is the long hand of contempt of Court left in the armoury of judicial repository which, when needed, can reach any neck howsoever high or far away it may be. In In Re, Vinay Chandra Mishra (the alleged contemner) (AIR 1995 SC 2348), this Court reiterated the position of law relating to the powers of contempt and opined that the judiciary is

not only the guardian of the rule of law and third pillar but in fact the central pillar of a democratic State. If the judiciary is to perform its duties and functions effectively and true to the spirit with which they are sacredly entrusted to it, the dignity and authority of the Courts have to be respected and protected at all costs. Otherwise the very corner-stone of our constitutional scheme will give way and with it will disappear the rule of law and the civilized life in the society. It is for this purpose that the Courts are entrusted with extraordinary powers of punishing those who indulge in acts, whether inside or outside the Courts, which tend to undermine the authority of law and bring it in disrepute and disrespect by scandalising it. When the Court exercises this power, it does not do so to vindicate the dignity and honour of the individual Judge who is personally attacked or scandalised, but to uphold the majesty of the law and of the administration of justice. The foundation of the judiciary is the trust and the confidence of the people in its ability to deliver fearless and impartial justice. When the foundation itself is shaken by acts which tend to create disaffection and disrespect for the authority of the Court by creating distrust in its working, the edifice of the judicial system gets eroded.

[2] No person can flout the mandate of law of respecting the Courts for establishment of rule of law under the cloak of freedoms of speech and expression guaranteed by the Constitution. Such a freedom is subject to reasonable restrictions imposed by any law. Where a provision, in the law, relating to contempt imposes reasonable restrictions, no citizen can take the liberty of scandalising the authority of the institution of judiciary. Freedom of speech and expression, so far as they do not contravene the statutory limits as contained in the Contempt of Courts Act, are to prevail without any hindrance. However, it must be remembered that the maintenance of dignity of Courts is one of the cardinal principles of rule of law in a democratic set up and any criticism of the judicial institution couched in language that apparently appears to be mere criticism but ultimately results in undermining the dignity of the Courts cannot be permitted when found having crossed the limits and has to be punished. This Court in In Re, Harijai Singh and another (1996 (6) SCC 466) has pointed out that a free and healthy Press is indispensable to the function of a true democracy but, at the same time, cautioned that the freedom of Press is not absolute, unlimited and unfettered at all times and in all circumstances. Lord Dening in his Book "Road to Justice" observed that Press is the watchdog to see that every trial is conducted fairly, openly and above board but the watchdog may sometimes break loose and has to be punished for misbehaviour. Frankfurther, J. in Pennekamp v. Florida [(1946) 90 Led 1295 at p. 1313] observed :

"If men, including Judges and journalists were angels, there would be no problems of contempt of Court. Angelic Judges would be undisturbed by extraneous influences and angelic journalists would not seek to influence them. The power to punish for contempt, as a means of safeguarding Judges in deciding on behalf of the community as impartially as is given to the lot of men to decide, is not a privilege accorded to Judges. The power to punish for contempt of Court is a

safeguard not for Judges as persons but for the function which they exercise."

[3] The law of contempt has been enacted to secure public respect and confidence in the judicial process. If such confidence is shaken or broken, the confidence of the common man in the institution of judiciary and democratic set up is likely to be eroded which, if not checked, is sure to be disastrous for the society itself."

39. Their Lordships of the Hon'ble Supreme Court in ***Radha Mohan Lal*** vs. ***Rajasthan High Court (Jaipur Bench),*** (2003) 3 SCC 427 have held that free expression cannot be equated or confused with a licence to make unfounded and irresponsible allegations against the judiciary. Their Lordships have held as under:

"[10] The liberty of free expression as was sought to be contended by Mr. Sualal Yadav cannot be equated or confused with a licence to make unfounded and irresponsible allegations against the judiciary. The imputation that was made was clearly contemptuous. The effect is lowering of the dignity and authority of the Court and an affront to the majesty of justice."

40. Their Lordships of the Hon'ble Supreme Court in ***M.P. Lohia*** vs ***State of W.B. and another***, (2005) 2 SCC 686 have deprecated the practice and cautioned the publisher, editor and the journalist who were responsible for the article against indulging in such trial by media when the issue was *sub judice*.

41. In ***Rajendra Sail*** vs. ***M.P. High Court Bar Association***, (2005) 6 SCC 109, their Lordships of the Hon'ble Supreme Court have held that criticism likely to interfere with due administration of justice or undermine confidence that public reposes in courts of law as courts of justice, ceases to be fair and reasonable criticism and amounts to criminal contempt of court. Their Lordships have further held that in the free marketplace of ideas criticism about the judicial system or judges should be welcome so long as such criticism does not impair or hamper the administration of justice. Liberty of free expression is not to be confused with a licence to make unfounded, unwarranted and irresponsible aspersions against the judges or the courts in relation to judicial matters. No system of justice can tolerate such unbridled licence. Their Lordships have further held that the reach of the media, in the present times of 24 hour channels, is to almost every nook and corner of the world. Thus, the power and reach of the media, both print as well as electronic is tremendous. It has to be exercised in the interest of the public good. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable, therefore, protected. While the media can, in the public interest, resort to reasonable criticism of a judicial act or the judgment of a court for public good or report any such statements, it should refrain from casting scurrilous aspersions on, or impute improper motives or personal bias to the judge. Their Lordships have held as under:

[13] In Aswini Kumar Ghose and Anr. v. Arabinda Bose and Anr. it was held that the Supreme Court is never over-sensitive to public criticism; but when there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. The path of criticism is a public way: the wrong-headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism and not acting in malice or attempting to impair the

administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful even though outspoken comments of ordinary men.

[14] In Brahma Prakash Sharma and Ors. v. The State of U. P. 3 it was held that, if the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt is a wrong done to the public. It will be injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the Judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law.

[15] In Perspective Publications Pvt. Ltd. and Anr. v. The State of Maharashtra, a bench of three judges after referring to the leading cases on the subject held that " (1) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice. (2) It is open to everyone to express fair, reasonable and legitimate criticism of any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men". (3) A distinction must be made between a mere libel of defamation of a Judge and what amounts to a contempt of the court. The test in each case would be whether the impugned publication is a mere defamatory attack on the Judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as contempt. Alternatively the test will be whether the wrong is done to the Judge personally or it is done to the public. The publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. "

[19] In P. N. Duda v. P. Shiv Shanker and ors. 2 it has been held that administration of justice and Judges are open to public criticism and public scrutiny. Judges have their accountability to the society and their accountability must be judged by the conscience and oath to their office i. e. to defend and uphold the Constitution and the laws without fear and favour. Any criticism about the judicial system or the Judges which hampers the administration of justice or which erodes the faith in the objective approach of the Judges and brings administration of

justice to ridicule must be prevented. The contempt of court proceedings arise out of that attempt. Judgments can be criticized, motives to the Judges need not be attributed, it brings the administration of justice into deep disrepute. Faith in the administration of justice is one of the pillars on which democratic institution functions and sustains. In the free market place of ideas criticism about the judicial system or Judges should be welcome so long as such criticism does not impair or hamper the administration of justice. In a democracy judges and courts alike are, therefore, subject to criticism and if reasonable argument or criticism in respectful language and tempered with moderation is offered against any judicial act as contrary to law or public good, no court would treat criticism as a contempt of court.

[20] In Re. Roshan Lal Ahuja, a three judge bench held, Judgments of the court are open to criticism. Judges and courts are not unduly sensitive or touchy to fair and reasonable criticism of their judgments. 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 don't attract any punishment for contempt of court. However, when from the criticism a deliberate, motivated and calculated attempt is discernible to bring down the image of the 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 litigant can be permitted to overstep the limits of fair, bona fide and reasonable criticism of a judgment and bring the courts generally in disrepute or attribute motives to the Judges rendering the judgment. Perversity, calculated to undermine the judicial system and the prestige of the court, cannot be permitted for otherwise the very foundation of the judicial system is bound to be undermined and weakened and that would be bad not only for the preservation of rule of law but also for the independence of judiciary. Liberty of free expression is not to be confused with a licence to make unfounded, unwarranted and irresponsible aspersions against the Judges or the courts in relation to judicial matters. No system of justice can tolerate such an unbridled licence. Of course "justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men", but the members of the public have to abstain from imputing improper motives to those taking part in the administration of justice and exercise their right of free criticism without malice or in any way attempting to impair to administration of justice and refrain from making any comment which tends to scandalize the court in relation to judicial matters. If a person committing such gross contempt of court were to get the impression that he will get off lightly it would be a most unfortunate state of affairs. Sympathy in such a case would be totally misplaced, mercy has no meaning. His action calls for deterrent punishment to that, it also serves as an example to others and there is no repetition of such contempt by any other person.

[24] In re, Arundhati Roy the Court held, fair criticism of the conduct of a Judge, the institution of the judiciary and its functioning

may not amount to contempt if it is made in good faith and in public interest. To ascertain the good faith and the public interest, the courts have to see all the surrounding circumstances including the person responsible for comments, his knowledge in the field regarding which the comments are made and the intended purpose sought to be achieved. All citizens cannot be permitted to comment upon the conduct of the courts in the name of fair criticism which, if not checked, would destroy the institution itself. Litigant losing in the court would be the first to impute motives to the Judges and the institution in the name of fair criticism, which cannot be allowed for preserving the public faith in an important pillar of democratic set-up i. e. judiciary.

[31] The reach of media, in present times of 24 hours channels, is to almost every nook and corner of the world. Further, large number of people believe as correct which appears in media, print or electronic. It is also necessary to always bear in mind that the judiciary is the last resort of redressal for resolution of disputes between State and subject, and high and low. The confidence of people in the institute of judiciary is necessary to be preserved at any cost. That is its main asset. Loss of confidence in institution of judiciary would be end of rule of law. Therefore, any act which has such tendency deserves to be firmly curbed. For rule of law and orderly society, a free responsible press and independent judiciary are both indispensable. Both have to be, therefore, protected.

[32] The judgments of courts are public documents and can be commented upon, analyzed and criticized, but it has to be in dignified manner without attributing motives. Before placing before public, whether on print or electronic media, all concerned have to see whether any such criticism has crossed the limits as aforesaid and if it has, then resist every temptation to make it public. In every case, it would be no answer to plead that publication, publisher, editor or other concerned did not know or it was done in haste. Some mechanism may have to be devised to check the publication which has the tendency to undermine the institution of judiciary.

[35] Regarding the institution like judiciary which cannot go public, media can consider having an internal mechanism to prevent these types of publications. There can be an efficient and stringent mechanism to scrutinize the news reports pertaining to such institutions which because of the nature of their office cannot reply to publications which have tendency to bring disrespect and disrepute to those institutions. As already noted such publications are likely to be believed as true. Such a mechanism can be the answer to pleas like the one in the present case by editor, printer and publisher and correspondent that either they did not know or it was done in a hurry and similar pleas and defences.

[37] While the media can, in the public interest, resort to reasonable criticism of a judicial act or the judgment of a court for public good or report any such statements; it should refrain from casting scurrilous aspersions on, or impute improper motives or personal bias to the judge. Nor should they scandalize the court or the

judiciary as a whole, or make personal allegations of lack of ability or integrity against a judge. It should be kept in mind that Judges do not defend their decisions in public and if citizens disrespect the persons laying down the law, they cannot be expected to respect the law laid down by them. The only way the Judge can defend a decision is by the reasoning in the decision itself and it is certainly open to being criticized by anyone who thinks that it is erroneous.

[42] The issue as to whether the alleged statements amount to contempt or not does not present any difficulty in the present case. If the conclusions reached by the high Court are correct, there can be little doubt that it is serious case of scandalizing the court and not a case of fair criticism of a judgment. Undoubtedly, judgments are open to criticism. No criticism of a judgment, however vigorous, can amount to contempt of Court, provided it is kept within the limits of reasonable cour- tesy and good faith. Fair and reasonable criticism of a judgment which is a public document or which is a public act of a Judge concerned with administration of justice would not constitute contempt. Such a criticism may fairly assert that the judgment is incorrect or an error has been committed both with regard to law or established facts.

[44] When there is danger of grave mischief being done in the matter of administration of justice, the animadversion cannot be ignored and viewed with placid equanimity. If the criticism is likely to interfere with due administration of justice or undermine the confidence which the public reposes in the courts of law as Courts of justice, the criticism would cease to be fair and reasonable criticism but would scandalise Courts and substantially interfere with administration of justice. Having perused the record, we are unable to accept the contention urged on behalf of Mr. Rajendra Sail that on facts the conclusions arrived at by the high Court are not sustainable. Once this conclusion is reached, clearly the publication amounts to a gross contempt of court. It has serious tendency to undermine the confidence of the society in the administration.

42. Their Lordships of the Hon'ble Supreme Court in ***Government of Andhra Pradesh and others*** vs. ***P. Laxmi Devi***, (2008) 4 SCC 720 have adopted and reiterated the principle of ***American*** law as under:

[82] However, when it came to civil liberties, Mr. Justice Holmes was an activist Judge. Thus, in Schenck vs. U.S. 249 U.S. 47 (1919) he laid down his famous "clear and present danger" test for deciding whether restriction on free speech was constitutionally valid. As Mr. Justice Holmes observed, the question in every case is "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about substantive evils that Congress has a right to prevent".

[97] Why is it that the Courts both in India and in America have taken an activist approach in upholding the civil liberties and rights of the citizens? In our opinion, this is because freedom and liberty is essential for progress, both economic and social. Without freedom to speak, freedom to write, freedom to think, freedom to experiment,

freedom to criticize (including criticism of the Government) and freedom to dissent there can be no progress.

43. Their Lordships of the Hon'ble Supreme Court in ***Sidhartha Vashisht alias Manu Sharma*** vs. ***State (NCT of Delhi),*** (2010) 6 SCC 1 have held that despite the significance of the print and electronic media in the present day, it is not only desirable but the least that is expected of the persons at the helm of affairs in the field, is to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Their Lordships have held as under:

"[147] There is danger, of serious risk of prejudice if the media exercises an unrestricted and unregulated freedom such that it publishes photographs of the suspects or the accused before the identification parades are constituted or if the media publishes statements which out rightly hold the suspect or the accused guilty even before such an order has been passed by the Court.

[148] Despite the significance of the print and electronic media in the present day, it is not only desirable but least that is expected of the persons at the helm of affairs in the field, to ensure that trial by media does not hamper fair investigation by the investigating agency and more importantly does not prejudice the right of defence of the accused in any manner whatsoever. It will amount to travesty of justice if either of this causes impediments in the accepted judicious and fair investigation and trial.

[149] In the present case, certain articles and news items appearing in the newspapers immediately after the date of occurrence, did cause certain confusion in the mind of public as to the description and number of the actual assailants/suspects. It is unfortunate that trial by media did, though to a very limited extent, affect the accused, but not tantamount to a prejudice which should weigh with the Court in taking any different view. The freedom of speech protected under Article 19 (1) (a) of the Constitution has to be carefully and cautiously used, so as to avoid interference in the administration of justice and leading to undesirable results in the matters sub judice before the Courts.

[151] Presumption of innocence of an accused is a legal presumption and should not be destroyed at the very threshold through the process of media trial and that too when the investigation is pending. In that event, it will be opposed to the very basic rule of law and would impinge upon the protection granted to an accused under Article 21 of the Constitution [Anukul Chandra Pradhan V. Union Of India & Ors., 1996 6 SCC 354]. It is essential for the maintenance of dignity of Courts and is one of the cardinal principles of rule of law in a free democratic country, that the criticism or even the reporting particularly, in sub judice matters must be subjected to check and balances so as not to interfere with the administration of justice.

> **303 (11). Every effort should be made by the print and electronic media to ensure that the distinction between trial by media and informative media should always be maintained. Trial by media should be avoided particularly, at a stage when the suspect is entitled to the constitutional protections. Invasion of his rights is bound to be held as impermissible."**

44. Their Lordships of the Hon'ble Supreme Court in ***Indirect Tax Practitioners" Association*** vs. ***R.K. Jain***, (2010) 8 SCC 281 have held that criticism becomes contempt when it is done with ill-motive or there is deliberate attempt to run down the institution or an individual Judge is targeted for extraneous reasons. Ordinarily, court would not use its power of contempt to silence criticism unless criticism of judicial institutions transgresses all limits of decency and fairness, or there is total lack of objectivity, or there is deliberate attempt to denigrate the institution. Their Lordships have held as under:

> **[18] Before adverting to the second and more important issue, we deem it necessary to remind ourselves that freedom of speech and expression has always been considered as the most cherished right of every human being. Justice Brennan of U.S. Supreme Court, while dealing with a case of libel - New York Times Company v. L.B. Sullivan observed that "it is a prized privilege to speak one's mind, although not always with perfect good taste, on all public institutions and this opportunity should be afforded for vigorous advocacy no less than abstract discussion.**
>
> **[22] In the land of Gautam Buddha, Mahavir and Mahatma Gandhi, the freedom of speech and expression and freedom to speak one's mind have always been respected. After independence, the Courts have zealously guarded this most precious freedom of every human being. Fair criticism of the system of administration of justice or functioning of institutions or authorities entrusted with the task of deciding rights of the parties gives an opportunity to the operators of the system/institution to remedy the wrong and also bring about improvements. Such criticism cannot be castigated as an attempt to scandalize or lower the authority of the Court or other judicial institutions or as an attempt to interfere with the administration of justice except when such criticism is ill motivated or is construed as a deliberate attempt to run down the institution or an individual Judge is targeted for extraneous reasons.**
>
> **23. Ordinarily, the Court would not use the power to punish for contempt for curbing the right of freedom of speech and expression, which is guaranteed under Article 19(1)(a) of the Constitution. Only when the criticism of judicial institutions transgresses all limits of decency and fairness or there is total lack of objectivity or there is deliberate attempt to denigrate the institution then the Court would use this power. The judgments of this Court in Re S. Mulgaokar , (1978) 3 SCC 339 and P.N. Duda v. P. Shiv Shanker, 1988 3 SCC 167 are outstanding examples of this attitude and approach."**

45. Their Lordships of the Hon'ble Supreme Court in ***Sanjoy Narayan, Editor-in-Chief, Hindustan Times and others*** vs. ***High Court of Allahabad***, (2011) 13 SCC 155 have held that the judiciary also must be magnanimous in accepting an apology when filed

through an affidavit duly sworn, conveying remorse for such publication. Their Lordships have held as under:

> **[11] The judiciary also must be magnanimous in accepting an apology when filed through an affidavit duly sworn, conveying remorse for such publication. This indicates that they have accepted their mistake and fault. This Court has also time and again reiterated that this Court is not hypersensitive in matter relating to Contempt of Courts Act and has always shown magnanimity in accepting the apology. Therefore, we accept the aforesaid unqualified apology submitted by them and drop the proceeding.**

46. Their Lordships of the Hon'ble Supreme Court in ***Ramlila Maidan Incident***, In Re (2012) 5 SCC 1 have held compared the freedom of speech and freedom of expression and freedom to assemble between Indian Constitution and U.S. Constitution as under:

> **[2] It appears justified here to mention the First Amendment to the United States (US) Constitution, a bellwether in the pursuit of expanding the horizon of civil liberties. This Amendment provides for the freedom of speech of press in the American Bill of Rights. This Amendment added new dimensions to this right to freedom and purportedly, without any limitations. The expressions used in wording the Amendment have a wide magnitude and are capable of liberal construction. It reads as under :**
>
> **"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."**
>
> **[3] The effect of use of these expressions, in particular, was that the freedom of speech of press was considered absolute and free from any restrictions whatsoever. Shortly thereafter, as a result of widening of the power of judicial review, the US Supreme Court preferred to test each case on the touchstone of the rule of 'clear- and-present-danger'. However, application of this rule was unable to withstand the pace of development of law and, therefore, through its judicial pronouncements, the US Supreme Court applied the doctrine of 'balancing of interests'. The cases relating to speech did not simply involve the rights of the offending speaker but typically they presented a clash of several rights or a conflict between individual rights and necessary functions of the Government. Justice Frankfurter often applied the above-mentioned Balancing Formula and concluded that "while the court has emphasized the importance of 'free speech', it has recognized that free speech is not in itself a touchstone. The Constitution is not unmindful of other important interests, such as public order, if free expression of ideas is not found to be the overbalancing considerations."**
>
> **[4] The 'balancing of interests' approach is basically derived from Roscoe Pound's theories of social engineering. Pound had insisted that his structure of public, social and individual interests are all, in fact, individual interests looked at from different points of view for the purpose of clarity. Therefore, in order to make the system work**

properly, it is essential that when interests are balanced, all claims must be translated into the same level and carefully labelled. Thus, a social interest may not be balanced against individual interest, but only against another social interest. The author points out that throughout the heyday of the clear-and-present-danger and preferred position doctrines, the language of balancing, weighing or accommodating interests was employed as an integral part of the libertarian position. [Freedom of Speech: The Supreme Court and Judicial Review, by Martin Shapiro, 1966]

[5] Even in the United States there is a recurring debate in modern First Amendment Jurisprudence as to whether First Amendment rights are 'absolute' in the sense that the Government may not abridge them at all or whether the First Amendment requires the 'balancing of competing interests' in the sense that free speech values and the Government's competing justification must be isolated and weighted in each case. Although the First Amendment to the American Constitution provides that Congress shall make no law abridging the freedom of speech, press or assembly, it has long been established that those freedoms themselves are dependent upon the power of the constitutional Government to survive. If it is to survive, it must have power to protect itself against unlawful conduct and under some circumstances against incitements to commit unlawful acts. Freedom of speech, thus, does not comprehend the right to speak on any subject at any time.

[7] In contradistinction to the above approach of the US Supreme Court, the Indian Constitution spells out the right to freedom of speech and expression under Article 19(1)(a). It also provides the right to assemble peacefully and without arms to every citizen of the country under Article 19(1)(b). However, these rights are not free from any restrictions and are not absolute in their terms and application. Articles 19(2) and 19(3), respectively, control the freedoms available to a citizen. Article 19(2) empowers the State to impose reasonable restrictions on exercise of the right to freedom of speech and expression in the interest of the factors stated in the said clause. Similarly, Article 19(3) enables the State to make any law imposing reasonable restrictions on the exercise of the right conferred, again in the interest of the factors stated therein.

[8] In face of this constitutional mandate, the American doctrine adumbrated in Schenck's case cannot be imported and applied. Under our Constitution, this right is not an absolute right but is subject to the above-noticed restrictions. Thus, the position under our Constitution is different.

[10] The fundamental right enshrined in the Constitution itself being made subject to reasonable restrictions, the laws so enacted to specify certain restrictions on the right to freedom of speech and expression have to be construed meaningfully and with the constitutional object in mind. For instance, the right to freedom of speech and expression is not violated by a law which requires that name of the printer and publisher and the place of printing and publication should be printed legibly on every book or paper.

[11] Thus, there is a marked distinction in the language of law, its possible interpretation and application under the Indian and the US laws. It is significant to note that the freedom of speech is the bulwark of democratic Government. This freedom is essential for proper functioning of the democratic process. The freedom of speech and expression is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties, giving succour and protection to all other liberties. It has been truly said that it is the mother of all other liberties. Freedom of speech plays a crucial role in the formation of public opinion on social, political and economic matters. It has been described as a "basic human right", "a natural right" and the like. With the development of law in India, the right to freedom of speech and expression has taken within its ambit the right to receive information as well as the right of press.

[12] In order to effectively consider the rival contentions raised and in the backdrop of the factual matrix, it will be of some concern for this Court to examine the constitutional scheme and the historical background of the relevant Articles relating to the right to freedom of speech and expression in India. The framers of our Constitution, in unambiguous terms, granted the right to freedom of speech and expression and the right to assemble peaceably and without arms. This gave to the citizens of this country a very valuable right, which is the essence of any democratic system. There could be no expression without these rights. Liberty of thought enables liberty of expression. Belief occupies a place higher than thought and expression. Belief of people rests on liberty of thought and expression. Placed as the three angles of a triangle, thought and expression would occupy the two corner angles on the baseline while belief would have to be placed at the upper angle. Attainment of the preambled liberties is eternally connected to the liberty of expression. (Ref. Preamble, The Spirit and Backbone of the Constitution of India, by Justice R.C. Lahoti). These valuable fundamental rights are subject to restrictions contemplated under Articles 19(2) and 19(3), respectively. Article 19(1) was subjected to just one amendment, by the Constitution (44th Amendment) Act, 1979, vide which Article 19(1)(f) was repealed. Since the Parliament felt the need of amending Article 19(2) of the Constitution, it was substituted by the Constitution (First Amendment) Act, 1951 with retrospective effect. Article 19(2) was subjected to another amendment and vide the Constitution (Sixteenth Amendment) Act, 1963, the expression "sovereignty and integrity of India" was added. The pre-amendment Article had empowered the State to make laws imposing reasonable restrictions in exercise of the rights conferred under Article 19(1)(a) in the interest of the security of the State, friendly relations with foreign states, public order, decency or morality or in relation to contempt of court, defamation or incitement of an offence. To introduce a more definite dimension with regard to the sovereignty and integrity of India, this Amendment was made. It provided the right spectrum in relation to which the State could enact a law to place reasonable restrictions upon the freedom of speech and expression.

47. Their Lordships of the Hon'ble Supreme Court in ***Sahara India Real Estate Corporation Limited and others*** vs. ***Securities and Exchange Board of India and another***, (2012) 10 SCC 603 have held that media by virtue of section 4 of Contempt of Courts Act, 1971 is entitled to publish a fair and accurate report. Their Lordships have also held that guidelines for reporting cannot be framed across the board and what constitutes an offending publication would depend on the decision of the court on case to case basis. Their Lordships have further held that excessive prejudicial publicity leading to usurpation of functions of the court not only interferes with administration of justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such case, superior courts are duty-bound under inherent jurisdiction to protect eh presumption of innocence which is now recognized by the Court as a human right. Their Lordships have further held that no single right taken individually is absolute and Court's duty is to strike a proper balance in a given situate where one right conflict with other. Their Lordships have further held that freedom of expression is one of the most cherished values of a free democratic society. Media is an instrument of free expression, however, not absolute and subject to reasonable restrictions under Article 19 (2) of the Constitution of India. Their Lordships have held as under:

> **[17] Protecting speech is the US approach. The First Amendment does not tolerate any form of restraint. In US, unlike India and Canada which also have written Constitutions, freedom of the press is expressly protected as an absolute right. The US Constitution does not have provisions similar to Section 1 of the Charter Rights under the Canadian Constitution nor is such freedom subject to reasonable restrictions as we have under Article 19(2) of the Indian Constitution. Therefore, in US, any interference with the media freedom to access, report and comment upon ongoing trials is prima facie unlawful. Prior restraints are completely banned. If an irresponsible piece of journalism results in prejudice to the proceedings, the legal system does not provide for sanctions against the parties responsible for the wrongdoings. Thus, restrictive contempt of court laws are generally considered incompatible with the constitutional guarantee of free speech. However, in view of cases, like O.J. Simpson, Courts have evolved procedural devices aimed at neutralizing the effect of prejudicial publicity like change of venue, ordering re-trial, reversal of conviction on appeal (which, for the sake of brevity, is hereinafter referred to as "neutralizing devices"). It may be stated that even in US as of date, there is no absolute rule against "prior restraint" and its necessity has been recognized, albeit in exceptional cases [see Near v. Minnesota, 283 US 697] by the courts evolving neutralizing techniques.**
>
> **[18] In 1993, Chief Justice William Rehnquist observed: "constitutional law is now so firmly grounded in so many countries, it is time that the US Courts begin looking at decisions of other constitutional courts to aid in their own deliberative process".**
>
> **[19] Protecting Justice is the English approach. Fair trials and public confidence in the courts as the proper forum for settlement of disputes as part of the administration of justice, under the common law, were given greater weight than the goals served by unrestrained freedom of the press. As a consequence, the exercise of free speech respecting ongoing court proceedings stood limited. England does not have a written constitution. Freedoms in English law have been largely**

determined by Parliament and Courts. However, after the judgment of ECHR in the case of Sunday Times v. United Kingdom,1979 2 EHRR 245, in the light of which the English Contempt of Courts Act, 1981 (for short "the 1981 Act") stood enacted, a balance is sought to be achieved between fair trial rights and free media rights vide Section 4(2). Freedom of speech (including free press) in US is not restricted as under Article 19(2) of our Constitution or under Section 1 of the Canadian Charter. In England, Parliament is supreme. Absent written constitution, Parliament can by law limit the freedom of speech. The view in England, on interpretation, has been and is even today, even after the Human Rights Act, 1998 that the right of free speech or right to access the courts for the determination of legal rights cannot be excluded, except by clear words of the statute. An important aspect needs to be highlighted. Under Section 4(2) of the 1981 Act, courts are expressly empowered to postpone publication of any report of the proceedings or any part of the proceedings for such period as the court thinks fit for avoiding a substantial risk of prejudice to the administration of justice in those proceedings. Why is such a provision made in the Act of 1981? One of the reasons is that in Section 2 of the 1981 Act, strict liability has been incorporated (except in Section 6 whose scope has led to conflicting decisions on the question of intention). The basis of the strict liability contempt under the 1981 Act is the publication of "prejudicial" material. The definition of publication is also very wide. It is true that the 1981 Act has restricted the strict liability contempt to a fewer circumstances as compared to cases falling under common law. However, contempt is an offence sui generis. At this stage, it is important to note that the strict liability rule is the rule of law whereby a conduct or an act may be treated as contempt of court if it tends to interfere with the course of justice in particular legal proceedings, regardless of intent to do so. Sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only safeguards fairness of the later or connected trials, it prevents possible contempt. That seems to be the underlying reason behind enactment of Section 4(2) of the 1981 Act. According to Borrie & Lowe on the "Law of Contempt", the extent to which prejudgment by publication of the outcome of a proceedings (referred to by the House of Lords in Sunday Times's case) may still apply in certain cases. In the circumstances to balance the two rights of equal importance, viz., right to freedom of expression and right to a fair trial, that Section 4(2) is put in the 1981 Act. Apart from balancing it makes the media know where they stand in the matters of reporting of court cases. To this extent, the discretion of courts under common law contempt has been reduced to protect the media from getting punished for contempt under strict liability contempt. Of course, if the court's order is violated, contempt action would follow.

[20] In the case of Home Office v. Harman, 1983 1 AC 280 the House of Lords found that the counsel for a party was furnished

documents by the opposition party during inspection on the specific undertaking that the contents will not be disclosed to the public. However, in violation of the said undertaking, the counsel gave the papers to a third party, who published them. The counsel was held to be in contempt on the principle of equalization of the right of the accused to defend himself/herself in a criminal trial with right to negotiate settlement in confidence. [See also Globe and Mail v. Canada (Procureur g n ral),2008 QCCA 2516

[21] The Continental Approach seeks to protect personality. This model is less concerned with the issue of fair trial than with the need for safeguarding privacy, personal dignity and presumption of innocence of trial participants. The underlying assumption of this model is that the media coverage of pending trials might be at odds not only with fairness and impartiality of the proceedings but also with other individual and societal interests. Thus, narrowly focussed prior restraints are provided for, on either a statutory or judicial basis. It is important to note that in the common-law approach the protection of sanctity of legal proceedings as a part of administration of justice is guaranteed by institution of contempt proceedings. According to Article 6(2) of the European Convention of Human Rights, presumption of innocence needs to be protected. The European Courts of Human Rights has ruled on several occasions that the presumption of innocence should be employed as a normative parameter in the matter of balancing the right to a fair trial as against freedom of speech. The German Courts have accordingly underlined the need to balance the presumption of innocence with freedom of expression based on employment of the above normative parameter of presumption of innocence. France and Australia have taken a similar stance. Article 6(2) of the European Convention of Human Rights imposes a positive obligation on the State to take action to protect the presumption of innocence from interference by non-State actors. However, in a catena of decisions, the ECHR has applied the principle of proportionality to prevent imposition of overreaching restrictions on the media. At this stage, we may state, that the said principle of proportionality has been enunciated by this Court in Chintaman Rao v. The State of Madhya Pradesh, 1950 SCR 759.

[22] The Canadian Approach: Before Section 1 of Canadian Charter of Rights, the balance between fair trial and administration of justice concerns, on the one hand, and freedom of press, on the other hand, showed a clear preference accorded to the former. Since the Charter introduced an express guarantee of "freedom of the press and other media of communication", the Canadian Courts reformulated the traditional sub judice rule, showing a more tolerant attitude towards trial-related reporting [see judgment of the Supreme Court of Canada in Dagenais v. Canadian Broadcasting Corp.,1994 3 SCR 835 which held that a publication ban should be ordered when such an order is necessary to prevent a serious risk to the proper administration of justice when reasonably alternative measures like postponement of trial or change of venue will not prevent the risk (necessity test); and that salutary effects of the publication bans outweigh the deleterious effects on the rights and interests of the parties and the public, including the

effect on the right to free expression and the right of the accused to open trial (i.e. proportionality test)]. The traditional common law rule governing publication bans that there be real and substantial risk of interference with the right to a fair trial emphasized the right to a fair trial over the free expressions interests of those affected by the ban. However, in the context of post-Charter situation, the Canadian Supreme Court has held that when two protected rights come in conflict, Charter principles require a balance to be achieved that fully respects both the rights. The Canadian Courts have, thus, shortened the distance between the US legal experience and the common-law experiences in other countries. It is important to highlight that in Dagenais, the publication ban was sought under common law jurisdiction of the Superior Court and the matter was decided under the common law rule that the Courts of Record have inherent power to defer the publication. In R. v. Mentuck, 2001 3 SCR 442 that Dagenais principle was extended to the presumption of openness and to duty of court to balance the two rights. In both the above cases, Section 2(b) of the Charter which deals with freedom of the press was balanced with Section 1 of the Charter. Under the Canadian Constitution, the Courts of Record (superior courts) have retained the common law discretion to impose such bans provided that the discretion is exercised in accordance with the Charter demands in each individual case.

[23] The Australian Approach: The Australian Courts impose publication bans through the exercise of their inherent jurisdiction to regulate their own proceedings. In Australia, contempt laws deal with reporting of court proceedings which interfere with due administration of justice. Contempt laws in Australia embody the concept of "sub judice contempt" which relates to the publication of the material that has a tendency to interfere with the pending proceedings.

[24] The New Zealand Approach: It recognizes the Open Justice principle. However, the courts have taken the view that the said principle is not absolute. It must be balanced against the object of doing justice. That, the right to freedom of expression must be balanced against other rights including the fundamental public interest in preserving the integrity of justice and the administration of justice.

Indian Approach to prior restraint

(i) Judicial decisions

[25] At the outset, it may be stated that the Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control. Freedom of expression is one of the most cherished values of a free democratic society. It is indispensable to the operation of a democratic society whose basic postulate is that the government shall be based on the consent of the governed. But, such a consent implies not only that the consent shall be free but also that it shall be grounded on adequate information, discussion and aided by the widest possible dissemination of information and opinions from diverse and antagonistic sources. Freedom of expression which includes freedom of the press has a capacious content and is not restricted to expression of thoughts and ideas which are accepted and acceptable but also to those which offend

or shock any section of the population. It also includes the right to receive information and ideas of all kinds from different sources. In essence, the freedom of expression embodies the right to know. However, under our Constitution no right in Part III is absolute. Freedom of expression is not an absolute value under our Constitution. It must not be forgotten that no single value, no matter exalted, can bear the full burden of upholding a democratic system of government. Underlying our Constitutional system are a number of important values, all of which help to guarantee our liberties, but in ways which sometimes conflict. Under our Constitution, probably, no values are absolute. All important values, therefore, must be qualified and balanced against, other important, and often competing, values. This process of definition, qualification and balancing is as much required with respect to the value of freedom of expression as it is for other values. Consequently, free speech, in appropriate cases, has got to correlate with fair trial. It also follows that in appropriate case one right [say freedom of expression] may have to yield to the other right like right to a fair trial. Further, even Articles 14 and 21 are subject to the test of reasonableness after the judgment of this Court in the case of Maneka Gandhi v. Union of India, 1978 1 SCC 248.

[35] Section 2 defines "contempt", "civil contempt" and "criminal contempt". In the context of contempt on account of publications which are not fair and accurate publication of court proceedings, the relevant provisions are contained in Sections 4 and 7 whereas Section 13 is a general provision which deals with defences. It will be noticed that Section 4 deals with "report of a judicial proceeding". A person is not to be treated as guilty of contempt if he has published such a report which is fair and accurate. Section 4 is subject to the provisions of Section 7 which, however, deals with publication of "information" relating to "proceedings in chambers". Here the emphasis is on "information" whereas in Section 4, emphasis is on "report of a judicial proceeding". This distinction between a "report of proceedings" and "information" is necessary because Section 7 deals with proceedings in camera where there is no access to the media. In this connection, the provisions of Section 13 have to be borne in mind. The inaccuracy of reporting of court proceedings will be contempt only if it can be said on the facts of a particular case, to amount to substantial interference with the administration of justice. The reason behind Section 4 is to grant a privilege in favour of the person who makes the publication provided it is fair and accurate. This is based on the presumption of "open justice" in courts. Open justice permits fair and accurate reports of court proceedings to be published. The media has a right to know what is happening in courts and to disseminate the information to the public which enhances the public confidence in the transparency of court proceedings. As stated above, sometimes, fair and accurate reporting of the trial (say a murder trial) would nonetheless give rise to substantial risk of prejudice not in the pending trial but in the later or connected trials. In such cases, there is no other practical means short of postponement orders that is capable of avoiding such risk of prejudice to the later or connected trials. Thus, postponement order not only

safeguards fairness of the later or connected trials, it prevents possible contempt by the Media.

43. Further, we must also keep in mind the words of Article 19(2) "in relation to contempt of court". At the outset, it may be stated that like other freedoms, clause 1(a) of Article 19 refers to the common law right of freedom of expression and does not apply to any right created by the statute (see page 275 of Constitution of India by D.D. Basu, 14th edition). The above words "in relation to" in Article 19(2) are words of widest amplitude. When the said words are read in relation to contempt of court, it follows that the law of contempt is treated as reasonable restriction as it seeks to prevent administration of justice from getting perverted or prejudiced or interfered with. Secondly, these words show that the expression "contempt of court" in Article 19(2) indicates that the object behind putting these words in Article 19(2) is to regulate and control administration of justice. Thirdly, if one reads Article 19(2) with the second part of Article 129 or Article 215, it is clear that the contempt action does not exhaust the powers of the Court of Record. The reason being that contempt is an offence sui generis. Common law defines what is the scope of contempt or limits of contempt. Article 142(2) operates only in a limited field. It permits a law to be made restricted to investigations and punishment and does not touch the inherent powers of the Court of Record. Fourthly, in case of criminal contempt, the offending act must constitute interference with administration of justice. Contempt jurisdiction of courts of record forms part of their inherent jurisdiction under Article 129/ Article 215. Superior Courts of Record have inter alia inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts. The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the "real and substantial risk of serious prejudice" to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. The principle underlying postponement orders is that it prevents possible contempt. Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect. Such postponement orders operate on actual publication. Such orders direct postponement of the publication for a limited period. Thus, if one reads Article 19(2), Article 129/ Article 215 and Article 142(2), it is clear that Courts of Record "have all the powers including power to punish" which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content. Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same time such neutralizing devices or techniques evolved by the Courts effectuate a balance between conflicting public interests.

Further, we must also keep in mind the words of Article 19(2) "in relation to contempt of court". At the outset, it may be stated that like other freedoms, clause 1(a) of Article 19 refers to the common law right of freedom of expression and does not apply to any right created by the statute (see page 275 of Constitution of India by D.D. Basu, 14th edition). The above words "in relation to" in Article 19(2) are words of widest amplitude. When the said words are read in relation to contempt of court, it follows that the law of contempt is treated as reasonable restriction as it seeks to prevent administration of justice from getting perverted or prejudiced or interfered with. Secondly, these words show that the expression "contempt of court" in Article 19(2) indicates that the object behind putting these words in Article 19(2) is to regulate and control administration of justice. Thirdly, if one reads Article 19(2) with the second part of Article 129 or Article 215, it is clear that the contempt action does not exhaust the powers of the Court of Record. The reason being that contempt is an offence sui generis. Common law defines what is the scope of contempt or limits of contempt. Article 142(2) operates only in a limited field. It permits a law to be made restricted to investigations and punishment and does not touch the inherent powers of the Court of Record. Fourthly, in case of criminal contempt, the offending act must constitute interference with administration of justice. Contempt jurisdiction of courts of record forms part of their inherent jurisdiction under Article 129/ Article 215. Superior Courts of Record have inter alia inherent superintendent jurisdiction to punish contempt committed in connection with proceedings before inferior courts. The test is that the publication (actual and not planned publication) must create a real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. It is important to bear in mind that sometimes even fair and accurate reporting of the trial (say murder trial) could nonetheless give rise to the "real and substantial risk of serious prejudice" to the connected trials. In such cases, though rare, there is no other practical means short of postponement orders that is capable of avoiding the real and substantial risk of prejudice to the connected trials. Thus, postponement orders safeguard fairness of the connected trials. The principle underlying postponement orders is that it prevents possible contempt. Of course, before passing postponement orders, Courts should look at the content of the offending publication (as alleged) and its effect. Such postponement orders operate on actual publication. Such orders direct postponement of the publication for a limited period. Thus, if one reads Article 19(2), Article 129/ Article 215 and Article 142(2), it is clear that Courts of Record "have all the powers including power to punish" which means that Courts of Record have the power to postpone publicity in appropriate cases as a preventive measure without disturbing its content. Such measures protect the Media from getting prosecuted or punished for committing contempt and at the same time such neutralizing devices or techniques evolved by the Courts effectuate a balance between conflicting public interests.

45. The postponement orders is, as stated above, a neutralizing device evolved by the courts to balance interests of equal weightage,

viz., freedom of expression vis-a-vis freedom of trial, in the context of the law of contempt.

46. One aspect needs to be highlighted. The shadow of the law of contempt hangs over our jurisprudence. The media, in several cases in India, is the only representative of the public to bring to the notice of the court issues of public importance including governance deficit, corruption, drawbacks in the system. Keeping in mind the important role of the media, Courts have evolved several neutralizing techniques including postponement orders subject to the twin tests of necessity and proportionality to be applied in cases where there is real and substantial risk of prejudice to the proper administration of justice or to the fairness of trial. Such orders would also put the Media to notice about possible contempt. However, it would be open to Media to challenge such orders in appropriate proceedings. Contempt is an offence sui generis. Purpose of Contempt Law is not only to punish. Its object is to preserve the sanctity of administration of justice and the integrity of the pending proceeding. Thus, the postponement order is not a punitive measure, but a preventive measure as explained hereinabove. Therefore, in our view, such orders of postponement, in the absence of any other alternative measures such as change of venue or postponement of trial, satisfy the requirement of justification under Article 19(2) and they also help the Courts to balance conflicting societal interests of right to know vis-a-vis another societal interest in fair administration of justice.

47. One more aspect needs to be mentioned. Excessive prejudicial publicity leading to usurpation of functions of the Court not only interferes with administration of justice which is sought to be protected under Article 19(2), it also prejudices or interferes with a particular legal proceedings. In such case, Courts are duty bound under inherent jurisdiction, subject to above parameters, to protect the presumption of innocence which is now recognised by this Court as a human right under Article 21, subject to the applicant proving displacement of such a presumption in appropriate proceedings.

48. Lastly, postponement orders must be integrally connected to the outcome of the proceedings including guilt or innocence of the accused, which would depend on the facts of each case.

49. For afore-stated reasons, we hold that subject to above parameters, postponement orders fall under Article 19(2) and they satisfy the test of reasonableness.

48. The contempt proceedings are quasi-criminal in nature and the Court must be satisfied about the contemnor's guilt beyond reasonable doubt. We would also like to hasten to add that the person cannot be permitted to comment upon the conduct of the Court in the name of fair criticism, which, if not checked, the same would be detrimental to the institution itself. The role of the Court is to maintain the majesty of law and to permit reasonable criticism.

49. The print media integrates/assimilates people and harmonizes their living. It moulds opinion and also induces changes. The role of Press is also to generate healthy debate and discussion. India is one of the 10th largest publishers of the newspapers. Indian Press has played a very important role in the country's struggle for freedom. The reporting

must be error free, actual and based on factual information. It should be objective and interpretive in order to reach the truth and significant facts and separate truth from falsehood. The Journalist's views should be without prejudice. There should be clarity of expression. He has to undertake research. He, as a sociologist, has to feel the pulse of the society to usher new era. He has to garner public opinion against the evils in the society and how to eradicate them. In order to ensure that there is accurate reporting of the court proceedings, the Journalists/Reporters should be well conversant with the legal terms and are expected to peruse the judgments/orders of the Courts of law. Fearless and independent press is essential to strengthen and nurture the democracy.

50. ***The Tribune*** was founded on 2nd February 1881 in Lahore by Sardar Dyal Singh Majithia. The Tribune and its sister publications are published by the Tribune trust.

51. We hold the Tribune to highest esteem. The Editorial and the Articles published in the Tribune are world class. The Statesmen like Mr. B.K. Nehru have remained President of the Tribune trust. Hon'ble Justice S.S. Sodhi (Retd. Chief Justice) also falls in the same league being eminent jurist and thinker. Sh. Dyal Singh Majithia's contribution towards fearless journalism and his contribution in the sphere of education is also legendry. The contribution of the Tribune before and after independence remains unparalleled. It has kept and maintained the highest standard of journalism. The Tribune has also moulded our careers and we have no hesitation in admitting that it has acted as a philosopher, guide and mentor to us. We start our day by reading the Tribune in the morning. When we go out during vacations and come back, the first thing which we do is to catch up with the Tribune in order to be with the time and space.

52. Before parting with the judgment, it would be apt to add that in order to strengthen the 4th pillar of the democracy, we recommend/suggest to the State Government to prepare a welfare scheme to improve the service conditions of the Journalists and create a corpus to pay pensionary benefits to those Journalists, who have spent at least 30 years in journalism. These suggestions/recommendations are necessary to provide security and fearlessness in their professional pursuits.

53. The Andhra Pradesh Government has framed the rules for the welfare of working journalists called "The Andhra Pradesh Working Journalists Welfare Fund Rules, 1986. These rules have come into force with effect from 1.1.1986. Similarly, Orissa Government has also framed the Orissa Working Journalists Welfare Fund Rules, 2006 vide resolution dated 7.3.2006 to provide for the constitution of a welfare fund for the benefit of the indigent working journalists and retired working journalists and their dependants. The U.P. Government has three tier welfare benefits, i.e. pension scheme regulated by Director Public Relation, health scheme and certain reservation in housing plots/flats in Government housing schemes. In Himachal Pradesh, the retired journalists only get meagre pension between Rs. 4,000/- to 5,000/-. The wage structure of permanent journalists is governed by the wage board and the wage structure of contractual journalists is regulated by the terms and conditions of the contract. Till date, the Government of Himachal Pradesh has not framed the rules for the creation of welfare fund/pension scheme/health scheme for the working/retired journalists. We recommend/suggest to the State of Himachal Pradesh to frame Working Journalists Fund Rules as framed by the Government of Andhra Pradesh as well as Government of Orissa. We also recommend/ suggest that pension scheme/health scheme be framed by the State Government to be regulated by the Addl. Chief Secretary/Director, Information and Public Relations, Government of Himachal Pradesh by creating necessary corpus on the analogy of scheme framed by the Government of Utter Pradesh. It is made clear that the suggestions/ recommendations would only govern the Journalists, who earn their livelihood primarily from the field of journalism. The pension

should be made applicable to only those journalists, who have spent 20-25 years in the field of active journalism. Needful be done within a period of three months from today.

54. Thus, in view of the definitive law laid down by the Hon'ble Supreme Court and having regard to the facts and circumstances of the case, the unconditional apology tendered by Sh. Kuldeep Chauhan is accepted with a warning that in future he should be more careful and responsible by providing fair, accurate and impartial information. The proceedings are closed. The notice is discharged.

55. We remember the metonymic adage coined by English author ***Edward Bulwar Lytton*** in 1839 "***The pen is mightier than the sword***".

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sh. Desh Raj, S/o Sh. Om Parkash ....Petitioner.

Versus

Sh. Rattan Chand S/o Ghapu Ram& others. ....Non-Petitioners.

CMPMO No. 131 of 2014
Decided on: 4.12.2015.

H.P. Panchayati Raj Act, 1994- Section 12- Order was passed by Panchayat on 23.7.2011- appeal was filed on 3.10.2011 - appeal can be filed within 30 days according to Act - application for condonation of delay was not disposed of – however, appeal was decided and the case was remanded to Panchayat- held, that without disposing of the application for condonation of delay, appeal could not have been disposed of - order passed by SDO set aside and the matter remanded to SDO with the direction to decide the application for condonation of delay and thereafter to dispose of the appeal in accordance with law.

For the Petitioner :	Mr. Sanjeev Sood, Advocate.
For Non-Petitioner No. 1 :	Mr. Amit Chandel, Advocate.
For non-petitioner No. 2.	Mr. J.S. Rana, Assistant Advocate General.
For non-petitioner No.3.	Mr. Mukul Sood, Advocace.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Heard. Present petition is filed under Article 227 of the Constitution of India for quashing and setting aside the order dated 31.10.2013 passed by learned Sub Divisional Officer (Civil) Nadaun District Hamirpur H.P. in case No. 3 of 2011 titled Rattan Chand vs. Desh Raj. It is observed by Court that appeal was filed against the order of Gram Panchayat under Panchayati Raj Act 1994 under Section 12 (3) of Act before SDO Nadaun District Hamirpur H.P. The order of the Panchayat was dated 23.7.2011 relating to public nuisance under Section 12 of Act and appeal was filed on 3.10.2011 under Section 12 (3) of H.P. Panchayati Raj Act 1994. As per Section 12 (3) Panchayati Raj Act 1994 appeal against the order of Panchayat passed under Section 12 of Act should be filed within 30 days from the date of order before SDO relating to public nuisance matters in Panchayat. Appeal was not filed within 30 days before the learned SDO and application under Section 5 of the

Limitation Act was filed before the learned SDO Nadaun District Hamirpur H.P. Learned SDO without disposing of application filed under Section 5 of the Limitation Act decided appeal No. 3 of 2011 on merits and remanded back the case to Panchayat. It is well settled law that main appeal cannot be decided on merits until application filed under Section 5 of the Limitation Act is not disposed of in accordance with law. In view of above stated facts following order passed:-

i) Order of learned Sub Divisional Officer dated 31.10.2013 passed in appeal No. 3 of 2011 titled Rattan Chand vs. Desh Raj is set aside and case is remanded back to learned Sub Divisional Officer Nadaun District Hamirpur H.P. with direction to dispose of application filed under Section 5 of the Limitation Act firstly in accordance with law placed on record and if application filed under Section 5 of the Limitation Act is allowed by the SDO thereafter Sub Divisional Officer will decide the appeal on merits in accordance with law under Section 12 (3) of H.P. Panchayati Raj Act 1994.

ii) Learned Sub Divisional Officer (Civil) Nadaun District Hamirpur H.P. is directed to dispose of the matter within two months after receipt of file.

iii) Parties are directed to appear before the Sub Divisional Officer (Civil) Nadaun District Hamirpur H.P. on **4.1.2016**. File of learned Sub divisional Officer Naduan District Hamirpur H.P. and Panchayant concerned be sent back forthwith along with certified copy of this order.

2. CMPMO No. 131 of 2014 is disposed of accordingly. No order as to costs. Pending applications if any also disposed of.

****

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

Dhani Ram .....Appellant

Versus

Chet Ram and another ....Respondents

RSA No. 645/2005
Reserved on: 1.12.2015
Decided on: 4.12.2015

Specific Relief Act, 1963- Section 38- Plaintiff pleaded that he is owner in possession of the suit land- defendant started interfering with the same without any right to do so- PW-1 specifically admitted in his examination-in-chief as well as in cross-examination that defendants are co-sharers- plaintiff and defendants are recorded as co-sharers in Khasra girdawari and jamabandi- therefore, plaintiff should have filed suit for partition and not for injunction- appeal dismissed. (Para-11 to 13)

Case referred:
Bachan Singh v. Swaran Singh, AIR 2001 Punjab & Haryana 112

For the Appellant : Mr. Karan Singh Kanwar, Advocate.
For the Respondents : None.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge :

This Regular Second Appeal has been instituted against judgment dated 1.10.2005 rendered by learned District Judge, Sirmaur District at Nahan, HP in Civil Appeal No. 06-CA/13 of 2005.

2. "Key facts" necessary for adjudication of the present appeal are that the appellant-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake) filed a suit against the respondents-defendants (hereinafter referred to as 'defendants' for convenience sake) for injunction and mandatory injunction. According to the plaintiff he was exclusive owner-in-possession of the land as detailed in the plaint. Defendants have started causing interference in the suit land by way of digging for construction without any right, title or interest.

3. Suit was contested by the defendants. Case of the defendant is that they are co-owners of the suit property and shed was built on the suit land long back and no fresh construction was raised during the pendency of the suit.

4. Issues were framed by the learned trial Court on 11.8.2004. Learned Civil Judge (Senior Division) decreed the suit on 3.1.2005. Defendants filed appeal before the District Judge. Appeal was allowed on 1.10.2005. Hence, this appeal.

5. The Regular Second Appeal was admitted on 20.4.2006 on the following substantial questions of law:

> "1. Whether the first appellate Court could not have held that the plaintiff-appellant did not approach the Court with clean hands when in Para-1 of the plaint it was claimed that he was owner in possession, as per entries in the Jamabandi, and in the Jamabandi, it is recorded that the plaintiff and defendant No. 1 are the joint owners?
>
> 2. Whether the first appellate Court has erred in returning the finding that a joint owner can raise construction on joint property without getting his share separated?"

6. Mr. Karan Singh Kanwar, Advocate, on the basis of substantial questions of law framed, has vehemently argued that the findings given by the first appellate Court below that the plaintiff has not approached the Court with clean hands are contrary to the revenue record. According to him, defendant could not raise construction on the suit land.

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

8. Suresh Kumar has appeared as PW-1. He has proved the General Power of Attorney of the plaintiff. He has proved copy of GPA Ext. PW2/A. He testified that his father is owner-in-possession of the suit land. Defendants were also owners of the suit land. Possession was with the plaintiff. Defendants started digging up the suit land in January 2004. Interim order was obtained on 28.2.2004 and despite that defendants did not stop raising construction. They raised temporary shed. He has proved the photographs mark A and B. In his cross-examination, he has categorically admitted that the defendants were also co-sharers of the suit land. Suit land was vacant on the spot. It is a plain piece of land. He has never got demarcation of the suit land.

9. PW-2 Pankaj Sood has proved Photographs Ext. PW-2/A and Ext. PW-2/B. He has proved negatives of the photographs, Ext. PW-2/C and Ext. PW-2/D.

10. Defendant No. 2 has appeared as DW-1. He deposed that the plaintiff and his father resided together. His father has share in the suit land. Cow-shed was demolished and new cowshed was constructed in 2002. They have not raised any construction after filing of the suit.

11. It is thus, evident from the discussion of the evidence herein above that PW-1 has categorically admitted in his examination-in-chief and also in cross-examination that the defendants are cosharers in the suit land. Even as per Khasra girdawari, Ext. P1 and Jamabandi for the year 2002-03, Ext. PW-1/A, plaintiff alongwith defendants and other is shown as cosharer and reflected to be co-sharer on the suit land. Thus, as per revenue record, suit land is shown to be joint. Presumption of truth is attached to revenue record and no evidence has been led by the plaintiff to rebut the same. Plaintiff is out of possession of the suit land. it is not the case of the plaintiffs that the value and utility of the suit land is diminishing or the acts of the co-owners are detrimental to the interest of the plaintiff.

12. A Division Bench of the Punjab & Haryana High Court in **Bachan Singh v. Swaran Singh** reported in AIR 2001 Punjab & Haryana 112, have summarised the law on the inter-se interests of the co-owners. The Division Bench has held as under:

> 18. On a consideration of the judicial pronouncements on the subject, we are of the opinion that:
>
> (i) a co-owner who is not in possession of any part of the property is not entitled to seek an injunction against another co-owner who has been 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. (ii) Mere making of construction or improvement of, in the common property does not' amount to ouster.
>
> (iii) If by the act of the co-owner in possession the value or utility of the property is diminished, then a co-owner out of possession can certainly seek an injunction to' prevent the diminution of the value and utility of the property.
>
> (iv) If the acts of the co-owner in possession are detrimental to the interest of other co-owners, a co-owner out of possession can seek an injunction to prevent such act which, is detrimental to his interest.
>
> 19. In all other cases, the remedy of the co-owner out of possession of the property is to seek partition, but not an injunction restraining the co-owner in possession from doing any act in exercise of his right to every inch of it which he is doing as a co-owner.
>
> 20. In this view of the matter, we are unable to agree to the propositions laid down by the learned single Judge of this Court in Nazar Mohd. Khan v. Arshad All Khan and Ors. (supra) wherein his Lordship broadly stated that there is no denying the fact that a co-sharer has no right to raises construction until the land is partitioned by metes and bounds and so even when one of the co-sharers is in exclusive possession of a particular piece of land any other person can seek injunction restraining the other co-owner from raising construction. We accordingly overrule the said decision of the learned single judge of this Court and also the decisions in Mst. Parsini alias Mono v. Mahan Singh, 1982 P.L.J. 280, Om Parkash and Ors. v. Chhaju

Ram, (1992-2) 102 P.L.R. 75 and Daulat Ram v. Dalip Singh 1989(1) Rev, L.R. 523.

13. Remedy open to the plaintiff was to seek partition and not to file suit for injunction restraining co-owners in possession from doing any act in exercise of their rights to raise the construction. It was never the case of the plaintiff that the respondents were trying to raise construction in excess of their share in the joint land. First appellate Court has correctly appreciated the oral evidence as well as revenue record. The substantial questions of law are answered accordingly.

14. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

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

Himachal Road Transport Corporation and another ...Appellants.

Versus

Smt. Nisha Devi and others ...Respondents.

FAO No. 224 of 2011
Decided on: 04.12.2015

Motor Vehicles Act, 1988- Section 1988- Tribunal had held that accident had taken place due to contributory negligence of the drivers of the bus and truck- drivers had appeared in the witness box but they were not able to rebut the evidence of the claimant regarding negligence- held, that the tribunal had rightly held that accident was the result of contributory negligence of the drivers of the bus and truck and had rightly directed the payment of compensation in equal shares. (Para-8 to 10)

For the appellants: Mr. Jagdish Thakur, Advocate.
For the respondents: Mr. Rakesh Bharti, Advocate, for respondents No. 1 to 4.
Mr. Naresh Kaul, Advocate, for respondent No. 5.
Nemo for respondents No. 6 and 8 to 10.
Ms. Devyani 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 judgment and award, dated 22.03.2011, made by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala, (H.P.) (for short "the Tribunal") in M.A.C.P. No. 13-N/2006, titled as Nisha Devi and others versus H.R.T.C. and others, whereby compensation to the tune of Rs.19,72,100/- with interest @ 9% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the appellants herein and the insurer of the offending truck were saddled with liability in equal shares (for short "the impugned award").

2. The claimants, the driver of the offending bus, the owners and the insurer of the offending truck have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

3. It is apt to record herein that the Tribunal has directed the appellants, i.e. the owner-insured of the offending bus, and the insurer of the offending truck, i.e. National Insurance Company Limited, to satisfy the impugned award in equal shares. The insurer of the offending truck has not questioned the impugned award.

4. Learned counsel for the appellants argued that the driver of the HRTC bus was not negligent in any way and the entire liability was to be fastened upon the insurer of the offending truck. The argument of the learned counsel for the appellants is devoid of any force for the following reasons:

5. The claimants filed claim petition before the Tribunal for grant of compensation to the tune of Rs.twenty lacs, as per the break-ups given in the claim petition, was resisted by all the respondents by the medium of the replies.

6. Following issues came to be framed by the Tribunal on 07.06.2008:

"1. Whether deceased Kamal Kishore was traveling in the offending bus HP-38A-6060 owned by the respondent No. 1 and 2 and was being driven by respondent No. 3 in a rash and negligent manner and he had struck it against truck No. RJ-07 G-3331 owned by respondent No. 4 and one Rameshwar the predecessor-in-interest of the respondents No. 6 to 8 thereby causing death of the deceased Kamal Kishore? OPP

2. If issue No. 1 is proved in affirmative whether the petitioners being legal heirs of the deceased are entitled to compensation from the respondents? If so, to what amount and who is liable to pay the same to the petitioners? OPP

3. Whether the petition is not maintainable in the present form, as alleged? OPR-1 to 3 & 5

4. Whether the act and conduct of the petitioners are bar to the present petition, as alleged? OPR-1 to 3

5. Whether the accident had taken place due to the wrong act and conduct of the deceased driver Rameshwar of Truck No. RJ-07G-3331? If so its effect? OPR-1 to 3

6. Whether respondent No. 5 has been mis-joined as party in this petition as alleged? OPR-5

7. Whether the petition is collusive in between the petitioners and respondents No. 1 to 3, 4 and 6 to 8, as alleged? OPR-5

8. Whether the deceased Rameshwar driver of truck No. RJ-07G-3331 was not holding proper and valid driving license to drive the vehicle on the day of accident and had violated terms and conditions of the insurance policy, as alleged? If so, its effect? OPR-5

9. Whether the offending truck RJ-07G-3331 was being plied by its owner in violation of the provisions of M.V. Act and this Tribunal has no jurisdiction to entertain the petition, as alleged? OPR-5

10. Relief."

7. Parties have led evidence.

8. The Tribunal after scanning the evidence, oral as well as documentary, held that Kamal Kishore, who was travelling in the bus, bearing registration No. HP-38A-6060, became victim of the vehicular accident, which was outcome of the contributory

negligence of the drivers of the bus, bearing registration No. HP-38A-6060, and the truck, bearing registration No. RJ-07G-3331.

Issues No. 1 and 5:

9. Both these issues are interlinked, thus, are being determined together.

10. The respondents in the claim petition have not led any evidence. The driver of the offending bus, namely Shri Karnail Singh, appeared in the witness box as RW-2, who was not able to prove that he was not driving the offending bus rashly and negligently at the time of the accident.

11. The co-owner of the offending truck, namely Shri Kishan Lal, also appeared in the witness box as RW-1 and tried to avoid the liability, but of no use.

12. The Tribunal, after discussing the evidence, has rightly decided issues No. 1 & 5 and held that the claimants have proved that the deceased had died due to the contributory negligence of the drivers of both the offending vehicles, needs no interference. Accordingly, the findings returned by the Tribunal on issues No. 1 and 5 are upheld.

13. Before I deal with issue No. 2, I deem it proper to determine issues No. 3, 4 and 6 to 9.

Issues No. 3, 4 and 6 to 9:

14. It was for the respondents in the claim petition to discharge the onus, have not led any evidence to discharge the same. Even otherwise, the findings returned by the Tribunal on the said issues have not been questioned. Accordingly, the findings returned by the Tribunal on issues No. 3, 4 and 6 to 9 are upheld.

Issue No. 2:

15. I have gone through the assessment made by the Tribunal. The amount awarded is adequate, cannot be said to be excessive in any way.

16. The Tribunal has rightly held that the accident was outcome of the contributory negligence of the drivers of both the offending vehicles and directed the appellants and the insurer of the offending truck to satisfy the award in equal shares. Thus, the findings on issue No. 2 are also upheld.

17. It appears that the appellants have filed this appeal in order to delay the payment of compensation to the claimants, who are sufferers.

18. Having said so, the appellants have not been able to carve out a case for interference. Viewed thus, the impugned award merits to be upheld and the appeal is to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

19. 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 after proper identification.

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

****

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

Himachal Road Transport Corporation .....Appellant
Versus
Smt. Sushma Devi & others ...Respondents

FAO No. 623 of 2008 a/w
Cross Objections No. 354 of 2009
Decided on: 4.12.2015

Motor Vehicles Act, 1988- Section 166- Income of the deceased was taken as Rs.3,000/- per month- 1/5th of the amount was to be deducted towards loss of dependency and claimants are entitled to Rs.2,400/- under the head 'loss of dependency'- Tribunal had applied the multiplier of '12'- the age of deceased was 43 years at the time of accident, thus, multiplier of '14' will be applicable- thus, claimants will be entitled to Rs.2400 x 12 x 14= Rs. 4,03,200/-- they will be entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses'- total compensation of Rs. 4,43,200/- awarded along with interest. (Para-12 to 17)

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

For the Appellant : Mr. Jagdish Thakur, Advocate.
For the Respondents: Mr. Rakesh Bharti, Advocate, for respondents No. 1 to 4.
Nemo for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 2nd September, 2008, made by the Motor Accidents Claims Tribunal (1), Kangra at Dharamshala (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 16-N/11/2008, titled Smt. Sushama Devi & others versus Himachal Road Transport Corporation & another, whereby compensation to the tune of Rs.4,03,200/- with interest @ 9% per annum from the date of the award till its realization, was awarded in favour of the claimants-appellants herein and against the respondents (for short, "the impugned award").

2. Alongwith this appeal, the respondents-claimants have filed Cross Objection No. 354 of 2009, for enhancement of the compensation.

3. The driver has not questioned the impugned award, on any count. Thus, it has attained finality, so far as it relates to him.

Brief Facts:

4. The claimants being victims of the motor vehicular accident, had invoked the jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles

Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition.

5. The respondents contested the claim petition on the grounds taken in their memo of objections.

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

"1. Whether on 06.01.2006, at about 6.15 p.m., respondent No. 2 was driving bus and had hit the deceased Hakam Singh causing his death?..OPP

2. If issue No. 1 is proved, whether the petitioners are entitled to compensation, if so, how much and from whom? ....OPP

3. Whether the petition is not maintainable in the present form being malafide, vague and incorrect, as alleged? ...OPR

4. Whether the act and conduct of the petitioners is a bar to the petition? OPR-1

5. Whether the petitioners have no cause of action and locus standi to file the petition?....OPR-1

6. Relief."

7. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that driver, namely, Parkash Chand has driven the offending vehicle, i.e. bus bearing registration No. HP-38-2486, rashly and negligently, on 06.01.2006, at about 6.15. p.m., at village Rohr near the shop of one Sh. Lal Singh, caused the accident, in which deceased Hakam Singh sustained injuries and succumbed to the same.

Issue No. 1.

8. The claimants have proved issue No. 1. The findings returned by the Tribunal on this issue are not in dispute. Accordingly, the same are upheld.

Issues No. 3 to 5.

9. Issues No. 2 to 5 are inter-connected. However before dealing with issue No. 2, I deem it proper to deal with Issues No. 3 to 5.

10. It was for the respondents to prove issues No. 3 to 5, have not led any evidence, thus have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issues No. 3 to 5 are upheld.

Issue No. 2.

11. Learned Counsel for the appellant-Himachal Pradesh Road Transport Corporation, argued that the award amount is excessive.

12. The Tribunal has held that the deceased was earning Rs.3,000/- per month by working as a Public Distribution Helper in the H.P. State Civil Supplies Retail Shop and has rightly held the claimants entitled to the tune of Rs.2,400/-, under the head 'loss of dependency, after deducting 1/5th towards his personal expenses, 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** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

13. The Tribunal has applied the multiplier of '12'. The age of deceased was 43 years at the time of accident. Keeping in view the age of the deceased and the claimants,

the multiplier of '14' was applicable in this case, as per the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the apex Court in ***Sarla Verma's*** case, supra.

14. The Tribunal has not awarded compensation under four heads. Keeping in view the recent judgments of the Apex Court, a sum of Rs.10,000/- each, is also awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate' and 'funeral expenses' in favour of the claimants.

15. The Tribunal has also fallen in an error in awarding interest from the date of the award, which was to be awarded from the date of filing of the claim petition. Accordingly, the interest is awarded from the date of filing of the claim petition.

16. Viewed thus, a sum of Rs.4,03,200/- + Rs.40,000/- = Rs.4,43,200/-, is awarded in favour of the claimants, with interest as awarded by the Tribunal, from the date of filing of the claim petition.

17. The impugned award is modified, as indicated above. The appeal and cross objections are accordingly disposed of.

18. The enhanced amount, alongwith interest, be deposited by the insurer within a period of eight weeks from today and on deposit, the amount be released in favour of the claimants strictly in terms of the impugned award.

19. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sh. Jagdish Singh & another. ...Petitioners

Versus

Sh. Gurmeet Singh. ...Respondent

CMPMO No. 505 of 2015
Date of decision: 4.12.2015

Code of Civil Procedure, 1908- Order 21- A decree was passed that defendant will file an affidavit along with tatima showing the land which he is offering to the plaintiff and in case defendant failed to file the affidavit, suit of the plaintiff shall be deemed to have been decreed for possession- decree holder filed an execution petition which was dismissed- however, an opportunity was given to the defendant to comply with the decree- defendant did not comply with the decree on which an order was passed to issue warrant of possession- defendant pleaded that land which was being offered was under charge with the bank which was vacated on 20.1.2014- requests were made to the plaintiff to accept the land which was not accepted- held, that sufficient opportunities had been granted to the defendant for complying with the decree by offering the land which was not complied with- therefore, trial Court had rightly ordered the issuance of warrant of possession as per decree- petition dismissed. (Para-2 to 10)

Cases referred:

Ravinder Kaur Vs. Ashok Kumar (2003) 8 SCC 289

N.S.S. Narayana Sarma & Ors. Vs. M/s Goldstone Exports (P.) Ltd. and others, AIR 2002 SC 251
Satyawati Vs. Rajinder Singh and another, (2013) 9 SCC 491

For the Petitioners: Mr. Sanjay Dalmia, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (oral).

The petitioners are the judgment debtors, who have filed this petition under Article 227 of the Constitution of India assailing therein the order passed by the learned Civil Judge (Senior Division), Nalagarh on 27.8.2015, whereby he issued warrant of possession of the suit land in terms of the decree sought to be executed.

Brief facts may be noticed.

2. This Court while adjudicating RSA No. 617 of 2000, after reversing the concurrent findings rendered by the Court below proceeded to pass judgment in favour of the respondent/decree holder. The operative portion whereof reads as under:-

> *"10. In view of the above discussion, the appeal is allowed. The judgment and decree of the learned trial Court as affirmed by the learned Appellate Court is set-aside and the suit of the plaintiff is decreed in terms of the second agreement Ext.PW-4/A. A decree is passed to the effect that the defendant Jagdish shall on or before 31st October, 2010 file an affidavit alongwith the Tatima showing the land which he offers to the plaintiff in terms of the agreement Ext.PW-4/A. The plaintiff shall be given notice of the said application and he may file his objections thereto and thereafter, if necessary, the learned trial Court shall appoint a Commissioner to identify the land available at the spot. IN case the defendant fails to file such an application or it is found that he is not offering land at the place which was initially agreed to in agreement Ext.PW-4/A the suit of the plaintiff shall be deemed to have been decreed for possession of five biswas of land comprised in Khasra No. 473/1 which is the suit land. The appeal is disposed of in the aforesaid terms. No orders as to costs. Decree sheet be drawn up accordingly."*

3. The decree holder filed execution petition, wherein the petitioner filed objections, which were dismissed by the learned executing Court vide order dated 6.1.2014. Even while dismissing the objections, the learned executing Court offered yet another opportunity to the petitioners to comply with the decree, taking into consideration the fact that the parties were real brothers. Despite this order, the petitioners did not bother to comply with the decree, ultimately constraining the Court to pass the impugned order, which reads as under:-

> *"Although, this court, vide order dated 6.1.2014, had dismissed an application under Section 151 CPC preferred by the DH and the objections under Section 47 CPC preferred by the JDs, but before issuing warrant of possession of suit land comprised in Khasra No. 473/1, at that stage, this court deeded it just and appropriate to direct JD No. 1 to comply with the decree under execution as the parties are not real brothers, but are in advance age of life. The JD No. 1 has repeatedly failed to comply with the decree under execution. Thus in the aforementioned circumstances, this court has no option*

except to adhere to the decree under execution and issue warrant of possession of suit land comprised in Khasra No. 473/1 against the JDs.

Let warrant of possession of suit land comprised in Khasra No. 473/1, measuring 3 biswas as described in the decree under execution be issued against the JDs, returnable for 12.10.2015, on taking necessary steps within 5 days."

4. The petitioner has assailed the order primarily on the ground that before passing of the decree by this Court on 11.8.2010, the land which was being offered by the petitioners to the respondent was under charge with the State Bank of Patiala vide rapat No. 253, which was ultimately vacated after application on 20.1.2014 to this effect had been preferred. Thereafter, the decree holder made several requests to the judgment debtors to comply with the order and appear before the learned Registrar-cum-Executive Magistrate to execute the decree, but they failed to do so.

5. I have heard the learned counsel for the petitioner and find that the present petition is yet another device to defeat the fruits of the decree, which the respondent has earned. The learned executing Court had been considerate enough to offer yet another chance to the judgment debtors to comply with the decree, while dismissing the objections on 6.1.2014. Even despite a passage of nearly more than 1 and ½ years, the judgment debtors took no steps to implement the same and it is only after warrants of possession have been issued that they rushed to this Court, that too by raising pleas which have no legs to stand.

6. In ***Ravinder Kaur Vs. Ashok Kumar (2003) 8 SCC 289***, Hon'ble Supreme Court observed that:

"Courts of law should be careful enough to see through such diabolical plans of the judgment-debtors to deny the decree-holders the fruits of the decree obtained by them. These type of errors on the part of the judicial forums only encourage frivolous and cantankerous litigations causing law's delay and bringing bad name to the judicial system"

7. In ***N.S.S. Narayana Sarma & Ors. Vs. M/s Goldstone Exports (P.) Ltd. and others, AIR 2002 SC 251,*** it was observed that:

".....it is a general impression prevailing amongst the litigant public that difficulties of a litigant are by no means over on his getting a decree for immoveable property in his favour. Indeed, his difficulties in real and practical sense arise after getting the decree."

8. The Hon'ble three Judges Bench of Hon'ble Supreme Court in ***Satyawati Vs. Rajinder Singh and another, (2013) 9 SCC 491*** made the following eye opening observations:-

*"**13**. It is really agonizing to learn that the appellant- decree holder is unable to enjoy the fruits of her success even today i.e. in 2013 though the appellant-plaintiff had finally succeeded in January, 1996. As stated hereinabove, the Privy Council in the case of The General Manager of the Raj Durbhnga under the Court of Wards vs. Maharajah Coomar Ramaput Sing had observed that the difficulties of a litigant in India begin when he has obtained a Decree. Even in 1925, while quoting the aforestated judgment of the Privy Council in the case of Kuer Jang Bahadur vs. Bank of Upper India Ltd., Lucknow [AIR 1925 Oudh 448], the Court was constrained to observe that Courts in India have to be careful to see that process of the Court and law of procedure are not*

abused by the judgment-debtors in such a way as to make Courts of law instrumental in defrauding creditors, who have obtained decrees in accordance with their rights.

14. *In spite of the aforestated observation made in 1925, this Court was again constrained to observe in Babu Lal vs. M/s. Hazari Lal Kishori Lal & Ors. [(1982) 1 SCC 525] in para 29 that Procedure is meant to advance the cause of justice and not to retard it. The difficulty of the decree holder starts in getting possession in pursuance of the decree obtained by him. The judgment debtor tries to thwart the execution by all possible objections...*

15*. This Court, again in the case of Marshall Sons & Co. (I) Ltd. vs. Sahi Oretrans (P) Ltd. & Anr. [(1999) 2 SCC 325] was constrained to observe in para 4 of the said judgment that ..it appears to us, prima facie, that a decree in favour of the appellant is not being executed for some reason or the other, we do not think it proper at this stage to direct the respondent to deliver the possession to the appellant since the suit filed by the respondent is still pending. It is true that proceedings are dragged for a long time on one count or the other and on occasion, become highly technical accompanied by unending prolixity at every stage providing a legal trap to the unwary. Because of the delay, unscrupulous parties to the proceedings take undue advantage and person who is in wrongful possession draws delight in delay in disposal of the cases by taking undue advantage of procedural complications. It is also a known fact that after obtaining a decree for possession of immovable property, its execution takes long time...*

16*. Once again in the case of Shub Karan Bubna alias Shub Karan Prasad Bubna vs. Sita Saran Bubna and Ors. (2009) 9 SCC 689 at para 27 this Court observed as under:*

> *"In the present system, when preliminary decree for partition is passed, there is no guarantee that the plaintiff will see the fruits of the decree. The proverbial observation by the Privy Council is that the difficulties of a litigant begin when he obtains a decree. It is necessary to remember that success in a suit means nothing to a party unless he gets the relief. Therefore, to be really meaningful and efficient, the scheme of the Code should enable a party not only to get a decree quickly, but also to get the relief quickly. This requires a conceptual change regarding civil litigation, so that the emphasis is not only on disposal of suits, but also on securing relief to the litigant."*

9. The respondent has a decree in his favour, which has to be given effect to and taken to its logical end by delivery of possession in terms thereof. The petitioners have successfully delayed the delivery of possession by five years, living under the illusion that the long arms of the law will fail to reach them. They only need to be reminded that law is not that powerless and its long arms will always throttle such litigants' caricatures so that the confidence and credibility of the society in judiciary is maintained and survives.

10. Indisputably, the order dated 6.1.2014 whereby the objections filed by the petitioners against the order came to be dismissed, has attained finality and therefore, there is no option left with the petitioners but to give effect to the decree as passed against them.

11. Having said so, there is no merit in this petition and the same is dismissed with costs.

Normally, this would have been a fit case where this Court would impose heavy costs, but since no notice has been issued to the opposite side, this Court refrains from doing so.

****

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

FAO (MVA) No. 369 of 2009 a/w
FAO No. 453 of 2009
Date of decision: 4th December, 2015

FAO No.369/2009.

Jasvir Singh . .....Appellant.

Versus

Shri Amer Singh and another .....Respondents

FAO No.453/2009.

Sh. Amer Singh .....Appellant.

Versus

Sh. Jasvir Singh and others ....Respondents.

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded Rs. 74,000/- as compensation- petitioner had suffered 25% permanent disability relating to left lower limb- injury was on the knee- petitioner will suffer pain throughout his life- he may develop osteoarthritis and may require replacement at a later stage- petitioner will not be in a position to work in the fields in a routine manner- an amount of Rs.50,000/- awarded under the head 'pain and suffering', Rs.25,000/- awarded under the head 'loss of amenities of life' , Rs.1 lac awarded under the head 'loss of earnings' and the petitioner held entitled to a sum of Rs.1,89,000/- along with interest @ 7.5% per annum. (Para-6 to 8)

For the appellant: Mr. Vinay Thakur, Advocate, for the appellant in FAO No. 369 of 2009 and Mr. Ashok Sharma, ASGI, with Mr. Ajay Chauhan, Advocate, for the appellant in FAO No. 453 of 2009.

For the respondents: Mr. Ashok Sharma, ASGI, with Mr. Ajay Chauhan, Advocate, for respondent No.1 in FAO No. 369 of 2009.

Mr. Ratish Sharma, Advocate, for respondent No.3 in both the petitions.

Mr. Vinay Thakur, Advocate, for respondent No.1 in FAO No. 453 of 2009.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

Both these appeals are directed against the judgment and award dated 4.7.2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. in MAC No. 6-S/2 of 2007, titled *Sh. Jasvir Singh versus Shri Amer Singh and others*, for short "the Tribunal", whereby compensation to the tune of Rs.74000/- alongwith interest @ 9% per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short.

2. The claimant, by the medium of appeal being FAO No. 369 of 2009, has questioned the impugned award on the ground of adequacy of the compensation and owner has questioned the impugned award by the medium of FAO No. 453 of 2009, on the ground that the Tribunal has fallen in an error in discharging the insurer from the liability.

3. Both these appeals are outcome of a common award, thus, I deem it proper to determine both these appeals by this common judgment.

4. During the pendency of the appeal, Mr. Ashok Sharma learned Assistant Solicitor General of India has stated that the driver has renewed the licence from time to time and produced the copy of the same which was also handed over to the learned counsel for the insurer for verification. On the last date, the learned counsel for the insurer placed on record a communication which appears to be made to him by the competent officer concerned and sought time to seek instructions. Today he has frankly conceded that the driver was having a valid and effective driving licence. His statement is taken on record.

5. Having said so, the Tribunal has fallen in an error in exonerating the insure from the liability. Accordingly, the appeal (FAO No. 453 of 2009), filed by the owner is allowed and the insurer is saddled with the liability.

6. Now coming to the appeal (FAO No. 369 of 2009), filed by the claimant for enhancement. The Tribunal has awarded only Rs.74000/- under the seven heads as recorded in para 26 of the impugned award, which appears to be too meager on the fact of it, for the following reasons.

7. Dr. Ramesh Chauhan (PW1) has stated that the petitioner was examined by a board of doctors to assess the disability. 25% permanent disability relating to the left lower limb was found. Certificate Ext. PW1/A in this regard was issued by the Board. It bears his signatures and the signatures of the other members of the Board. The injury was on the knee. The patient has to suffer pain throughout his life. In future, he will develop osteoarthritis and may also require the knee replacement at a later stage. He will not be in a position to work in the fields in a routine manner.

8. While going through the statement made by the doctor, one comes to an inescapable conclusion that the claimant has suffered 25% permanent disability, has affected his physical frame and his income also. Thus, I deem it proper to exercise guess work and award Rs.50,000/- under the head *"Pain and sufferings"* instead of Rs.5000/- awarded by the Tribunal and Rs.25000/- under the head *"Loss of amenities of life"*, instead of Rs. 5000/- awarded by the Tribunal, Rs. 1 lac under the head *"loss of earnings*" in *lump sum*. The amount awarded under the other heads is maintained. The claimant is thus held entitled to Rs.1,00,000+ Rs.50,000+ Rs.25000/- + Rs.14000/-. i.e., Rs.10,000/- under the head *"Medical expenses and expenses for future treatment*", Rs.2000/-, under the head "Attendants Expenses" and Rs.2000 under the head "Special diet and nutrition." Total Rs.1,89,000/-, with interest, as awarded.

9. Accordingly, the appeal filed by the claimant is allowed, the impugned award is modified and compensation is enhanced, as indicated hereinabove.

10. The insurer is directed to deposit the entire amount alongwith 7.5% interest from the date of claim petition, so far as it relates to the amount awarded by the Tribunal, and from the date of the impugned award so far it relates to the enhanced amount, within eight weeks from today.

11. On deposit, the Registry is directed to release the amount, in favour of the claimant, strictly, as per the terms and conditions contained in the impugned award, through payee's cheque account. The amount deposited by the owner is directed to be released to the owner minus Rs.25,000/- statutory amount, which is awarded as costs payable in favour of the claimant.

12. Accordingly, both the appeals are disposed of.

13. Send down the record, forthwith, after placing a copy of this judgment.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Mast Ram . ...Petitioner

Versus

Nand Lal .....Respondent.

CMPMO No. 325 of 2015.
Date of decision : 04.12.2015

Code of Civil Procedure, 1908- Order 26 Rule 9- Plaintiff had filed a suit for possession- he filed an application for appointment of Local Commissioner to demarcate the land at the stage of argument- demarcation had already been carried out at the instance of the plaintiff and the report was exhibited on the record- held, that object of local investigation is not to collect evidence, but to obtain such material, which can be had only at the spot- application for appointment cannot be allowed merely on the ground that no prejudice would be caused to the other side or the expenses for the commissions are going to be borne by the plaintiff- in the present case, land was demarcated twice and plaintiff had relied upon the reports of those demarcation- submission of the defendant that appointment of local commissioner would amount to collection of evidence on behalf of the plaintiff and rewarding the plaintiff for negligence or inaction to prove the facts alleged in the plaint is sustainable- revision accepted and the application dismissed. (Para-3 to 10)

For the Petitioner : Mr. G. R. Palsra, Advocate.
For the Respondent : Ex-parte

The following order of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This petition under Article 227 of the Constitution of India is directed against the order dated 9.7.2015 passed by learned Civil Judge (Junior Division), Chachiot at Gohar, District Mandi in Civil Suit No. 21/2010 whereby he appointed the Local Commissioner for demarcation of the suit land, that too, after the parties had led their evidence.

2. The respondent despite service has not chosen to put in appearance.

3. The respondent had filed a suit for possession and consequential relief of injunction and when the same was at the stage of arguments, he filed an application for appointment of Local Commissioner to demarcate the land. It would be evident from

the record that a demarcation had earlier been carried out, that too, on the application of the respondent and report to this effect has already been exhibited as Ex.PW-2/A.

4. The learned trial Court allowed the application by concluding "*that the suit land is imminent to the land of the applicant/plaintiff, so applicant/plaintiff is justified in filing the present application at this stage. As per the record, applicant/plaintiff is coming in dispute qua suit land with respondent/defendant since the year 2006 and evidence on record is not sufficient to give a true picture of the spot. Since the motion made by applicant/plaintiff is bonafide one and circumstances of the case are just defined in the application filed by applicant. In view of this, this Court is of the considered opinion that appointment of Local Commissioner for the demarcation of the suit land is necessary for the ends of justice. So far as plea of the respondent/defendant that appointment of the Local Commissioner in this case at this stage will amount collection of evidence in favour of applicant/plaintiff is concerned to this effect, it is stated here that this plea is not sustainable as no prejudice shall be caused to the respondent/defendant. In case Local Commissioner is appointed in this case for the demarcation of the suit land and moreover, respondent/ defendant will have sufficient opportunity to rebut the demarcation report by cross-examining the Local Commissioner in this case".*

5. In so far as the earlier demarcation report is concerned, the learned trial Court held "*that in the demarcation report Ex.PW2/B, applicant/plaintiff has been found owner in possession of the suit land comprised in Khasra No. 374/1, area measuring 0-4-11 bigha as per revenue record. But as per contents of the application as well as plaint of the applicant/plaintiff, respondent/defendant has caused interference on the suit land from dated 11.2.2010 by cutting grass and cultivating the same and this fact has also been admitted in evidence by respondent/defendant in his cross examination but he has explained his admission by deposing that he plaughed his own field. There is no evidence in support of the version of the respondent/defendant that he has not encroached the portion of the suit land comprised in Khasra No. 374/1, area measuring 0-4-11 bigha".*

6. I am afraid that I cannot concur with the reasoning assigned by the learned trial Court. The object of local investigation is not to collect evidence, but to obtain such material, which from its peculiar nature, can be had only at the spot. The object of Order 26 Rule 9 is not to assist a party to collect evidence. The Courts are not expected to mechanically order the appointment of Commissioner, liberally on the requests made without proper and due application of its mind, to the conditions stipulated in the relevant provisions of law, to be adhered to, before embarking upon passing orders for appointing the Local Commissioner.

7. Mechanical and indiscriminate appointment of Local Commissioner, that too, merely because the Court thinks the other party to the proceedings may not be prejudiced or that the expenses for the commissions are going to be borne by the applicant for the purpose cannot be countenanced. No doubt, it is the Court concerned where the issue is pending, which alone is the best judge to decide the need or necessity to appoint a Commission, but then the Court must record its satisfaction to such a request bearing in mind the interest of justice of both the parties and the stage of the suit and that too within the frame work of its powers as conferred by the Code and this essentially would depend upon the facts and circumstances of each case.

8. It would be evident from the perusal of the application moved by the plaintiff that he was seeking appointment of a Local Commissioner on the ground that the respondent had taken objection regarding the spot memo prepared by the Tehsildar having not been supplied to the respondent. Indisputably, it is the report of the Tehsildar Ex.PW-

2/A, which is sought to be relied upon by the plaintiff/petitioner for which he has already led evidence and after conclusion of the same even the defendant/respondent have led the evidence and it is only thereafter that the application for demarcation has been preferred. In such circumstances, the respondent was perfectly justified in submitting that the appointment of Local Commissioner at this stage would only amount to collect the evidence on behalf of the applicant and rewarding the party for the negligence or inaction to prove the facts alleged in the plaint.

9. It is evident from the record that the petitioner had earlier got the demarcation carried out through the revenue officials on 8.3.2007 and had thereafter lodged an FIR against the respondent and his family members and during the course of investigation by the police the demarcation was again conducted on 21.6.2007 through the revenue officials and the spot map was also prepared. Thus, it is clear that the petitioner himself was relying upon these two demarcation reports and was therefore required to prove the same in accordance with law and not fall back on the Court to seek its aid or assistance to gather or collect evidence for him and fill up the lacunas of his case.

10. The power of appointment of Commissioner cannot be exercised by the Court to assist the party to collect the evidence where it can get evidence itself. It is settled law that the issuance of commission for local investigation is the discretion of the Court and no party can claim such relief as a right, nor the Court is bound to issue a commission. While considering the prayer for appointment of commission, the Court is obliged to apply its mind to the facts and circumstances of the case on hand and take an appropriate decision granting or refusing the relief. There should be sufficient basis and justification as also need and necessity for appointment of commission. It is settled law that the Court cannot be used as a means to collect evidence for a party to achieve an ulterior object.

11. In view of the aforesaid discussion, the order passed by the learned trial Court dated 9.7.2015 is not at all sustainable and the same is accordingly quashed and set-aside, leaving the parties to bear their costs. Interim order granted by this Court on 6.8.2015 is vacated. With the aforesaid observations, the petition stands disposed of, so also the pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Mohinder Singh .....Appellant.
Versus
State of H.P .....Respondent.

Cr. Appeal No. 319 of 2015
Reserved on: 2.12.2015
Decided on: 4th December, 2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2 kg. of charas- independent witnesses had not supported the prosecution version- case property produced in the Court is not connected to the case property recovered at the spot as entry in the malkhana register was not produced- held, that in these circumstances, prosecution version is not proved- accused acquitted. (Para-10 to 13)

For the Appellant: Mr. Vivek Sharma, Advocate.
For the Respondent: Mr. Ramesh Thakur, Assistant Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant appeal is directed against the impugned judgment rendered on 4.7.2015, by the learned Special Judge, solan, District Solan, H.P. in Sessions Trial No. 4-S/7 of 2013, whereby the learned trial Court convicted and sentenced the accused/appellant to undergo rigorous imprisonment for a period of ten years and to pay a fine in a sum of Rs.1,00,000/- (one lac) and in default of payment of fine to further undergo simple imprisonment for a period of one year for commission of offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, for short "the Act".

2. Brief facts of the case are that on 23.2.2013, HC Ram Pal, PW-12 along with HC Ambi Lal, Constables Ajay Kumar, Pawan Kumar, PW-1, Rohit Kumar and Bhupender Singh had gone for traffic checking and patrolling from the Office of SIU, Solan towards Kotla Nala, Shamti, Oachghat etc. after getting entered rapat in the daily diary Ext.PW-7/A and at about 11.45 AM, all the members of the police party were present at Zonal Hospital, Chowk near Police Assistance booth at Kotla Nala when a private bus bearing registration No.HP-16-2185 came from Rajgarh side. The said bus was stopped for checking. HC Ram Pal along with Constable Pawan Kumar entered into the bus from front door, whereas HC Ambi Lal and Constable Ajay entered the bus from its rear door and they started checking the luggage of the passengers travelling in the bus. The accused was sitting on seat No.15 and on seeing the police party, the accused became perplexed. The accused at that time was carrying a bag on his lap. The bag of the accused was searched from which one jacket was recovered and on checking of the jacket one transparent polythene pack was recovered from inside the jacket, which on opening was found to be having charas in the form of wicks. The accused on enquiry also disclosed that recovered substance was charas which was also found to be so by HC Ram Pal, PW-12. Gian Chand, PW-4, Narender Sharma, PW-5, who were sitting on seats No.16 and 17 and Sandeep Kumar, PW-2, conductor of the bus and Virender Kumar, PW-3, driver of the bus were associated in the search and charas so recovered was weighed and found to be 2 kgs. The charas so recovered was put back in the same transparent polythene bag, which was put in a cloth parcel and the parcel was sealed with five seals of impression 'A'. The specimen seal Ext.PW-1/A was taken separately and seal impression was affixed over the NCB form Ext.PW-11/D, which was filled in triplicate at the spot by the Investigating Officer and parcel containing contraband along with pithu bag and jacket were taken into possession vide memo Ext.PW-1/B. Photographs Ext.P.9 to Ext.P.11 were taken and the videography of the spot proceedings was also done. Rukka Ext.PW-11/A was prepared by HC Ram Pal,PW-12 and was forwarded to the police station, Sadar Solan through Constable Pawan Kumar, PW-1, on receipt of which FIR Ext.PW-10/A came to be recorded at the Police Station, Sadar Solan by Inspector Chaman Lal, PW-11. Site Plan Ext.PW-12/A was prepared by HC Ram Pal and the accused was arrested vide memo Ext.PW-12/F. The case property alongwith sample seals, seizure memo, NCB form were deposited with HHC Narender Parkash, PW-8, Incharge Malkhana, Police Station, Sadar Solan, who made entry in the Malkhana register, the abstract whereof is Ext.PW-8/A. On 26.2.2013, the parcel containing contraband alongwith sample seals, copy of seizure memo, NCB form etc. were forwarded to FSL, Junga through Constable Om Prakash,PW-6 vide RC Ext.PW-6/A, who had deposited the same at FSL, Junga in a safe condition and as per the report of Chemical Examiner Ext.PW-11/F, the parcel of analysis was found to be

containing extract of cannabis and sample of charas. On completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court.

3. The trial Court charged the accused for his having committed an offence punishable under Section 20 of the Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 12 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused was given an opportunity to adduce evidence in defence, which he refused to avail.

5. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. Shri H.S Rangra, learned Advocate, has concerted to vigorously contend before this Court qua the findings of conviction, recorded by the learned trial Court, being not based on a proper appreciation of evidence on record by it, rather, theirs being sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

6. On the other hand, the learned Deputy Advocate General appearing for the State, 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 they do not necessitate interference, rather merit vindication.

7. 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.

8. Recovery of charas weighing 2 kg was effected under memo Ex. PW-1/B from the alleged conscious and exclusive possession of the accused while its being kept by him in a pithu bag Ex. P-4 which stood carried by him on his lap while his occupying seat No. 15 of bus bearing Registration No. HP-16-2185. Even though the prosecution witnesses have deposed in tandem besides in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the entire chain of circumstances, hence it stands argued qua when the prosecution case standing established, it would be legally unwise for this Court to acquit the accused.

9. Besides when the testimonies of the official witnesses, unravel the factum of theirs being bereft of any inter-se or intra-se contradictions hence, theirs enjoying credibility for sustaining thereupon findings of conviction recorded against the accused by the learned trial Court. Apparently, proof of the prosecution case is endeavored to be sustained on the strength of the unblemished testimonies of police witnesses. A close and studied perusal of the deposition of the police witnesses underscores the factum of theirs having therein neither rendered a version qua the factum of recovery of contraband from the exclusive and conscious possession of the accused inconsistent with the manner thereof recited in the F.I.R. Ext.PW-10/A for begetting a conclusion of hence their testimonies comprised in their respective examinations in chief being ridden with a vice of inter-se contradictions vis-à-vis their testimonies comprised in their respective cross-examinations nor when their depositions are afflicted with any vice of intra se contradictions rather when they have rendered a deposition qua the manner of recovery of charas from the alleged conscious and exclusive possession of the accused bereft of any disharmony or inconsistency, gives leverage to an inference of hence the prosecution succeeding in sustaining its charge against

the accused of charas weighing 2 kg having stood recovered from his conscious and exclusive possession while its being kept by him in a bag Ex. P-4 carried on his lap while his occupying seat No. 15 of the bus aforesaid.

10. The Investigating Officer had associated two independent witnesses PW-4 Gian Chand and PW-5 Narender Sharma in the apposite proceedings qua effectuation of recovery of charas weighing 2 Kg. under memo Ex. PW-1/B from Pithu Bag Ex. P-4 carried by the accused on his lap while his occupying seat No. 15 of bus bearing No. HP-16-2185. However, both the independent witnesses aforesaid associated by the Investigating Officer in the apposite proceedings held by him at the site of occurrence have not lent any muscle to the propagation by the prosecution of the accused while occupying seat No.15 of the bus aforesaid his holding or carrying pithu bag Ex. P-4 on his lap wherefrom recovery of charas weighing 2Kg. stood effectuated. On the contrary, they have in their respective depositions on oath unequivocally deposed qua the factum of recovery of pithu bag Ex. P-4 standing effectuated from the rack of the bus. As a corollary, with the independent witnesses associated by the investigating Officer in the apposite proceedings held by him at the site of occurrence having repulsed or repelled the prosecution case qua the accused while occupying seat No. 15 of bus bearing registration No. HP-16-2185 his holding Pithu on his lap wherefrom charas stood recovered concomitantly dismantles as well rips apart the edifice of the genesis of the prosecution case cast in the depositions of the official witnesses. In aftermath, the prosecution version is gripped with an aura of doubt benefit whereof ought to go to the accused.

11. Be that as it may, it was also incumbent upon the prosecution to fortifyingly establish the factum probandum in as much as the case property produced before the trial Court being linkable to its recovery standing effectuated from the alleged conscious and exclusive possession of the accused in the manner espoused by the prosecution. The germane besides apt material for forming a conclusion qua the case property as produced in Court being linkable to the apposite stage of its recovery from the alleged conscious and exclusive possession of the accused in the manner propagated by the prosecution, stood embedded in the apposite descriptive entries qua it, recorded in the Malkhana register of the police station concerned. Imperatively at the stage contemporaneous to its production in Court by the learned PP for its being shown to the PWs (a) the former was enjoined to produce in Court either the abstract of the malkhana register personificatory of narrations or descriptions compatible or congruous to the one borne on Ex.PW-1/B as shown to the prosecution witnesses (b) or he was obliged to elicit from the PWs to whom the case property stood shown in Court by him communications portraying the factum of it being carried by them on its being handed over to them by an authorized official after its retrieval by the latter from the Malkhana concerned whereupon it stood handed over by them to the learned PP for facilitating on its production by him in Court emanation of apposite elicitations from them unveiling the factum of it being the case property as attributed by the prosecution to the accused (c) even in the face of the aforesaid omission the learned PP at the time of production of case property Ex.P-8 in Court, for its being shown to the PWs for theirs deposing qua it being the very same property as was recovered from the alleged conscious and exclusive possession of the accused in the manner as propagated by the prosecution to yet gain muscle was obliged to on its production in Court by him besides prior to its being shown to the PWs communicate before it the factum of his having received it from an empowered official after its retrieval by the latter from the Malkhana concerned.

12. However, a close and circumspect reading of the testimonies of PW-1 C. Pawan Kumar and PW-12 HC Ram Pal to whom the case property on its production in Court by the learned PP was shown omits to unfold (a) the factum of either at the stage

contemporaneous to its production in Court by the learned PP for its being shown to the PWs aforesaid he divulged to the trial Court the factum of his having received it from an authorized officer on its retrieval by the latter from the Malkhana concerned (b) nor is there any emanation in the deposition of both PWs aforesaid of theirs having received it from an authorized official on it retrieval by the latter from the malkhana concerned, (c) besides there is no communication by both in their recorded depositions on oath of theirs carrying with them at the time of recording their depositions in court during course whereof the learned PP showed them case property Ex.P-8, the relevant abstract of the malkhana register wherefrom compatibility intra-se descriptions or narrations borne thereon on its comparison with the abstract of the malkhana register could stand either disinterred or fathomed, for as a corollary rendering a conclusion of the case property as produced in the Court being the one as stood recovered from the conscious and exclusive possession of the accused.

13. The summom bonum of the above discussion is of the omissions aforesaid countervailing the propagation of the prosecution of case property Ex.P-8 produced in Court by the learned PP for its being shown to PWs being relatable to the contraband recovered from the alleged conscious and exclusive possession of the accused under memo Ex. PW-1/B. The crux of the above discussion is of the prosecution having not adduced cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court suffers from an infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court merit interference.

14. In view of above discussion, the instant appeal is allowed and the impugned judgment of 4.7.2015 rendered by the learned Special Judge, Solan is set-aside. The appellant/accused is acquitted of the offence charged. The fine amount, if any, deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

15. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of the jail concerned, in conformity with the judgment forthwith. Records be sent back forthwith.

****

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

National Insurance Company Limited ...Appellant.
Versus
Smt. Kaveeta Shreshta and another ...Respondents.

FAO No. 479 of 2009
Decided on: 04.12.2015

Motor Vehicles Act, 1988- Section 149- Insurer contended that policy taken by the owner was an Act Policy and it was wrongly saddled with liability – preliminary objection was taken by the owner to this effect in the reply but no issue was framed by the Tribunal- therefore, case remanded to the Tribunal to determine whether the policy was an 'Act Policy,' whether the risk of the deceased was covered and who is liable to satisfy the award. (Para-2 to 6)

For the appellant: Mr. Jagdish Thakur, Advocate.

For the respondents: Ms. Ritta Goswami, Advocate, for respondent No. 1.
Nemo for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Subject matter of this appeal is judgment and award, dated 21.03.2009, made by the Motor Accident Claims Tribunal, Kinnaur Civil Division at Rampur Bushahr, H.P. (for short "the Tribunal") in M.A.C. Petition No. 80 of 2006, titled as Smt. Kaveeta Shrestha versus Vishal alias Rinku and another, whereby compensation to the tune of Rs.73,000/- came to be awarded in favour of the claimant and against the respondents (for short "the impugned award").

2. Appellant-insurer has questioned the impugned award on the ground that the insurance policy was 'Act Policy', therefore, it was not liable to indemnify and the owner-insured had to satisfy the entire award.

3. I have perused the record. It appears that the Tribunal has not discussed the following three questions:

(i) Whether the insurance policy was 'Act Policy' or otherwise?

(ii) Whether risk of the deceased was covered? and

(iii) Who is to satisfy the award?

4. I have decided a case of the like nature being **FAO No. 164 of 2007,** titled as **Sh. Vipan Kumar versus Naushad Ahmed and another,** decided on 28.11.2014 and have remanded the matter to the Tribunal for determining the issues. It is apt to reproduce paras 12 and 13 of the judgment herein:

> *"12. The question is who is to be saddled with the liability. This issue has not been decided by the Tribunal. The insurer has not led any evidence to prove whether it is an "Act policy" or otherwise.*
>
> *13. In the given circumstances, I deem it proper to remand the appeal by directing the Tribunal to decide the said issue, i.e., who is to be saddled with the liability. The insurer and owner are at liberty to lead evidence to that effect."*

5. It is also worthwhile to record herein that the appellant-insurer has taken a preliminary objection to this effect in its reply to the claim petition, but despite that, no issue has been framed by the Tribunal.

6. Having said so, the case is remanded to the Tribunal for determining all the three questions (supra). The appellant-insurer and the owner-insured of the offending vehicle are at liberty to lead evidence to that effect.

7. Parties are directed to cause appearance before the Tribunal on **30th December, 2015** and the Tribunal is directed to decide the matter within four months with effect from 30th December, 2015.

8. Registry is directed to release the awarded amount with interest in favour of the claimant strictly as per the terms and conditions contained in the impugned award after proper identification. Release of the amount is subject to the findings to be recorded by the Tribunal.

9. Send down the record after placing copy of the judgment on Tribunal's file. Copy **dasti.**

****

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

The New India Assurance Company .....Appellant
Versus
Smt. Kanta Devi & others .....Respondents

FAO No. 563 of 2009
Decided on : 4.12.2015

Motor Vehicles Act, 1988- Section 166- Tribunal had deducted 1/3rd of the income of the deceased towards his personal expenses- 50% of the income was to be deducted- loss of dependency would be Rs. 1500/- per month and the claimants would be entitled to Rs. 1500x12x17=Rs. 3,06,000/-towards loss of dependency- Rs. 20,000/- awarded under the head 'loss of expectancy of love and affection' and Rs.10,000/- under the head 'funeral & conveyance' upheld- thus, total compensation of Rs.3,06,000 + 20,000 + 10,000 = Rs.3,36,000/- awarded along with interest. (Para-5 to 8)

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

For the Appellant : Mr. B.M. Chauhan, Advocate.
For the Respondents: Mr. Kishore Pundeer, Advocate vice Mr. V.S. Rathore, Advocate, for respondents No. 1 & 2.
Mr. Ajay Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 25th July, 2009, made by the Motor Accidents Claims Tribunal (1), Kangra at Dharamshala (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 57-D/II-2007, titled Kanta Devi & another versus Belwinder Kumar Sharma & another, whereby compensation to the tune of Rs.4,38,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization was awarded in favour of the claimants-respondents No. 1 & 2 herein and the insurer-appellant herein, was saddled with liability (for short, "the impugned award").

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

3. The insurer has questioned the impugned award on the ground of adequacy of compensation.

4. It is a moot question-whether this appeal is maintainable? However, I leave this question open.

5. The Tribunal has fallen in an error in deducting 1/3rd of the income of the deceased towards his personal expenses. 50% of the income of the deceased was to be deducted, as per 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** read with **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120.**

6. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.1500/- per month and are held entitled to compensation to the tune of Rs.1500 x 12 = Rs.18,000 x 17= Rs.3,06,000/- under the head 'loss of dependency'.

7. The Tribunal has awarded Rs.20,000/- under the head 'loss of expectancy of love and affection' and Rs. 10,000/- under the head 'funeral & conveyance', is upheld.

8. Viewed thus, a sum of Rs.3,06,000 + Rs.20,000/- + Rs.10,000/- = Rs.3,36,000/- is awarded in favour of the claimants, with interest as awarded by the Tribunal, from the date of filing of the claim petition.

9. Accordingly, the impugned award is modified, as indicated above. The appeal is accordingly disposed of

10. The excess amount be refunded to the insurer through payees' cheque account. The Registry is directed to release the compensation amount in favour of the claimants, strictly in terms of the impugned award.

11. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sh. Nikhil Bhagra S/o Sh. Ravi Bhagra & another ....Petitioners

Versus

Sh. Rattan Chand S/o late Sh. Bhagat Ram. ....Non-Petitioner

CMPMO No. 32 of 2015
Decided on: 4.12.2015.

Code of Civil Procedure, 1908- Order 23- Section 151- Petitioner sought permission to withdraw the civil suit unconditionally- no objection was raised to this prayer- hence, civil suit was permitted to be withdrawn and was dismissed as withdrawn.

For the Petitioner : Ms. Meera Devi, Advocate.
For the Non-petitioner : Mr. Vipul Sharda, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the petitioners submitted that permission to withdraw CMPMO No. 32 of 2015 titled Nikhil Bharga & another vs. Rattan

Chand and permission to withdraw Civil Suit No. 35-1 of 2013 be granted unconditionally. Separate statement of learned Advocate recorded and placed on record. Learned Advocate appearing on behalf of the non-petitioner submitted that he has no objection if permission is granted. In view of the above stated facts permission to withdraw CMPMO No. 32 of 2015 titled Nikhil Bharga & another vs. Rattan Chand and permission to withdraw Civil Suit No. 35-1 of 2013 titled Nikhil Bharga & another vs. Rattan Chand is granted in the ends of justice. CMPMO No. 32 of 2015 and Civil Suit No. 35-1 of 2013 are dismissed as withdrawn. C.S. No. 35-1 of 2013 is disposed of while exercising inherent powers under Section 151 CPC in the ends of justice and in order to avoid multiplicity of judicial proceedings inter-se parties. No order as to costs. Record of learned trial Court along with certified copy of this order be sent back forthwith. Pending applications if any also disposed of. CMPMO No. 32 of 2015 and C.S. No. 35-1 of 2013 are disposed of. Dasti copy.

****

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

Cr.MMO Nos. 134, 181, 212 and 243 of 2015.
Reserved on 19.11.2015.
Decided on: 4.12.2015.

1.	**Cr.MMO. No. 134 of 2015.**	
	Sh. Prem Kumar Dhumal	.....Petitioner.
	Versus	
	State of Himachal Pradesh	.....Respondent.
2.	**Cr.MMO. No. 181 of 2015.**	
	Dr. P.C.Kapoor	.....Petitioner.
	Versus	
	State of Himachal Pradesh	.....Respondent.
3.	**Cr.MMO. No. 212 of 2015.**	
	Sh. Amar Nath Sharma	.....Petitioner.
	Versus	
	State of Himachal Pradesh	.....Respondent.
4.	**Cr.MMO. No. 243 of 2015.**	
	Sh. Ravi Dhingra	.....Petitioner.
	Versus	
	State of Himachal Pradesh	.....Respondent.

Code of Criminal Procedure, 1973- Section 197- **Prevention of Corruption Act, 1988-** Section 19- The file was sent to the Governor for seeking prosecution sanction- Governor made observation that prosecution sanction was not required- subsequently, a representation was made by Ex Chief Minister on which the Governor denied prosecution sanction- held, that in the earlier order Governor had observed that prosecution sanction was not required- however, subsequently, a specific decision declining the prosecution sanction was taken- the second order was not review of the first and it was in accordance with the law. (Para-28)

Code of Criminal Procedure, 1973- Section 482- A was working as DIG who sought voluntary retirement from the service by submitting an application w.e.f. 21.12.2007- he sent communication to Principal Secretary (Home) on 18.10.2007 for waiving off compulsory period of 3 months to 2 months and sought retirement from 21.11.2007- he filed an application on 20.11.2007 withdrawing his prayer for voluntary retirement- he was

voluntarily retired w.e.f. 21.11.1007- he filed original application before Central Administrative Tribunal who directed the parties to maintain status quo- he filed fresh representation for review of the earlier order, on which C.M. made the remarks "His withdrawal which appears to be in order, may be accepted, as it fulfills the statutory requirements" – A was also afforded personal hearing- ultimately, A was permitted to withdraw his prayer for voluntary retirement and he retired on 30.11.2011 on attaining the age of superannuation – subsequently, FIR was registered against the C.M., Chief Secretary, Principal Secretary (Home) and A for the commission of offences punishable under Sections 420 and 120-B of IPC and Section 13(2) of Prevention of Corruption Act- held, that a member of the service can retire from the service after the completion of 30 years or attaining 50 years of age by giving three months previous notice in writing- he can withdraw the notice after it has been accepted by State Government only with the approval of the State Government provided that withdrawal is made before the expiry of the period of notice- in the present case, the notice was withdrawn prior of date of retirement - Principal Secretary (Home), Chief Secretary, Chief Minister had acted in accordance with rules- no pecuniary advantage was derived by them- no case for the commission of any offence was made out- hence, FIR ordered to be quashed. (Para-19 to 27 and 70)

Cases referred:

R.S.Nayak Vs. A.R.Antulay, 1984(2) SCC 183
Parkash Singh Badal Vs. State of Punjab, 2007(1) SCC 1
Abhay Singh Chautala Vs. CBI, 2011(7) SCC 141
Mansukhlal Vithaldas Chauhan Versus State of Gujarat, (1997) 7 SCC 622
State of Madhya Pradesh Versus Sheetla Sahai and others, (2009) 8 SCC 617,
Choudhury Parveen Sultana vrs. State of West Bengal and another, (2009) 3 SCC 398,
State of Punjab and another vrs. Mohammed Iqbal Bhatti, (2009) 17 SCC 92
State of Himachal Pradesh vrs. Nishant Sareen, 2010 (14) SCC 527
Om Prakash and others vrs. State of Jharkhand through the Secretary, Department of Home, Ranchi 1 and another, with connected matter, (2012) 12 SCC 72
Urmila Devi vrs. Yudhvir Singh, (2013) 15 SCC 624
Nirmal Yadav vrs. Central Bureau of Investigation and anr., 2011(4) R.C.R. (Criminal) 809
Balram Gupta vrs. Union of India and another, 1987 (Supp.) SCC 228
C.K. Jaffer Sharief Versus State (Through CBI), (2013) 1 SCC 205,
P. Lal vrs. Union of India and others, reported in (2003) 3 SCC 393
Fakhruddin Ahmad vrs. State of Uttranchal and another, (2008) 17 SCC 157,
Rajeshwar Tiwari and others vrs. Nanda Kishore Roy, (2010) 8 SCC 442
Kishan Singh vrs. Gurpal Singh and others, (2010) 8 SCC 775
State of Andhra Pradesh vrs. Gourishetty Mahesh and others, (2010) 11 SCC 226
Joseph Salvaraja vrs. State of Gujarat and others, (2011) 7 SCC 59
Harshendra Kumar D. vrs. Rebatilata Koley and others, (2011) 3 SCC 351
Amit Kapoor vrs. Ramesh Chander and another, (2012) 9 SCC 460
Rajiv Thapar and others vrs. Madan Lal Kapoor, (2013) 2 SCC 330
Binod Kumar and others vrs. State of Bihar and another, (2014) 10 SCC 663,
Esher Singh vrs. State of A.P, (2004) 11 SCC 585
State of Maharashtra vrs. Som Nath Thapa, (1996) 4 SCC 659
State through Superintendent of Police, CBI/SIT vrs. Nalini and others and connected matters, (1999) 5 SCC 253
K.R.Purushothaman vrs. State of Kerala, (2005) 12 SCC 631

R.S.Nayak Vrs. A.R.Antulay and another, (1986) 2 SCC 716
Dalip Kaur and others vrs. Jagnar Singh and another, (2009) 14 SCC 696

For the petitioner(s):	Mr. A.P.S. Deol, Sr. Advocate with Mr. Anshul Bansal, Mr. Sudhir Thakur, Mr. Vikrant Thakur, Mr. Vir Bahadur Verma, Mr. Adhiraj Thakur and Mr. Shriyek Sharda, Advocates for the petitioner in Cr.MMO No. 134 of 2015. Mr. K.S.Thakur and Mr. Sushant Vir Thakur, Advocates, for the petitioner in Cr.MMO No. 181 of 2015. Mr. H.S.Rana and Mr. A.S.Rana, Advocates for the petitioner in Cr.MMO No. 212 of 2015. Mr. Atul Jhingan, Advocate, for the petitioner in Cr.MMO No. 243 of 2015.
For the respondent(s):	Mr. Shrawan Dogra, Advocate General with Mr. Parmod Thakur, Addl. Advocate General and Mr. Vikram Thakur, Dy. AG for respondent-State in all the petitions.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since common questions of law and facts are involved in these petitions, the same were taken up together for hearing and are being disposed of by a common judgment. However, in order to maintain clarity, the facts of Cr.MMO No. 134 of 2015 have been taken into consideration.

Cr.MMO. No. 134 of 2015.

2. Sh. A.N.Sharma, was working as Deputy Inspector General of Police in Police Training College, Daroh, Distt. Kangra, H.P. He sought voluntary retirement from service by submitting an application to the Principal Secretary (Home) to the Government of Himachal Pradesh vide letter dated 20.9.2007 under All India Services (Death-cum- Retirement Benefits) Rules, 1958, vide Annexure P-2. He sought voluntary retirement w.e.f. 21.12.2007. Sh. A.N.Sharma, sent communication to the Principal Secretary (Home) to the Government of Himachal Pradesh on 18.10.2007 with a request to waive off compulsory period of 3 months to 2 months for voluntary retirement from service w.e.f. 21.11.2007 vide Annexure P-3. Sh. A.N.Sharma, submitted an application on 20.11.2007 seeking withdrawal of application dated 18.10.2007. The application dated 20.11.2007 is marked as Annexure P-4. However, the fact of the matter is that the petitioner was retired voluntarily w.e.f. 21.11.2007 vide notification dated 16.11.2007. The request of Sh. A.N.Sharma was declined vide letter dated 10.12.2007 vide Annexure P-7. Sh. A.N.Sharma filed Original Application before the Central Administrative Tribunal, Chandigarh Bench (CAT) bearing No. 799/HP/2007. The parties were directed to maintain status quo vide order dated 14.12.2007 by the Central Administrative Tribunal, Chandigarh Bench (CAT). Sh. A.N.Sharma, filed fresh representation to the Chief Secretary, Government of Himachal Pradesh for reviewing the earlier order dated 10.12.2007. The Chief Minister made the following remarks vide Annexure P-8:

> "His withdrawal which **appears** to be in order, **may** be accepted, as it fulfills the statutory requirements."

3. Sh. A.N.Sharma, was also afforded personal hearing vide order dated 24.1.2008. He produced Clerk LC Sandhya as well as Const. Prakash Chand posted at PTC,

Daroh. These witnesses deposed that the application dated 20.11.2007 was received by LC Sandhya and entry was made with regard to receipt of the application in the Dak register at Sr. No. 17902 dated 21.11.2007. The copy of the letter addressed to the Chief Secretary is marked as Annexure P-9. The matter was dealt with by the Principal Secretary (Home) to the Government of Himachal Pradesh. He made the following observations:

> "Sh. A.N.Sharma, IPS, DIG (P) PTC Daroh applied for voluntary retirement which was accepted on 16.11.2007. Sh. A.N.Sharma on 20.11.2007 applied for withdrawal of voluntary retirement and again requested on 4.12.2007 to permit him to withdraw the option of voluntary retirement. But the Govt. rejected his request for withdrawal of voluntary retirement vide letter at page 242/cors. Sh. A.N.Sharma approached Hon'ble Central Administrative Tribunal for redressal of his grievance which is pending with Hon'ble Central Administrative Tribunal. He has further stated that in case his request for withdrawal of voluntary retirement is accepted he will withdraw O.A. from Hon'ble Central Administrative Tribunal.
>
> As per sub rule (2A) of Rule 16 of the All India Service (Death-cum-retirement benefit) Rules 1958, the exact provision for withdrawal is:-
>
> > "A notice of voluntary retirement given by a member of the service may be withdrawn by him after it is accepted by the State Government, only with the approval of the State Government concerned provided the request for such withdrawal is made before the expiry of the period of notice."
>
> The above guidelines state that the notice of voluntary retirement can be withdrawn with the approval of the State Govt. before the expiry of the period of notice. The officer, in this case, has withdrawn his voluntary retirement application before expiry of the notice period which was 21.11.2007, but the same was not considered by the State Government. I am of the view that we should consider his withdrawal application in right perspective and accept his withdrawal application. The officer is still in service. The State Govt. has not posted any officer there so far. In order to avoid future litigation, we may accept the plea of the officer and allow him to continue in Govt. service subject to withdrawal of O.A. from Hon'ble Central Administrative Tribunal."

4. Thereafter the Principal Secretary (Home) to the Government of Himachal Pradesh, made the following order dated 1.2.2008:

> "Sh. A.N.Sharma has submitted application on 30.1.2008 stating that as per directions during the personal hearing, he was asked to submit evidence of withdrawal. The statements of Lady Constable Smt. Sandhya No. 29 PTC Daroh and Sh. Om Parkash Constable No. 451 are also enclosed with the application of Sh. A.N.Sharma. Both the constables have stated that the withdrawal application was submitted on 20.11.2007 which was dispatched to higher authorities on 21.11.2007. in view of the evidence and as examined vide No. 239 to 241, we may accept the plea of the officer and allow him to continue in Govt. service subject to withdrawal of O.A. from Hon'ble Central Administrative Tribunal.
>
> sd/-
> (Dr. P.C.Kapoor)
> Principal Secretary (Home)
> 1.2.2008."

5. Thereafter, the Chief Secretary has made the following observations:

"The evidence submitted by the officer may be accepted."

sd/-
Ravi Dhingra
1.2.2008.

6. It was signed by the Chief Secretary on 1.2.2008 and thereafter by the Chief Minister on 1.2.2008. The plea of the petitioner was accepted vide order dated 2.2.2008. Sh. A.N.Sharma, retired on 30.11.2011.

7. The case was re-opened when Sh. Virbhadra Singh took over as the Chief Minister of the State on 25.12.2012. The enquiry was marked by the Chief Minister's Office on 6.2.2014 on the basis of letter dated "Nil" received from one Sh. Ram Singh Negi son of Tek Singh, on which the Hon'ble Chief minister made the following note:

"The ADGP Vigilance may be asked to enquire and report on file within 10 days."

8. Thereafter, FIR No. 6 of 2014 dated 17.6.2014 was registered under Sections 420 and 120 B of the IPC and Section 13(2) of the Prevention of Corruption Act, 1988. The request was made by I.O. through letter dated 22.12.2014 addressed to ADGP to seek prosecution sanction under Section 197 Cr.P.C. and Section 19 of the P.C. Act against the petitioner. The request to seek prosecution sanction against the petitioner was sent to the Governor of H.P., vide request dated 29.12.2014. The Governor of H.P. made the observation that prosecution sanction under Section 19 of the P.C. Act and 197 Cr.P.C. was not required in this case as per law, on 20.1.2015 vide Annexure P-15. The petitioner also made representation to the Governor of H.P. The same was considered by the Governor of H.P., by making following observations at page 152 of the paper book, as per order dated 21.3.2015:

"I have gone through the file placed before me and found out that Shri Prem Kumar Dhumal has acted on the legal advice and the recommendation of the Principal Secretary (Home) and the Chief Secretary without any mala fide, complicity, and favour. Mr. Dhumal has all acted in discharge of his official duty. Apart from this, there is nothing on record wherein either the Principal Secretary (Law), Principal Secretary (Home) and the Chief Secretary have stated that they had recommended the matter on the directions of Shri. Prem Kumar Dhumal. So I found it a fit case for denial of prosecution sanction. Accordingly, I hereby deny prosecution sanction sought against Sh. Prem Kumar Dhumal for alleged offences under Section 420 and 120-B of IPC in FIR No. 6/2014, dated 17.6.2014, Police Station SV & ACB, Shimla exercising powers under Section 197 Cr.P.C.

Moreover it has been reported that the challan has been filed by the Vigilance Bureau in the Court. I have noted this development and am of the view that, legality of bar on Court taking cognizance without sanction u/s 197 Cr.P.C, should be left open for the court to decide as per law."

9. The communication dated 21.3.2015 was not placed on record by the prosecution and the learned trial Court proceeded to issue process against all the accused, including the petitioner for offences under Section 420 and 120-B of IPC and under Section 13(2) of the P.C. Act, in FIR No. 6/2014, dated 17.6.2014, registered at Police Station SV & ACB, Shimla, vide order dated 8.4.2015.

10. The gist of the accusations against the petitioner is that when he was the Chief Minister of the State of Himachal Pradesh, he passed an order asking Home Department to consider withdrawal of application of voluntary retirement of Sh. A.N.Sharma. There was no provision in the rules to take an officer back to service after he had retired. Thus, it amounted to illegal act. The application of Sh. A.N.Sharma was already rejected by the Government. The application for withdrawal reached the Government on 28.11.2007. The Government had earlier considered the date of dispatch as 21.11.2007, thus Sh. A.N.Sharma, could not be permitted to withdraw the application after expiry of period of notice. It amounted to abuse of office by Sh. P.K.Dhumal, the then Chief Minister.

11. The gist of the reply filed by the respondents is that once the prosecution sanctioning authority has earlier applied its mind to the facts then on same set of facts and evidences, the case could not be reviewed by the prosecution sanctioning authority on the basis of the representation made by the petitioner. The order dated 21.3.2015 amounts to review of earlier order of the Governor of H.P., dated 20.1.2015.

Cr.MMO No. 181 of 2015.

12. The petitioner has retired as Addl. Chief Secretary to the Government of Himachal Pradesh. The case of Sh. A.N.Sharma, was marked to the Principal Secretary (Home), Government of Himachal Pradesh. The relevant record pertaining to the retirement was obtained. The accusation made against the petitioner as per the final report is that the stand taken by the petitioner was contrary to the reply filed by the State in the Original Application before the Central Administrative Tribunal, Chandigarh on 31.12.2007. The position with respect to receipt of application remained unchanged but the petitioner approved the withdrawal of application for voluntary retirement by A.N.Sharma, contrary to the All India Service (Death-cum-Retirement Benefit) Rules, 1958, giving pecuniary advantage to Sh. A.N. Sharma, by illegally allowing him to continue in service after retirement.

13. Reply was filed by respondents No. 1 and 2 to the petition. The statements of LC Sandhya, Constable Bhim Singh and Constable Prakash Chand were recorded correctly during the course of investigation under Section 161 Cr.P.C. The sanction was accorded by the Governor of H.P. in accordance with law.

Cr.MMO No. 212 of 2015

14. The petitioner was working as Deputy Inspector General of Police in Police Training College, Daroh, District Kangra, H.P. He submitted an application seeking voluntary retirement on 20.9.2007. He sought voluntary retirement with effect from 21.12.2007 by curtailing period from 90 days to 60 days vide letter dated 18.10.2007. The petitioner was retired vide communication dated 16.11.2007 with effect from 21.11.2007. However, in the meantime, petitioner had also moved an application on 20.11.2007, seeking withdrawal of his application for voluntary retirement. His representation was rejected on 10.12.2007. He challenged order dated 10.12.2007. He filed OA No. 799/HP/2007 before the Central Administrative Tribunal, Chandigarh vide annexure P-8. Thereafter the case was considered and he was permitted to continue in service vide letter dated 2.2.2008, annexure P-9. FIR No. 6/2014 dated 17.6.2014 was registered and the matter was investigated. The sanctioning authority accorded the sanction vide annexure P-13. The accusation against the petitioner as per final report is that the decision of the government to reject the withdrawal letter was taken as per law. In fact, Shri A.N. Sharma was seeking BJP ticket from Nadaun and it was known to Shri Prem Kumar Dhumal as he was member of State Election Committee of the BJP. It is difficult to believe that the Chief Minister did not know this fact. However, due to changed circumstances mentioned in the withdrawal letter, Shri A.N.

Sharma, was aware that he would not get the BJP ticket. The illegal act of the government to allow his withdrawal application was against the All India Service (Death-cum-Retirement Benefit) Rules, 1958. It resulted in permanent pecuniary benefit to the petitioner. His pension would have been Rs. 27740/- per month if he had retired on 21.11.2007, while his pension after retiring on attaining the age of superannuation is Rs.32,770/- per month. He has obtained pecuniary advantage of Rs. 5030/- per month.

Cr.MMO No. 243/2015

15. The petitioner was working as Chief Secretary to the Government of Himachal Pradesh. FIR No. 6 dated 17.6.2014 was registered at Police Station SV & ACB Shimla under Sections 420, 120-B IPC and Section 13 (2) of the Prevention of Corruption Act. It was registered on the basis of inquiry conducted with a predetermined mind, alleging that Shri A.N. Sharma had obtained pecuniary advantage in terms of increase in his monthly pension by way of increase in length of service from 21.11.2007 till 30.11.2011. The accusation against Shri Ravi Dhingra is that earlier when he was Chief Secretary, he had already rejected the withdrawal of application and thereafter on the same material he has allowed the application contrary to provisions of sub rule (2A) of Rule 16 of the AIS (DCRB) Rules, 1958. The notification was issued on 2.2.2008 withdrawing the notification dated 16.11.2007. Sh. Ravi Dhingra has approved the file submitted by the Principal Secretary (Home) and forwarded to the then Chief Minister against the Rules, resulting in pecuniary advantage to Shri A.N. Sharma, by allowing him to continue in service after his retirement. The sanction was also obtained.

16. Rule 16(2A) of the AIS (DCRB) Rules, 1958, reads as under:

> "16(2A).- A member of the service may, after giving three months' previous notice in writing to the State Government concerned, retire from service on the date on which he completes 20 years of qualifying service or any date thereafter to be specified in the notice: Provided that a notice of retirement given by a member of the service shall require acceptance by the Central Government if the date of retirement on the expiry of the period of notice would be earlier than the date on which the member of the Service could have retired from service under sub-rule (2): Provided further that a member of the Service, who is on deputation to a corporation or company wholly or substantially owned or controlled by the government or to a body controlled or financed by the Government, shall not be eligible to retire from the service under this rule for getting himself permanently absorbed in such corporation, company or body. Provided also that a member of the Service borne on the Cadres of Assam-Meghalaya. Manipur-Tripura, Nagaland and Sikkim may retire from service on the date on which he/she completes 15 years of service."

(While computing the period of three months' notice referred to in sub-rules (2), (2-A) and (3), the date of service of the notice and the date of expiry is required to be excluded.)

17. The Government of India's decision under Rule 16(2A) reads as under:

> "GOVERNMENT OF INDIA DECISION UNDER RULE 16(2A)
>
> 1. Guidelines for acceptance of notice of voluntary retirement: - It has been decided to lay down the following guidelines for the acceptance of the notice of retirement under sub-rule (2A) of Rule 16 of the All India Service (Death-cum-retirement Benefits) Rules, 1958 for the information and guidance of the State Governments:- (i) A notice of voluntary retirement given by a member of the service may be withdrawn by him, after it is accepted by the

State Government, only with the approval of the State Government concerned provided the request for such withdrawal is made before the expiry of the period of notice. (ii) In cases where disciplinary proceedings are pending or contemplated against a member of the Service for the imposition of a major penalty and the disciplinary 77 authority having regard to the circumstances of the case, is of the view that the imposition of the major penalty of removal or dismissal for service would be warranted, the notice of voluntary retirement given by the officer concerned may not ordinarily be accepted. (iii) In cases where prosecution is contemplated or may have been launched in a court of law against a member of the service, the notice of voluntary retirement given by him may not ordinarily be accepted. (iv) The notice of voluntary retirement given a member of the Service, Who is on study leave or who has but not completed a minimum service of 3 years on completion of study leave, may not ordinarily be accepted."

(DP & AR Letter No. 25011/2/80-AIS (II), dated the 16th October, 1980)

18. The Governor of Himachal Pradesh observed in order dated 20.1.2015 that prosecution sanction for alleged offences under the Prevention of Corruption Act, 1988 is dealt under Section 19(1)(c). There is reference to the decisions of ***R.S.Nayak Vs. A.R.Antulay,*** reported in ***1984(2) SCC 183, Parkash Singh Badal Vs. State of Punjab*** reported in ***2007(1) SCC 1*** and ***Abhay Singh Chautala Vs. CBI,*** reported in 2011(7) SCC 141, wherein it is clearly laid down that once a public servant demits his office in respect of which the offence was alleged to have been committed, sanction under Section 19 of the P.C. Act is not required. According to the Governor, the offences in the instant case under Sections 420 and 120-B IPC were not reasonably connected with the discharge of official duty of the public servants, hence prosecution sanction u/s 197(1) (b) of the Cr.P.C. was not required as per the law laid down by the Hon'ble Supreme Court of India in the matter of ***Parkash Singh Badal vs. State of Punjab,*** reported in ***2007(1) SCC 1.*** Moreover, based on the settled position of law, the officers in the State Government and State Vigilance Bureau had not sought prosecution sanction from the Governor in a similarly situated case of Sh. Vir Bhadra Singh, the then former Chief Minister, in the C.D. Case. Even in the FIR No. 12/2013 dated 1.8.2013, registered at Police Station SV & ACB, Dharamshala against Sh. Prem Kumar Dhumal, former Chief Minister, the State Vigilance Department had not sought prosecution sanction from the Governor u/s 19 of the P.C. Act, although he was charge sheeted u/s 13 of the P.C. Act. The Court has already noticed that the petitioner made a representation to the Governor of Himachal Pradesh, which was duly considered by the Governor. The operative portion of the order has already been reproduced hereinabove. The Governor has declined the prosecution sanction against the petitioner Sh. Prem Kumar Dhumal for the alleged offences under Sections 420 and 120-B IPC in case FIR No. 6/2014 dated 17.6.2014.

19. According to the plain language of Section 16(2) of the AIS (DCRB) Rules 1958, a member of the service, may after giving at least three months' previous notice in writing to the State Government retire from service on the date on which such member completes thirty years of qualifying service or attains fifty years of age or on any date thereafter to be specified in the notice with proviso that no member of the service under suspension shall retire from service except with the specific approval of the Central Government. According to second proviso of Section 16(2), the State Government concerned on a request made by the member of the service may, if satisfied and for reasons to be recorded in writing, relax the period of notice. As per Section 16 (2A), a member of the service may, after giving three months' previous notice in writing, to the State Government concerned, retire from service on the date on which he completes 20 years of qualifying

service or any date thereafter to be specified in the notice. The first proviso to Rule 16(2A) provides that the notice of retirement given by a member of the service shall require acceptance by the Central Government, if the date of retirement on the expiry of the period of notice would be earlier than the date on which the member of the service could have retired from service under sub-rule (2). The second proviso to Rule 16(2A) provides that a member of the service, who is on deputation to a Corporation or company wholly or substantially owned or controlled by the government or to a body controlled or financed by the Government, shall not be eligible to retire from the service under this rule or getting himself permanently absorbed in such Corporation, Company or Body. According to the Government of India's decision under Rule 16(2A), as quoted verbatim in para 4 of Cr.MMO No. 134 of 2015, a notice of voluntary retirement given by a member of the service may be withdrawn by him, after it is accepted by the State Government, only with the approval of the State Government concerned provided the request for such withdrawal is made before the expiry of the period of notice.

20. In the instant case, the petitioner has submitted an application, as noticed hereinabove, seeking voluntary retirement on 20.9.2007 w.e.f. 21.12.2007. Thereafter another application was submitted by Sh. A.N.Sharma on 18.10.2007 curtailing compulsory period of 3 months to 2 months. The petitioner submitted an application for withdrawal of application dated 18.10.2007 on 20.10.2007. However, the fact of the matter is that the petitioner's request for voluntary retirement was accepted on 16.11.2007 w.e.f. 21.11.2007. The application was duly diarized and sent to the State Government. The petitioner has also made representation but the same was rejected on 10.12.2007, vide Annexure P-7. The text of the letter dated 10.12.2007, reads as under:

> "I am directed to refer to your letter no. P-I(2)YK-361/2000-69905 dated 30.11.2007 on the subject cited above to say that Shri A.N. Sharma, IPS stands retired from Government service w.e.f. 21.11.2007 (AN) pursuant to the acceptance of his notice for voluntary retirement vide notification of even number dated 16.11.2007. Since the request for withdrawal was not received before the expiry of the period of the notice in terms of guidelines under sub-rule (2A) of Rule 16 of the AIS (DCRB) Rules, 1958, the notice cannot be withdrawn and Shri A.N. Sharma, IPS, DIGP already stands retired from Govt. Service w.e.f. 21.11.2007 (AN)".

21. The petitioner thereafter approached the Central Administrative Tribunal by filing O.A. No. 799/HP/2007. The Central Administrative Tribunal directed the parties to maintain status quo on 14.12.2007. The petitioner submitted an application seeking withdrawal of his voluntary retirement as per Annexure P-8 dated 03.01.2008. The Special Secretary-cum-Principal Private Secretary to the Chief Minister marked the file to the Principal Secretary (Home) with the observation of the Chief Minister; *"His withdrawal which appears to be in order, may be accepted, as it fulfills the statutory requirements."* The Principal Secretary (Home) Dr. P.C. Kapoor gave reference to instructions appended to Rule 16(2A) of the All India Service (Death-cum-retirement Benefit) Rules, 1958 and was of the view that the State should consider the withdrawal application in right perspective and accept his withdrawal application. It was observed that State has not posted any Officer there so far. In order to avoid future litigation, they may accept the plea of the Officer and allow him to continue in government service subject to withdrawal of O.A. from the Central Administrative Tribunal. There is reference to instruction appended to Rule 16(2A), dated 16.10.1980 of the All India Service (Death-cum-Retirement Benefit) Rules, 1958, whereby the incumbent was permitted to withdraw his application. Dr. P.C. Kapoor, thereafter passed the order on 01.02.2008 stating therein that according to the statement of the L.C. Sandhya and Constable Om Prakash, the application for withdrawal was submitted on

20.11.2007 and was dispatched to higher authorities on 21.11.2007. The order was marked to the Chief Secretary, to the Government of Himachal Pradesh. He observed that the evidence submitted by the Officer may be accepted and thereafter it was signed on 01.02.2008, which led to withdrawal of earlier notification dated 16.11.2007 vide letter dated 02.02.2008. In these circumstances, Sh. A.N. Sharma continued to work up to 30.11.2011 with all consequential benefits. The Principal Secretary (Home) while considering the case of the petitioner for withdrawal of application for voluntary retirement has specifically referred to statements of two witnesses i.e. L.C. Sandhya and Constable Om Prakash. Sh. A.N. Sharma was also given an opportunity of personal hearing on 24.01.2008. It has also come on record that application was diarized on 20.11.2007 and forwarded on 21.11.2007. The application was submitted by Shri A.N. Sharma for withdrawal of application for voluntary retirement before the notification dated 16.11.2007 could take effect on 21.11.2007. The application was submitted by Shri A.N. Sharma before the expiry period of notice. The emphasis under the Rules and decisions is that the application should be made before the expiry of period of notice. Merely that the application has reached the State Government at later date, would not have any adverse effect, since Shri A.N. Sharma has already submitted an application for withdrawal of application for voluntary retirement before 21.11.2007.

22. The application has been processed in accordance with Rules governing the issue of submission of application for seeking voluntary retirement and its withdrawal. The order made by the Chief Minister on 03.01.2008 and the notings made by Principal Secretary (Home) and the Chief Secretary will not amount to criminal misconduct. It was purely an administrative decision. Merely that Shri A.N. Sharma has superannuated on 30.11.2011 instead of 21.11.2007, will not render it an illegal act. There was no dishonest intention or guilty mind involved in the decision making process. Even as per the language employed by the then Chief Minister, the observation made is that the withdrawal which appears to be in order, may be accepted. The words *"appears and may be accepted"* are not couched in mandatory and imperative language. It was for the officers concerned to deal with the matter in accordance with law which in fact they have done so by taking into consideration the Rules, decisions and the statements of the Constables who have diarized the application submitted by Shri A.N. Sharma seeking withdrawal of application for voluntary retirement.

23. What was most important in the present case is whether the application was filed before the expiry of period of notice or not. Prima facie, it was submitted on 20.11.2007 and diarized on 21.11.2007 and thereafter sent to the State Government, which culminated into order dated 02.02.2008. The case of the prosecution against the accused is that the act of grant of permission to withdraw the application for voluntary retirement amounted to permanent pecuniary advantage of Rs.5030/- per month to Sh. A.N.Sharma.

24. Once the application seeking withdrawal of application for voluntary retirement is accepted, it cannot be said that the monetary gains of Rs.5030/- in the monthly pension would amount to any illegality. It is mentioned in the final report that it was required to be proved that letter of withdrawal reached the authorities before 21.11.2007. The Court has already discussed that what was important was whether the letter has been written before the expiry of the period of notice. In fact, it was written on 20th and diarized on 21.11.2007. Thereafter, the final decision was to be taken on the same. The effective date of retirement was 21.11.2007 and the letter was submitted on 20.11.2007. Thus, it cannot be said that Shri Prem Kumar Dhumal has abused his official position. It would be necessary for completion of facts that the letter has reached the Government on 20.11.2007 and thereafter it was rejected on 10.12.2007. The decision dated 10.12.2007

was assailed before the Central Administrative Tribunal. The Central Administrative Tribunal has directed the parties to maintain status quo on 14.12.2007. Shri A.N. Sharma thereafter was permitted to discharge his duties. No substitute was also sent. He was regularly drawing salary till his retirement in the year 2011. Dr. P.C. Kapoor has made observations that the application submitted by the petitioner to review the earlier decision was required to be considered in right perspective. He has also highlighted the petition filed by Shri A.N. Sharma before the Central Administrative Tribunal. The Constables have categorically deposed that the application was received on 20th and diarized on 21.11.2007.

25. While taking the administrative decision, the principles of Evidence Act would not apply. The case was decided as per the conditions of service governing the case of Shri A.N. Sharma. Shri A.N. Sharma was also given personal hearing on 24.01.2008. Thus, it cannot be said that Dr. P.C. Kapoor has followed any illegal dictate of the then Chief Minister.

26. Now as far as Shri Ravi Dhingra is concerned, he has approved the file submitted by the Principal Secretary (Home) and has submitted to Hon'ble the Chief Minister. This exercise does not have any trappings of criminal misconduct or dishonest intention. It is purely administrative decision based on the orders passed by the Principal Secretary (Home).

27. Shri A.N. Sharma has submitted an application seeking voluntary retirement by giving three months' notice. He curtailed it to two months. Thereafter he submitted application on 20.11.2007, but vide notification dated 16.11.2007 his voluntary retirement came into force w.e.f 21.11.2007. He submitted application for reviewing order dated 16.11.2007, which was rejected on 10.12.2007 by making observations that by that time he made the application for voluntary retirement, he stood already retired from government service w.e.f. 21.11.2007. The Central Administrative Tribunal directed the parties to maintain status quo. The Court has already noticed that he was permitted to work and draw his salary. He made representation to the Chief Secretary, to the Government of Himachal Pradesh. It was considered by the then Chief Minister and as noticed hereinabove, the final decision was taken on 02.02.2008, as per notings of the Principal Secretary (Home). Since Shri A.N. Sharma was permitted to work by withdrawing notification dated 16.11.2007 on 02.02.2008, he was bound to get his pension after attaining the age of superannuation in the year 2011 @ Rs.32,770/-. Thus, it cannot be said that he has obtained any pecuniary advantage illegally in getting monthly pension. The so called advantage, as mentioned in the report that Shri A.N. Sharma obtained pecuniary advantage of Rs.16,15,368/-, can also not be termed as illegal. He has worked w.e.f. 21.11.2007 till 30.11.2011.

28. The I.O. has sent the case seeking prosecution sanction through proper channel. The then Governor has noted that sanction under Section 19 of the P.C. Act was not required once the public servant demits the office. Now as far as the case under Sections 420 and 120-B of the IPC is concerned, the observations made by the Governor of Himachal Pradesh was that it did not seem to be reasonably connected with the discharge of official duty of the public servant, hence prosecution sanction under Section 197 (1) (b) of Cr.P.C. was not required. Moreover, in similarly situated case of Shri Vir Bhadra Singh, in C.D. case, the prosecution has not sought sanction from the Governor. In earlier case bearing FIR No.12/2013 dated 01.08.2013 against the petitioner Shri Prem Kumar Dhumal, the State Vigilance Department has not sought the prosecution sanction. The petitioner Prem Kumar Dhumal has made representation to the Governor qua sanction. It was duly considered by the Governor of Himachal Pradesh vide order dated 21.03.2015. A specific observation was made that the decision has been taken by Shri Prem Kumar Dhumal on

legal advice and the recommendation of the Principal Secretary (Home) and the Chief Secretary without any mala fide, complicity and favour. He has acted in discharge of his official duty. Moreover, there is nothing on record wherein either the Principal Secretary (Law), Principal Secretary (Home) and the Chief Secretary had stated that they had recommended the matter on the directions of Shri Prem Kumar Dhumal. In view of this, the Governor of Himachal Pradesh denied the prosecution sanction against Shri Prem Kumar Dhumal. The decision dated 21.03.2015 cannot be termed as a review of the earlier order dated 20.01.2015. In earlier order dated 20.01.2015, the Governor of Himachal Pradesh has observed that prosecution sanction was not required under Section 19 of the P.C. Act and the same was also not required under Section 197 (1) (b) of the Cr.P.C. under Sections 420 and 120-B of the IPC and in similarly situation, the prosecution sanction was not obtained. The sum and substance of the order dated 20.01.2015 is that the prosecution sanction was not required. However, in order dated 20.01.2015 the then Governor has taken a specific decision declining the prosecution sanction under Section 197 Cr.P.C. qua Sections 420 and 120-B IPC in FIR No.6 of 2014, dated 17.06.2014 registered at Police Station, SV and ACB, Shimla. It is reiterated that order dated 21.03.2015 is not review of earlier order dated 20.01.2015. The order dated 20.01.2015 is strictly in accordance with law.

29. According to *Corpus Juris Secundum*, except as otherwise provided by the Statute, an overt act to constitute a crime must be accompanied by a criminal intent or by such negligence as is regarded by law as equivalent to a criminal intent and a crime is not committed if the mind of the person bring the act is innocent, "*Actus non facit reum, nisi mens sit rea*." To constitute a crime the act must, except as otherwise provided by Statue, be accompanied by a criminal intent on the part of the accused, or by such negligent and reckless conduct and indifference to the consequences of conduct as is regarded by the law as equivalent to a criminal intent. Thus, to constitute a crime, the intent with which the unlawful act was done must be established by either direct or indirect evidence tending to establish the fact or by inference of law from other facts proved. Criminal intent is a *sine qua non* of criminal responsibility. It is not the policy of the law to hold either individuals or groups criminally liable, unless their activities show clearly an intention to commit, aid, advise, or encourage, willfully and intentionally, a criminal act. Injury resulting from poor and foolish judgment is a matter for the Civil Courts, not the Criminal Courts. A crime usually is composed of two components and elements, an act and an intent. Unless excluded expressly or by necessary implication, the criminal intent or negligence must unite with the overt act, or there must be a union or joint operation of the criminal act and intention, and under some statutes this is expressly required. The personal volition or negligence of the actor must precede the act, and they must concur in point of time.

30. The case of the prosecution is that the then Chief Minister exercised the power with mala fide intention. What malice is, has been explained in *Corpus Juris Secundum* to signify either general malignity or ill-will toward another or simply an intent to commit a wrongful act. In criminal law, the term is not generally used in the former sense, but only in the latter as synonymous with "criminal intention" and as applied to the state of mind of a person who does a wrongful act intentionally or willfully, and without legal justification of excuse. According to *Corpus Juris Secundum*, ordinarily one is not guilty of a crime unless he is aware of the existence of all those facts which make his conduct criminal. Without guilty knowledge, criminal intent cannot exist. It cannot be said, in the present case, that the then Chief Minister has acted knowingly to do a criminal act. The act of the then Chief Minister and petitioners cannot be termed as willful. The willful act sometimes is held to be equivalent to "intentional" or "designed", and not to require a wrongful intention or malice. The act of the then Chief Minister and other petitioners cannot be held to be a

criminal act. They have neither any motive nor malice to do any criminal act or designed. It was purely an administrative decision.

31. The administrative action has been defined in Volume-2 of *Corpus Juris Secundum* to mean as under"-

> "*Administrative action* includes not only merely ministerial acts, but many decisions by responsible public officers involving judgment and discretion, and administrative officers, in arriving at decisions, may be free to investigate and determine proper methods and procedures, although their final decision is ex parte in nature, as distinguished from decisions based upon evidence which the parties at interest have an absolute right to present and insist upon.
>
> *Administrative acts*. Acts which are to be deemed as acts of administration, and classed among those governmental powers properly assigned to the executive department, are those which are necessary to be done to carry out legislative policies and purposes already declared by the legislative body, or such as are devolved upon it by the organic law of its existence. They are commonly called "administrative acts". "Administrative acts" have been compared with or distinguished from "judicial acts," and "legislative acts".

32. Their Lordships of the Hon'ble Supreme Court in the case of ***Mansukhlal Vithaldas Chauhan Versus State of Gujarat***, reported in ***(1997) 7 SCC 622,*** have held that the Government has discretion to grant or not to grant sanction under Section 6, but the sanctioning authority has to apply its own mind and then pass orders. The sanctioning authority has not to act mechanically in obedience to mandamus issued by the High Court. Their Lordships have further held that if it is shown that the sanctioning authority was unable to apply its independent mind for any reason or was under an obligation or compulsion or constraint to grant the sanction, the order granting sanction will be bad. It has been held as under:-

> "14. From a perusal of Section 6, it would appear that the Central or the State Government or any other authority (depending upon the category of the public servant) has the right to consider the facts of each case and to decide whether that "public servant" is to be prosecuted or not. Since the Section clearly prohibits the Courts from taking cognizance of the offences specified therein, it envisages that Central or the State Government or the "other authority" has not only the right to consider the question of grant of sanction, it has also the discretion to grant or not to grant sanction.
>
> 19. Since the validity of "Sanction" depends on the applicability of mind by the sanctioning authority to the facts of the case as also the material and evidence collected during investigation, it necessarily follows, that the sanctioning authority has to apply its own independent mind for the generation of genuie satisfaction whether prosecution has to be sanctioned or not. The mind of the sanctioning authority should not be under pressure from any quarter nor should any external force be acting upon it to take decision one way or the other. Since the discretion to grant or not to grant sanction vests absolutely in the sanctioning authority, its discretion should be shown to have not been affected by any extraneous consideration. If is shown that the sanctioning authority was unable to apply its independent mind for any reason whatsoever or was under an obligation or compulsion or constraint to grant the sanction, the order will be had for the reason that the

discretion of the authority "not to sanction" was taken away and it was compelled to act mechanically to sanction the prosecution.

32. By issuing a direction to the Secretary to grant sanction, the High Court closed all other alternatives to the Secretary and compelled him to proceed only in one direction and to act only in one way, namely, to sanction the prosecution of the appellant. The Secretary was not allowed to consider whether it would be feasible to prosecute the appellant; whether the complaint of Harshadraj of illegal gratification which was sought to be supported by "trip" was false and whether the prosecution would be vexatious particularly as it was in the knowledge of the Govt. that the firm had been black-listed once and there was demand for some amount to be paid to Govt, by the firm in connection with this contract. The discretion not to sanction the prosecution was thus taken away by the High Court.

33. The High Court put the Secretary in a piquant situation. While that Act gave him the discretion to sanction or not to sanction the prosecution of the appellant, the judgment gave him no choice except to sanction the prosecution as any other decision would have exposed him to action in contempt for not obeying the mandamus issued by the High Court. The High Court assumed that role of the sanctioning authority, considered the whole matter, formed an opinion that it was a fit case in which sanction should be granted and because it itself could not grant sanction under Section 6 of the Act, it directed the Secretary to sanction the prosecution so that the sanction order may be created to be an order passed by the Secretary and not that of the High Court. This is a classic case where a Brand name is changed to give a new colour to the package without changing the contents thereof. In these circumstances the sanctions order cannot but be held to be wholly erroneous having been passed mechanically at the instance of the High Court.

34. Learned counsel for the State of Gujarat contended that the judgment passed by the High Court cannot be questioned is these proceedings as it had become final. The contention is wholly devoid of substance. The appellant has questioned the legality of "sanction" on many grounds one of which is that the sanctioning authority did not apply its own mind and acted at the behest of the High Court which had issued a mandamus to sanction the prosecution. On a consideration of the whole matter, we are of the positive opinion that the sanctioning authority, in the instant case, was left with no choice except to sanction the prosecution and in passing the order of sanction, it acted mechanically in obedience to the mandamus issued by the High Court by putting the signature on a pro forma drawn up by the office. Since the correctness and validity of the `sanction order' was assailed before us, we had necessarily to consider the High Court judgment and its impact on the "Sanction". The so-called finality cannot shut out the scrutiny of the judgment in terms of actus curiae neminem gravabit as the order of the Gujarat High Court in directing the sanction to be granted, besides being erroneous, was harmful to the interest of the appellant, who had a right, a valuable right, of pair trial at every stage, from the initiation till the conclusion of the proceedings."

33. Their Lordships of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh Versus Sheetla Sahai and others,*** reported in ***(2009) 8 SCC 617,*** have explained the difference between criminal misconduct and service misconduct and have explained the official duty and purports to act. Their lordships have further held

that for establishing offence of conspiracy in regard to criminal misconduct under PC Act, prosecution is required to apply same legal principles as are required for establishing criminal misconduct against accused. Their lordships have held as follows:

> 37. Criminal conspiracy is an independent offence. It is punishable separately. Prosecution, therefore, for the purpose of bringing the charge of criminal conspiracy read with the aforementioned provisions of the Prevention of Corruption Act was required to establish the offence by applying the same legal principles which are otherwise applicable for the purpose of bringing a criminal misconduct on the part of an accused.
>
> 47. Even under the Act, an offence cannot be said to have been committed only because the public servant has obtained either for himself or for any other person any pecuniary advantage. He must do so by abusing his position as public servant or holding office as a public servant. In the latter category of cases, absence of any public interest is a sine qua non. The materials brought on record do not suggest in any manner whatsoever that the respondent Nos. 1 to 7 either had abused their position or had obtained pecuniary advantage for the respondent Nos. 8, 9 and 10, which was without any public interest.

34. In the instant case, it cannot be held that the petitioners have abused their position and obtained for themselves any valuable thing or pecuniary advantage while holding office as public servants without any public interest. Moreover, there is a difference between criminal misconduct and misconduct under service law.

35. Their lordships of the Hon'ble Supreme Court in the case of ***Parkash Singh Badal and another vrs. State of Punjab and others,*** reported in ***(2007) 1 SCC 1,*** have held that if it is prima-facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed. Their lordships have further held that sanctioning of prosecution of public servants has following limits:

> "35. The protection given under Section 197 is to protect responsible public servants against the institution of possibly vexatious criminal proceedings for offences alleged to have been committed by them while they are acting or purporting to act as public servants. The policy of the legislature is to afford adequate protection to public servants to ensure that they are not prosecuted for anything done by them in the discharge of their official duties without reasonable cause, and if sanction is granted, to confer on the Government, if they choose to exercise it, complete control of the prosecution. This protection has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant from the protection. The question is not as to the nature of the offence such as whether the alleged offence contained an element necessarily dependent upon the offender being a public servant, but whether it was committed by a public servant acting or purporting to act as such in the discharge of his official capacity. Before Section 197 can be invoked, it must be shown that the official concerned was accused of an offence alleged to have been committed by him while acting or purporting to act in the

discharge of his official duties. It is not the duty which requires examination so much as the act, because the act can be performed both in the discharge of the official duty as well as in dereliction of it. The act must fall within the scope and range of the official duties of the public servant concerned. It is the quality of the act which is important and the protection of this section is available if the act falls within the scope and range of his official duty. There cannot be any universal rule to determine whether there is a reasonable connection between the act done and the official duty, nor is it possible to lay down any such rule. This aspect makes it clear that the concept of Section 197 does not immediately get attracted on institution of the complaint case.

At this juncture, we may refer to P. Arulswami v. State of Madras (AIR 1967 SC 776), wherein this Court held as under: "... It is not therefore every offence committed by a public servant that requires sanction for prosecution under Section 197(1) of the Criminal Procedure Code; nor even every act done by him while he is actually engaged in the performance of his official duties; but if the act complained of is directly concerned with his official duties so that, if questioned, it could be claimed to have been done by virtue of the office, then sanction would be necessary. It is quality of the act that is important and if it falls within the scope and range of his official duties the protection contemplated by Section 197 of the Criminal Procedure Code will be attracted. An offence may be entirely unconnected with the official duty as such or it may be committed within the scope of the official duty. Where it is unconnected with the official duty there can be no protection. It is only when it is either within the scope of the official duty or in excess of it that the protection is claimable."

Section 197(1) and (2) of the Code reads as under: "197. (1) When any person who is or was a Judge or Magistrate or a public servant not removable from his office save by or with the sanction of the Government is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction -

(a) in the case of person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of the Union, of the Central Government;

(b) in the case of a person who is employed or, as the case may be, was at the time of commission of the alleged offence employed, in connection with the affairs of a State, of the State Government.

* * * (2) No Court shall take cognizance of any offence alleged to have been committed by any member of the Armed Forces of the Union while acting or purporting to act in the discharge of his official duty, except with the previous sanction of the Central Government."

The section falls in the chapter dealing with conditions requisite for initiation of proceedings. That is if the conditions mentioned are not made out or are absent then no prosecution can be set in motion. For instance no prosecution can be initiated in a Court of Sessions under Section 193, as it cannot take cognizance, as a court of original jurisdiction, of any offence unless the case has been committed to it by a Magistrate or the Code expressly provides for it. And the jurisdiction of a Magistrate to take cognizance of any offence is provided by Section 190 of the Code, either on receipt of a complaint, or upon a police report or upon information received

from any person other than police officer, or upon his knowledge that such offence has been committed. So far public servants are concerned the cognizance of any offence, by any court, is barred by Section 197 of the Code unless sanction is obtained from the appropriate authority, if the offence, alleged to have been committed, was in discharge of the official duty. The section not only specifies the persons to whom the protection is afforded but it also specifies the conditions and circumstances in which it shall be available and the effect in law if the conditions are satisfied. The mandatory character of the protection afforded to a public servant is brought out by the expression, 'no court shall take cognizance of such offence except with the previous sanction'. Use of the words, 'no' and 'shall' make it abundantly clear that the bar on the exercise of power by the court to take cognizance of any offence is absolute and complete. Very cognizance is barred. That is the complaint, cannot be taken notice of. According to Black's Law Dictionary the word 'cognizance' means 'jurisdiction' or 'the exercise of jurisdiction' or 'power to try and determine causes'. In common parlance it means 'taking notice of'. A court, therefore, is precluded from entertaining a complaint or taking notice of it or exercising jurisdiction if it is in respect of a public servant who is accused of an offence alleged to have committed during discharge of his official duty.

Such being the nature of the provision the question is how should the expression, 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty', be understood? What does it mean? 'Official' according to dictionary, means pertaining to an office, and official act or official duty means an act or duty done by an officer in his official capacity. In B. Saha and Ors. v. M. S. Kochar (1979 (4) SCC 177), it was held : (SCC pp. 184-85, para 17) "The words 'any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty' employed in Section 197(1) of the Code, are capable of a narrow as well as a wide interpretation. If these words are construed too narrowly, the section will be rendered altogether sterile, for, 'it is no part of an official duty to commit an offence, and never can be'. In the wider sense, these words will take under their umbrella every act constituting an offence, committed in the course of the same transaction in which the official duty is performed or purports to be performed. The right approach to the import of these words lies between two extremes. While on the one hand, it is not every offence committed by a public servant while engaged in the performance of his official duty, which is entitled to the protection of Section 197 (1), an act constituting an offence, directly and reasonably connected with his official duty will require sanction for prosecution under the said provision."

Use of the expression, 'official duty' implies that the act or omission must have been done by the public servant in the course of his service and that it should have been in discharge of his duty. The Section does not extend its protective cover to every act or omission done by a public servant in service but restricts its scope of operation to only those acts or omissions which are done by a public servant in discharge of official duty.

It has been widened further by extending protection to even those acts or omissions which are done in purported exercise of official duty. That is under the colour of office. Official duty therefore implies that the act or omission

must have been done by the public servant in course of his service and such act or omission must have been performed as part of duty which further must have been official in nature. The Section has, thus, to be construed strictly, while determining its applicability to any act or omission in course of service. Its operation has to be limited to those duties which are discharged in course of duty. But once any act or omission has been found to have been committed by a public servant in discharge of his duty then it must be given liberal and wide construction so far its official nature is concerned. For instance a public servant is not entitled to indulge in criminal activities. To that extent the Section has to be construed narrowly and in a restricted manner. But once it is established that act or omission was done by the public servant while discharging his duty then the scope of its being official should be construed so as to advance the objective of the Section in favour of the public servant. Otherwise the entire purpose of affording protection to a public servant without sanction shall stand frustrated. For instance a police officer in discharge of duty may have to use force which may be an offence for the prosecution of which the sanction may be necessary. But if the same officer commits an act in course of service but not in discharge of his duty and without any justification therefor then the bar under Section 197 of the Code is not attracted. To what extent an act or omission performed by a public servant in discharge of his duty can be deemed to be official was explained by this Court in Matajog Dobey v. H. C. Bhari (AIR 1956 SC 44) thus:

"The offence alleged to have been committed (by the accused) must have something to do, or must be related in some manner with the discharge of official duty ... there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable (claim) but not a pretended or fanciful claim, that he did it in the course of the performance of his duty."

If on facts, therefore, it is prima facie found that the act or omission for which the accused was charged had reasonable connection with discharge of his duty then it must be held to be official to which applicability of Section 197 of the Code cannot be disputed.

The above position was highlighted in State of H.P. v. M.P. Gupta (2004 (2) SCC 349), State of orissa through Kumar Raghvendra Singh & Ors. v. Ganesh Chandra Jew (JT 2004(4) SC 52), Shri S.K. Zutshi and Anr. v. Shri Bimal Debnath and Anr. (JT 2004(6) SC 323), K. Kalimuthu v. State by DSP (2005 (4) SCC 512) and Rakesh Kumar Mishra v. The State of Bihar and Anr. (2006 (1) SCC 557)."

36. Their lordships in the same judgment have further held that law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind or not would depend on the facts and circumstances of each case and there cannot be any generalized guidelines in that regard. It has been held as follows:

"47. The sanctioning authority is not required to separately specify each of the offence against the accused public servant. This is required to be done at the stage of framing of charge. Law requires that before the sanctioning authority materials must be placed so that the sanctioning authority can apply his mind and take a decision. Whether there is an application of mind

or not would depend on the facts and circumstances of each case and there cannot be any generalized guidelines in that regard."

37. Their lordships of the Hon'ble Supreme Court in the case of ***Choudhury Parveen Sultana vrs. State of West Bengal and another,*** reported in ***(2009) 3 SCC 398,*** have held that all acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 Cr.P.C. The underlying object of Section 197 Cr.P.C. is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the said official. It has been held as follows:

> "18. The direction which had been given by this Court, as far back as in 1971 in Bhagwan Prasad Prasad Srivastava's case (supra) holds good even today. All acts done by a public servant in the purported discharge of his official duties cannot as a matter of course be brought under the protective umbrella of Section 197 Cr.P.C. On the other hand, there can be cases of misuse and/or abuse of powers vested in a public servant which can never be said to be a part of the official duties required to be performed by him. As mentioned in Bhagwan Prasad Srivastava's case (supra), the underlying object of Section 197 Cr.P.C is to enable the authorities to scrutinize the allegations made against a public servant to shield him/her against frivolous, vexatious or false prosecution initiated with the main object of causing embarrassment and harassment to the said official. However, as indicated hereinabove, if the authority vested in a public servant is misused for doing things which are not otherwise permitted under the law, such acts cannot claim the protection of Section 197Cr.P.C. and have to be considered de hors the duties which a public servant is required to discharge or perform. Hence, in respect of prosecution for such excesses or misuse of authority, no protection can be demanded by the public servant concerned."

38. Their lordships of the Hon'ble Supreme Court in the case of ***State of Punjab and another vrs. Mohammed Iqbal Bhatti***, reported in ***(2009) 17 SCC 92,*** have held that grant of sanction, by reviewing an earlier sanction order is permissible but serious application of mind on part of the authority concerned as to existence of fresh materials is imperative. Their lordships have further held that although the State in the matter of grant of refusal to grant sanction exercises statutory jurisdiction under Section 197, the same, however, would not mean that power once exercised cannot be exercised once again. The validity of an order of sanction would depend upon application of mind on the part of the authority concerned and consideration of all the material facts and evidence collected during investigation and placed before it. It has been held as follows:

> "5. The respondent is a public servant. The Governor of the State of Punjab is his appointing authority. He is, therefore, not removable from his office save by and with the sanction of the Government and in that view of the matter if he is accused in any offence alleged to have been committed by him while acting or purporting to act in discharging of his official duty, grant of prior sanction is imperative in character in terms of Section 197 of the Code of Criminal Procedure, 1973. The power of the State, as is well known, is performed by an executive authority authorized in this behalf in terms of the Rules of Executive Business framed under Article 166 of the Constitution of India insofar as such a power has to be exercised in terms of Article

162 thereof. Once a sanction is refused to be granted, no appeal lies there against.

6. Although the State in the matter of grant or refusal to grant sanction exercises statutory jurisdiction, the same, however, would not mean that power once exercised cannot be exercised once again. For exercising its jurisdiction at a subsequent stage, express power of review in the State may not be necessary as even such a power is administrative in character. It is, however, beyond any cavil that while passing an order for grant of sanction, serious application of mind on the part of the concerned authority is imperative. The legality and/or validity of the order granting sanction would be subject to review by the criminal courts. An order refusing to grant sanction may attract judicial review by the Superior Courts.

7. Validity of an order of sanction would depend upon application of mind on the part of the authority concerned and the material placed before it. All such material facts and material evidences must be considered by it. The sanctioning authority must apply its mind on such material facts and evidences collected during the investigation. Even such application of mind does not appear from the order of sanction, extrinsic evidences may be placed before the court in that behalf. While granting sanction, the authority cannot take into consideration an irrelevant fact nor can it pass an order on extraneous consideration not germane for passing a statutory order. It is also well settled that the Superior Courts cannot direct the sanctioning authority either to grant sanction or not to do so. The source of power of an authority passing an order of sanction must also be considered. [See Mansukhlal vithaldas Chauhan v. State of Gujarat[(1997) 3 SCC 622] The concerned authority cannot also pass an order of sanction subject to ratification of a higher authority. [See State (Anti Corruption Branch) Govt. of N.C.T. of Delhi and Anr. v. Dr. R.C. Anand and Anr. [(2004) 4 SCC 615].

14. Before us, however, it was contended that requisite clarification was made by the Deputy Superintendent of Police, Vigilance Bureau on 17.12.2002 stating:

> "Besides this Sh. Hans Raj Golden has no link with Vigilance Department. It is false that he is a tout of Vigilance Department."

However, it is stated that with the change in the Government and after more than nine months of the said refusal to grant sanction, the Vigilance Department again approached the concerned Secretary for grant of sanction by a letter dated 16.05.2004.

15. The Deputy Secretary, Government of Punjab, Village Development and Panchayat Department by a letter dated 30.09.2004 addressed to the Deputy Secretary, Vigilance Bureau, stated as under:

> "On the above mentioned subject this department vide letter memo no. 6/37/2001-3 RDE-3/ 9925 dated 15.12.2003 had refused to grant sanction for prosecution of Sh. Mohammed Iqbal Bhatti.
>
> 2. Vide your letter under reference you had again requested to grant sanction for prosecution of the concerned official in the case and after reconsidering the case, sanction for prosecution Sh. Mohammed Iqbal Bhatti, District Development and Panchayat Officer is granted..."

16. The Governor of Punjab in his order of sanction dated 14.09.2004 recorded the prosecution case presumably as contained in the First Information Report and opined:

> "Therefore, after perusing the above case police file, documents, challan and attached all the documents minutely the Rajya Pal Ji has become fully satisfied that the above Mohd. Iqbal D.D.P.O. Ferozepur during the tenure of his service/ posting, have committed an offence u/s 7, 13(2) 88 P.C. Act."

The said order was also signed by the Secretary, Government of Punjab, Rural Development and Panchayat Department.

17. The contention of the learned Additional Advocate General for the appellants is that Rule 8 of the Rules of Business shall apply whereas according to the learned counsel for the respondent, Rule 9 thereof shall apply. In terms of Clause (3) of Article 166 of the Constitution of India all orders of the government must be issued in the name of the Governor. Such orders, however, may be signed by any authorities specified in Rule 9 of the Rules of Business. By reason of either Rule 8 or Rule 9 of the Rules of Business, no substantive power is conferred. The Rules of Executive Business inter alia provided for three authorities before whom the records are to be placed, viz., Minister of the Department, Chief Minister and Cabinet. It has not been contended that in terms of the Rules of Executive Business read with the Standing Order, the Minister of the Department concerned could not have refused to grant sanction. What is contended before us is that Rule 8 of the Rules of Business should have been complied with.

18. It is now well-known that in the event it appears from the order and the records produced before the court, if any occasion arises therefor that even if a valid order is not authenticated in terms of Clause (3) of Article 166 of the Constitution of India, the same would not be vitiated in law. Failure to authenticate an executive order is not fatal. The said provision is directory in nature and not mandatory. [See I.T.C. Bhadrachalam Paperboards and Another v. Mandal Revenue Officer, A.P. and Others (1996) 6 SCC 634].

19. From a perusal of the order dated 15.12.3003, it is evident that before the Hon'ble Minister all the relevant records were produced. The Vigilance Department did not contend that the Hon'ble Minister did not have any jurisdiction. It accepted the said order. It was not challenged. Only when a new government came in, a request was made for reconsideration of the earlier order, as would be evident from the memo of the Secretary of the Department.

20. It was, therefore, not a case where fresh materials were placed before the sanctioning authority. No case, therefore, was made out that the sanctioning authority had failed to take into consideration a relevant fact or took into consideration an irrelevant fact. If the clarification sought for by the Hon'ble Minister had been supplied, as has been contended before us, the same should have formed a ground for reconsideration of the order. It is stated before us that the Government sent nine letters for obtaining the clarifications which were not replied to."

39. Their lordships of the Hon'ble Supreme Court in the case of ***State of Himachal Pradesh vrs. Nishant Sareen,*** reported in ***2010 (14) SCC 527,*** have held that

when the prosecution sanction is refused on the basis of material placed on record by the Sanctioning Authority and no fresh material is brought on record by Investigating Agency, it is not permissible for the Sanctioning Authority to review or reconsider the matter on the same material again. It has been held as follows:

> "12. It is true that the Government in the matter of grant or refusal to grant sanction exercises statutory power and that would not mean that power once exercised cannot be exercised again or at a subsequent stage in the absence of express power of review in no circumstance whatsoever. The power of review, however, is not unbridled or unrestricted. It seems to us sound principle to follow that once the statutory power under Section 19 of the 1988 Act or Section 197 of the Code has been exercised by the Government or the competent authority, as the case may be, it is not permissible for the sanctioning authority to review or reconsider the matter on the same materials again. It is so because unrestricted power of review may not bring finality to such exercise and on change of the Government or change of the person authorised to exercise power of sanction, the matter concerning sanction may be reopened by such authority for the reasons best known to it and a different order may be passed. The opinion on the same materials, thus, may keep on changing and there may not be any end to such statutory exercise.
>
> 13. In our opinion, a change of opinion per se on the same materials cannot be a ground for reviewing or reconsidering the earlier order refusing to grant sanction. However, in a case where fresh materials have been collected by the investigating agency subsequent to the earlier order and placed before the sanctioning authority and on that basis, the matter is reconsidered by the sanctioning authority and in light of the fresh materials an opinion is formed that sanction to prosecute the public servant may be granted, there may not be any impediment to adopt such course.
>
> 14. Insofar as the present case is concerned, it is not even the case of the appellant that fresh materials were collected by the investigating agency and placed before the sanctioning authority for reconsideration and/or for review of the earlier order refusing to grant sanction. As a matter of fact, from the perusal of the subsequent order dated March 15, 2008 it is clear that on the same materials,the sanctioning authority has changed its opinion and ordered sanction to prosecute the respondent which, in our opinion, is clearly impermissible."

40. In the present case, the Governor of Himachal Pradesh in the order has held that sanction was not necessary but when the fresh material was placed before the Governor on the basis of the representation, the decision was taken not to accord the prosecution sanction under Section 197 Cr.P.C.

41. Their lordships of the Hon'ble Supreme Court in the case of ***Om Prakash and others vrs. State of Jharkhand through the Secretary, Department of Home, Ranchi 1 and another,*** *with connected matter,* reported in ***(2012) 12 SCC 72,*** have held that protection of sanction under Section 197 Cr.P.C. is available only for acts having reasonable connection with official duty. Their lordships have also explained the term "official duty". Reasonable connection between act done by public servant with discharge of his official duty must be established to avail of protection of prior sanction under Section 197. The question whether sanction is necessary or not may have to be determined from stage to stage. Their lordships further held that the true test as to whether a public servant

was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it. It has been held as follows:

> "32. The true test as to whether a public servant was acting or purporting to act in discharge of his duties would be whether the act complained of was directly connected with his official duties or it was done in the discharge of his official duties or it was so integrally connected with or attached to his office as to be inseparable from it. (K. Satwant Singh). The protection given under Section 197 of the Code has certain limits and is available only when the alleged act done by the public servant is reasonably connected with the discharge of his official duty and is not merely a cloak for doing the objectionable act. If in doing his official duty, he acted in excess of his duty, but there is a reasonable connection between the act and the performance of the official duty, the excess will not be a sufficient ground to deprive the public servant of the protection. (Ganesh Chandra Jew). If the above tests are applied to the facts of the present case, the police must get protection given underSection 197 of the Code because the acts complained of are so integrally connected with or attached to their office as to be inseparable from it. It is not possible for us to come to a conclusion that the protection granted under Section 197 of the Code is used by the police personnel in this case as a cloak for killing the deceased in cold blood.
>
> 34. In Matajog Dobey, the Constitution Bench of this court was considering what is the scope and meaning of a somewhat similar expression "any offence alleged to have been committed by him while acting or purporting to act in discharge of his official duty" occurring in Section 197 of the Criminal Procedure Code (Act V of 1898). The Constitution Bench observed that no question of sanction can arise under Section 197 unless the act complained of is an offence; the only point to determine is whether it was committed in the discharge of official duty. On the question as to which act falls within the ambit of above-quoted expression, the Constitution Bench concluded that there must be a reasonable connection between the act and the discharge of official duty; the act must bear such relation to the duty that the accused could lay a reasonable, but not a pretended or fanciful claim that he did it in the course of performance of his duty. While dealing with the question whether the need for sanction has to be considered as soon as the complaint is lodged and on the allegations contained therein, the Constitution Bench referred to Hori Ram Singh and observed that at first sight, it seems as though there is some support for this view in Hori Ram Singh because Sulaiman, J. has observed in the said judgment that as the prohibition is against the institution itself, its applicability must be judged in the first instance at the earliest stage of institution and Varadachariar, J. has also stated that the question must be determined with reference to the nature of the allegations made against the public servant in the criminal proceeding. It is pertinent to note that the Constitution Bench has further observed that a careful perusal of the later parts of the judgment however show that learned judges did not intend to lay down any such proposition. The Constitution Bench quoted the said later parts of the judgment as under:
>
> > "Sulaiman, J. refers (at page 179) to the prosecution case as disclosed by the complaint or the police report and he winds

> up the discussion in these words: "Of course, if the case as put forward fails or the defence establishes that the act purported to be done is in execution of duty, the proceedings will have to be dropped and the complaint dismissed on that ground". The other learned Judge also states at page 185, "At this stage we have only to see whether the case alleged against the appellant or sought to be proved against him relates to acts done or purporting to be done by him in the execution of his duty". It must be so. The question may arise at any stage of the proceedings. The complaint may not disclose that the act constituting the offence was done or purported to be done in the discharge of official duty; but facts subsequently coming to light on a police or judicial inquiry or even in the course of the prosecution evidence at the trial, may establish the necessity for sanction. Whether sanction is necessary or not may have to be determined from stage to stage. The necessity may reveal itself in the course of the progress of the case."

The legal position is thus settled by the Constitution Bench in the above paragraph. Whether sanction is necessary or not may have to be determined from stage to stage. If, at the outset, the defence establishes that the act purported to be done is in execution of official duty, the complaint will have to be dismissed on that ground.

41. The upshot of this discussion is that whether sanction is necessary or not has to be decided from stage to stage. This question may arise at any stage of the proceeding. In a given case, it may arise at the inception. There may be unassailable and unimpeachable circumstances on record which may establish at the outset that the police officer or public servant was acting in performance of his official duty and is entitled to protection given under Section 197 of the Code. It is not possible for us to hold that in such a case, the court cannot look into any documents produced by the accused or the concerned public servant at the inception. The nature of the complaint may have to be kept in mind. It must be remembered that previous sanction is a precondition for taking cognizance of the offence and, therefore, there is no requirement that the accused must wait till the charges are framed to raise this plea. At this point, in order to exclude the possibility of any misunderstanding, we make it clear that the legal discussion on the requirement of sanction at the very threshold is based on the finding in the earlier part of the judgment that the present is not a case where the police may be held guilty of killing Munna Singh in cold blood in a fake encounter. In a case where on facts it may appear to the court that a person was killed by the police in a stage- managed encounter, the position may be completely different".

42. Their lordships of the Hon'ble Supreme Court in the case of ***Urmila Devi vrs. Yudhvir Singh,*** reported in ***(2013) 15 SCC 624,*** have held that the expression "official duty" in the absence of any statutory definition, therefore denotes a duty that arises by reason of an office or position of trust or authority held by a person. It has been held as follows:

> "[54] A careful reading of the above would show that protection against prosecution will be available only if the following ingredients are satisfied:

(a) The person concerned is or was a judge or magistrate or public servant.

(b) Such person is not removable from his office save by the sanction of the Government.

(c) Such person is accused of commission of an offence and

(d) Such offence is committed while the person concerned was acting or purporting to act in the discharge of his official duties.

[55] There is in the instant case no dispute that the first three of the four requirements set out above are satisfied inasmuch as the Respondent public servant was not removable from the office held by him save by or with the sanction of the Government and that he is accused of the commission of offences punishable under the Indian Penal Code. What constituted the essence of the forensic debate at the bar was whether the offences allegedly committed by the Respondents were committed while he was 'acting or purporting to act in the discharge of his official duty'. The words "acting or purporting to act in the discharge of his official duty" appearing in Section 197 are critical not only in the case at hand but in every other case where the accused invokes the protection of that provision. What is the true and correct interpretation of that provision is no longer res integra. The provision has fallen for consideration on several occasions before this Court. Reference to all those decisions may be unnecessary for the law has been succinctly summed up in the few decisions to which we shall presently refer. But before we do so we may point out that the expression "official duty" appearing in Section 197 has not been defined. The dictionary meaning of the expression would, therefore, be useful for understanding the expression both literally and contextually. The term "official" has been defined in Black's Law Dictionary as under:

Official... Of or relating to an office or position of trust or authority .

[56] The term "office" is defined in the same dictionary as under:

Office: A position of duty, trust, or authority, esp. one conferred by a governmental authority for a public purpose.

[57] Law Lexicon also gives a similar meaning to the expression "official" and "office" as under

Official...As adjective, belonging to an officer: of a public officer; in relation to the duties of office.

Office...The word "office" refers to the place where business is transacted.

[58] The term "duty" is defined by Black's Law Dictionary in the following words:

Duty. 1. A legal obligation that is owed or due to another and that needs to be satisfied; an obligation for which somebody else has a corresponding right.

[59] The expression "official duty" would in the absence of any statutory definition, therefore, denote a duty that arises by reason of an office or position of trust or authority held by a person. It follows that in every case where the question whether the accused was acting in discharge of his official duty or purporting to act in the discharge of such a duty arises for consideration, the Court will first examine whether the accused was holding an office and, if so, what was the nature of duties cast upon him as holder of any such office. It is only when there is a direct and reasonable nexus

between the nature of the duties cast upon the public servant and the act constituting an offence that protection Under Section 197 Code of Criminal Procedure may be available and not otherwise. Just because the accused is a public servant is not enough. A reasonable connection between his duties as a public servant and the acts complained of is what will determine whether he was acting in discharge of his official duties or purporting to do so, even if the acts were in excess of what was enjoined upon him as a public servant within the meaning of that expression Under Section 197 of the Code."

43. The learned Single Judge of the Punjab and Haryana High Court in the case of ***Mrs. Nirmal Yadav vrs. Central Bureau of Investigation and another,*** reported in ***2011(4) R.C.R. (Criminal) 809,*** has held as follows:

"33. From the careful perusal of the aforesaid judgments relied upon by Shri Tulsi, following propositions emerge:-

(i)Grant or refusal of sanction for prosecution is a statutory function of the competent authority.

(ii)Grant or refusal of the sanction for prosecution of a public servant is the prerogative of the appointing authority/authority competent to remove from service.

(iii)Once the competent authority on the basis of material before it decides to decline sanction, it is impermissible in law to review the question of grant of sanction without fresh material and valid reasons.

(iv)Due application of mind by the competent authority at every stage of consideration is sine qua non for a legal and valid order for grant or refusal of sanction.

70. Now coming to the principal question argued by Mr. Tulsi regarding reviewability of the sanction order, in the case of Nishant Sareen (supra), Hon'ble Supreme Court has held that review on the basis of the same material is impermissible. In the same judgment in para 12, it has been said that it is not an absolute rule that sanction once refused in exercise of statutory power cannot be reconsidered at a subsequent stage. While acknowledging the power of review, it has been held that power is not unbridled or unrestricted. The embargo for review is on the same material and without any fresh inputs. Similarly, in case of Mohammed Iqbal Bhatti (supra), it has been noticed that no fresh material was produced at the time of reconsideration and no reason has been recorded for such reconsideration. Similar is the ratio in the case of Gopikant Choudhary (supra). However, in the present case, at the first place, there was no refusal at any stage or at least a positive view or order for refusal to grant sanction and thus, the question of review or reconsideration does not arise. Even if it is assumed that the note recorded in the letter of Mr. Meena, is to be construed as a refusal, indubitably further investigation was carried out which persuaded the Hon'ble CJI and the sanctioning authority to grant sanction. As per the affidavit of Ms. Neela Gangadharan, file was placed before the competent authority only once in February, 2011, after obtaining the concurrence of Hon'ble CJI in July, 2010. At no earlier stage, the file seems to have been produced before Hon'ble CJI or before the sanctioning authority (President of India). Since there was no earlier refusal, there was no occasion for review or reconsideration. In view of the dictum of

various judgments referred to above, review is permissible on the basis of fresh inputs and even for other valid reasons. Assuming in a given case, the sanctioning authority makes an order of declining sanction, even without looking to any material and without due application of mind and subsequently, such authority reviews its own opinion on consideration of material produced and application of mind, this definitely falls within the purview of other valid reasons providing an occasion to the sanctioning authority to review its earlier decision and grant sanction. Such an order would be legally valid and has the sanction of law."

44. Their lordships of the Hon'ble Supreme Court in the case of ***Balram Gupta vrs. Union of India and another,*** reported in ***1987 (Supp.) SCC 228,*** have held that when the voluntary retirement was sought under Rule 48-A by the government servant, the withdrawal of the same in quick succession within the time prior to expiry period, the order allowing to retire prospectively without allowing withdrawal of notice was illegal. It has been held as follows:

"8. The facts, therefore, are that the appellant offered to resign from his service by the letter dated 24th December, 1980 with effect from 31st March, 1981 and according to the appellant his resignation would have been effective, if accepted, only from 31st March, 1981. Before the resignation could have become effective the appellant withdrew the application by the letter dated 31st of January, 1981, long before, according to the appellant, the date the resignation could have been effective. In the meantime, however, prior thereto on the 20th of January, 1981 the respondent has purported to accept the resignation with effect from 31st March, 1981. The appropriate rule sub-rule (4) of Rule 48-A of the Pension Rules as set out hereinbefore enjoins that a government servant shall be precluded from withdrawing his notice except with the specific approval of such authority.

11. In Air India etc. etc. v. Nergesh Meerza & Ors. etc. etc., [1982] 1 S.C.R. 438, there the Court struck down certain provisions of Air India Employees Service Regulations. We are not concerned with the actual controversy. But the Court reiterated that there should not be arbitrariness and hostile discrimination in Government's approach to its employees. On behalf of the respondent it was submitted that a Government servant was not entitled to demand as of right, permission to withdraw the letter of voluntary retirement, it could only be given as a matter of grace. Our attention was also drawn to the observations of this Court in Raj Kumar v. Union of India, [1968] 3 S.C.R. 857. There the Court reiterated that till the resignation was accepted by the appropriate authority in consonance with the rules governing the acceptance, the public servant concerned has locus poenitentiae but not thereafter. Undue delay in intimating to the public servant concerned the action taken on the letter of resignation may justify an inference that resignation had not been accepted. But in the facts of the instant case the resignation from the Government servant was to take effect at a subsequent date prospectively and the withdrawal was long before that date. Therefore, the appellant, in our opinion, had locus. As mentioned hereinbefore the main question was whether the sub-rule (4) of Rule 48-A was valid and if so whether the power exercised under the sub-rule (4) of Rule 48-A was proper. In the view we have taken it is not necessary, in our opinion, to decide whether sub rule (4) of Rule 48-A was valid or not. It may be a salutary requirement that a Government servant cannot with- draw a

letter of resignation or of voluntary retirement at his sweet will and put the Government into difficulties by writing letters of resignation or retirement and withdrawing the same immediately without rhyme or reasons. Therefore, for the purpose of appeal we do not propose to consider the question whether sub-rule (4) of Rule 48-A of the Pension Rules is valid or not. If properly exercised the power of the government may be a salutary rule. Approval, however, is not ipse dixit of the approving authority. The approving authority who has the statutory authority must act reasonably and rationally. The only reason put forward here is that the appellant had not indicated his reasons for withdrawal. This, in our opinion, was sufficiently indicated that he was prevailed upon by his friends and the appellant had a second look at the matter. This is not an unreasonable reason. The guidelines indicated are as follows:

> "(2) A question has been raised whether a Government servant who has given to the appropriate authority notice of retirement under the para 2(2) above has any right subsequently (but during the currency of the notice) to withdraw the same and return to duty. The question has been considered carefully and the conclusion reached is that the Government servant has no such right. There would, however, be no objection to permission being given to such a Government servant, on consideration of the circumstances of his case to withdraw the notice given by him, but ordinarily such permission should not be granted unless he is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given.
>
> Where the notice of retirement has been served by Government on the Government servant, it may be withdrawn if so desired for adequate reasons, provided the Government servant concerned is agreeable."

12. In this case the guidelines are that ordinarily permission should not be granted unless the Officer concerned is in a position to show that there has been a material change in the circumstances in consideration of which the notice was originally given. In the facts of the instant case such indication has been given. The appellant has stated that on the persistent and personal requests of the staff members he had dropped the idea of seeking voluntary retirement. We do not see how this could not be a good and valid reason. It is true that he was resigning and in the notice for resignation he had not given any reason except to state that he sought voluntary retirement. We see nothing wrong in this. In the modern age we should not put embargo upon people's choice or freedom. If, however, the administration had made arrangements acting on his resignation or letter of retirement to make other employee available for his job, that would be another matter but the appellant's offer to retire and withdrawal of the same happened in so quick succession that it cannot be said that any administrative set up or management was affected. The administration has now taken a long time by its own attitude to communicate the matter. For this purpose the respondent is to blame and not the appellant.

13. We hold, therefore, that there was no valid reason for withholding the permission, by the respondent. We hold further that there has been compliance with the guidelines because the appellant has indicated that

there was a change in the circumstances, namely, the persistent and personal requests from the staff members and relations which changed his attitude towards continuing in Government service and induced the appellant to withdraw the notice. In the modern and uncertain age it is very difficult to arrange one's future with any amount of certainty, a certain amount of flexibility is required, and if such flexibility does not jeopardize Government or administration, administration should be graceful enough to respond and acknowledge the flexibility of human mind and attitude and allow the appellant to withdraw his letter of retirement in the facts and circumstances of this case. Much complications which had arisen could have been thus avoided by such graceful attitude. The court cannot but condemn circuitous ways "to ease out" uncomfortable employees. As a model employer the government must conduct itself with high probity and candour with its employees."

45. Their Lordships of the Hon'ble Supreme Court in the case of ***C.K. Jaffer Sharief*** Versus ***State (Through CBI),*** reported in ***(2013) 1 SCC 205,*** have held that it could not be held that accused abused his position as a public servant and caused pecuniary loss without public interest and thus no offence under Section 13(1) (d) of the P.C. Act, 1988 was made out. It has been held as under:-

"17. It has already been noticed that the appellant besides working as the Minister of Railways was the Head of the two Public Sector Undertakings in question at the relevant time. It also appears from the materials on record that the four persons while in London had assisted the appellant in performing certain tasks connected with the discharge of duties as a Minister. It is difficult to visualise as to how in the light of the above facts, demonstrated by the materials revealed in the course of investigation, the appellant can be construed to have adopted corrupt or illegal means or to have abused his position as a public servant to obtain any valuable thing or pecuniary advantage either for himself or for any of the aforesaid four persons. If the statements of the witnesses examined under Section 161 show that the aforesaid four persons had performed certain tasks to assist the Minister in the discharge of his public duties, however insignificant such tasks may have been, no question of obtaining any pecuniary advantage by any corrupt or illegal means or by abuse of the position of the appellant as a public servant can arise. As a Minister it was for the appellant to decide on the number and identity of the officials and supporting staff who should accompany him to London if it was anticipated that he would be required to perform his official duties while in London. If in the process, the Rules or Norms applicable were violated or the decision taken shows an extravagant display of redundance it is the conduct and action of the appellant which may have been improper or contrary to departmental norms. But to say that the same was actuated by a dishonest intention to obtain an undue pecuniary advantage will not be correct. That dishonest intention is the gist of the offence under section 13(1)(d) is implicit in the words used i.e. corrupt or illegal means and abuse of position as a public servant. A similar view has also been expressed by this Court in M. Narayanan Nambiar vs. State of Kerala[1] while considering the provisions of section 5 of Act of 1947."

46. Mr. Shrawan Dogra, learned Advocate General has placed reliance upon the decision in the case of ***P. Lal vrs. Union of India and others,*** reported in ***(2003) 3 SCC***

393. The facts of this case are different. In this case since the government servant accepted the notice of voluntary retirement and the retirement has become effective and consequently, the grant of permission at subsequent stage for withdrawal of voluntary retirement was bad. In the present case, Sh. A.N.Sharma has submitted the application for withdrawal of voluntary retirement on 20.11.2007 and the date of communication is 16.11.2007 w.e.f. from 21.11.2007.

47. Their lordships of the Hon'ble Supreme Court in the case of ***Fakhruddin Ahmad vrs. State of Uttranchal and another,*** reported in ***(2008) 17 SCC 157,*** have held that nevertheless, where the High Court is convinced that the allegations made in the first information report or the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused or where the allegations made in the FIR or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, the powers of the high Court under Section 482 should be exercised. It has been held as follows:

> "20. So far as the scope and ambit of the powers of the High Court under Section 482 of the Code is concerned, the same has been enunciated and reiterated by this Court in a catena of decisions and illustrative circumstances under which the High Court can exercise jurisdiction in quashing proceedings have been enumerated. However, for the sake of brevity, we do not propose to make reference to the decisions on the point. It would suffice to state that though the powers possessed by the High Court under the said provision are very wide but these should be exercised in appropriate cases, ex debito justitiae to do real and substantial justice for the administration of which alone the Courts exist. The inherent powers possessed by the High Court are to be exercised very carefully and with great caution so that a legitimate prosecution is not stifled. Nevertheless, where the High Court is convinced that the allegations made in the First Information Report or the complaint, even if they are taken at their face value and accepted in their entirety, do not prima facie constitute any offence or make out a case against the accused or where the allegations made in the F.I.R. or the complaint are so absurd and inherently improbable on the basis of which no prudent person can ever reach a just conclusion that there is sufficient ground for proceeding against the accused, the powers of the High Court under the said provision should be exercised."

48. In the present case also, even if the FIR and the final report are taken into consideration, at their face value and accepted in entirety, it does not prima-facie constitute an offence against the petitioners.

49. Their lordships of the Hon'ble Supreme Court in the case of ***Rajeshwar Tiwari and others vrs. Nanda Kishore Roy,*** reported in ***(2010) 8 SCC 442,*** have held that when the proceedings are civil in nature which cannot be adjudicated by criminal court, High Court would be justified in exercising its inherent jurisdiction and quashing the same. It has been held as follows:

> "29) This Court, in a series of decisions, has emphasized the inherent power of the High Court to pass appropriate orders to prevent the abuse of process of court or to secure the ends of justice. Though, inherent jurisdiction under Section 482 has to be exercised sparingly, carefully and with caution when adequate materials are available which clearly shows that the proceeding is either of civil nature, cannot be adjudicated by the criminal

court or if it is an abuse of process of court, the High Court is well within its power to exercise its inherent jurisdiction and quash the same.

30) Contours of the power under Section 482 CrPC have been explained in a series of decisions by this Court. In Nagawwa v. Veeranna Shivalingappa Konjalgi, (1976) 3 SCC 736, it was held that the Magistrate while issuing process against the accused should satisfy himself as to whether the allegations in the complaint, if proved, would ultimately end in the conviction of the accused. It was held that the order of Magistrate issuing process against the accused could be quashed under the following circumstances:

> "(1) Where the allegations made in the complaint or the statements of the witnesses recorded in support of the same taken at their face value make out absolutely no case against the accused or the complaint does not disclose the essential ingredients of an offence which is alleged against the accused;
>
> (2) Where the allegations made in the complaint are patently absurd and inherently improbable so that no prudent person can ever reach a conclusion that there is sufficient ground for proceeding against the accused; (3) Where the discretion exercised by the Magistrate in issuing process is capricious and arbitrary having been based either on no evidence or on materials which are wholly irrelevant or inadmissible; and (4) Where the complaint suffers from fundamental legal defects, such as, want of sanction, or absence of a complaint by legally competent authority and the like."

36) In the light of the above mentioned well established principles, we are of the view that the High Court has committed an error, firstly, in not assigning any reason and passing a cryptic order and secondly, failed to exercise its jurisdiction under Section 482 when the complaint does not disclose any offence of criminal nature. For the sake of repetition, we reiterate, though the respondent had some grievance about his non promotion, certain orders passed by the High Court including filing of contempt etc., in view of the statutory provisions of the Income Tax Act, the assertion of the appellants that deductions were being made for all the persons who are liable to pay tax in terms of the Income Tax Act, the proper remedy for the respondent is to approach the authority/officer concerned and not by filing complaint as mentioned above. We have already adverted to the report of SI Hirapur holding that the matter in issue is civil in nature."

50. Their lordships of the Hon'ble Supreme Court in the case of ***Kishan Singh vrs. Gurpal Singh and others,*** reported in ***(2010) 8 SCC 775,*** have held that in cases where there is delay in lodging an FIR, the Court has to look for a plausible explanation for such delay. In the absence of such an explanation, the delay may be fatal. In such cases, the Court should carefully examine the facts before it for the reason that a frustrated litigant who failed to succeed before the Civil Court may initiate criminal proceedings just to harass the other side. It has been held as follows:

> "22. In cases where there is a delay in lodging a FIR, the Court has to look for a plausible explanation for such delay. In absence of such an explanation, the delay may be fatal. The reason for quashing such proceedings may not be merely that the allegations were an after thought or had given a coloured version of events. In such cases the court should carefully examine the facts before it for the reason that a frustrated litigant

who failed to succeed before the Civil Court may initiate criminal proceedings just to harass the other side with mala fide intentions or the ulterior motive of wreaking vengeance on the other party. Chagrined and frustrated litigants should not be permitted to give vent to their frustrations by cheaply invoking the jurisdiction of the criminal court. The court proceedings ought not to be permitted to degenerate into a weapon of harassment and persecution. In such a case, where an FIR is lodged clearly with a view to spite the other party because of a private and personal grudge and to enmesh the other party in long and arduous criminal proceedings, the court may take a view that it amounts to an abuse of the process of law in the facts and circumstances of the case. (vide : Chandrapal Singh & Ors. Vs. Maharaj Singh & Anr., AIR 1982 SC 1238; State of Haryana & Ors. Vs. Ch. Bhajan Lal & Ors., AIR 1992 SC 604; G. Sagar Suri & Anr. Vs. State of U.P. & Ors., AIR 2000 SC 754; and Gorige Pentaiah Vs. State of A.P. & Ors., (2008) 12 SCC 531)."

51. The petitioner was permitted to withdraw his application for voluntary retirement on 2.2.2008 but the FIR No. 6 of 2014 was registered on 17.6.2014. The delay in lodging the FIR has not been explained.

52. Their lordships of the Hon'ble Supreme Court in the case of ***State of Andhra Pradesh vrs. Gourishetty Mahesh and others,*** reported in ***(2010) 11 SCC 226,*** have laid down the following principles for quashment of criminal proceedings at threshold as under:

"18) While exercising jurisdiction under Section 482 of the Code, the High Court would not ordinarily embark upon an enquiry whether the evidence in question is reliable or not or whether on a reasonable appreciation of it accusation would not be sustained. That is the function of the trial Judge/Court. It is true that Court should be circumspect and judicious in exercising discretion and should take all relevant facts and circumstances into consideration before issuing process, other wise, it would be an instrument in the hands of a private complainant to unleash vendetta to harass any person needlessly. At the same time, Section 482 is not an instrument handed over to an accused to short-circuit a prosecution and brings about its closure without full-fledged enquiry.

19) Though High Court may exercise its power relating to cognizable offences to prevent abuse of process of any Court or otherwise to secure the ends of justice, the power should be exercised sparingly. For example, where the allegations made in the FIR or complaint, even if they are taken at their face value and accepted in their entirety do not prima facie constitute any offence or make out a case against the accused or allegations in the FIR do not disclose a cognizable offence or do not disclose commission of any offence and make out a case against the accused or where there is express legal bar provided in any of the provisions of the Code or in any other enactment under which a criminal proceeding is initiated or sufficient material to show that the criminal proceeding is maliciously instituted with an ulterior motive for wreaking vengeance on the accused due to private and personal grudge, the High Court may step in.

20) Though the powers possessed by the High Court under Section 482 are wide, however, such power requires care/caution in its exercise. The interference must be on sound principles and the inherent power should not

be exercised to stifle a legitimate prosecution. We make it clear that if the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open to the High Court to quash the same in exercise of inherent powers under Section 482."

53. Their lordships of the Hon'ble Supreme Court in the case of ***Joseph Salvaraja vrs. State of Gujarat and others,*** reported in ***(2011) 7 SCC 59,*** have held that purely civil dispute sought to be given colour of criminal offence to wreak vengeance against the appellant, it did not meet strict standard of proof required to sustain a criminal accusation. In such type of cases, it is necessary to draw a distinction between civil wrong and criminal wrong. This Court, in the present case, has already held that the decision was civil/administrative in nature where no criminal wrong was committed by the petitioners.

54. Their lordships of the Hon'ble Supreme Court in the case of ***Harshendra Kumar D. vrs. Rebatilata Koley and others,*** reported in ***(2011) 3 SCC 351,*** have held that in order to prevent injustice or abuse of process or to promote justice, the High Court may look into the materials which have significant bearing on the matter at prima facie stage. The High Court can quash complaint if materials relied upon by accused are beyond suspicion or doubt or which are in the nature of public documents and are uncontroverted. Their lordships have further held that criminal prosecution is a serious matter. It affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. It has been held as follows:

"25. In our judgment, the above observations cannot be read to mean that in a criminal case where trial is yet to take place and the matter is at the stage of issuance of summons or taking cognizance, 7 (2004) 1 SCC 691 materials relied upon by the accused which are in the nature of public documents or the materials which are beyond suspicion or doubt, in no circumstance, can be looked into by the High Court in exercise of its jurisdiction under Section 482 or for that matter in exercise of revisional jurisdiction under Section 397 of the Code. It is fairly settled now that while exercising inherent jurisdiction under Section 482 or revisional jurisdiction under Section 397 of the Code in a case where complaint is sought to be quashed, it is not proper for the High Court to consider the defence of the accused or embark upon an enquiry in respect of merits of the accusations. However, in an appropriate case, if on the face of the documents - which are beyond suspicion or doubt - placed by accused, the accusations against him cannot stand, it would be travesty of justice if accused is relegated to trial and he is asked to prove his defence before the trial court. In such a matter, for promotion of justice or to prevent injustice or abuse of process, the High Court may look into the materials which have significant bearing on the matter at prima facie stage.

26. Criminal prosecution is a serious matter; it affects the liberty of a person. No greater damage can be done to the reputation of a person than dragging him in a criminal case. In our opinion, the High Court fell into grave error in not taking into consideration the uncontroverted documents relating to appellant's resignation from the post of Director of the Company. Had these documents been considered by the High Court, it would have been apparent that the appellant has resigned much before the cheques were issued by the Company."

55. Their lordships of the Hon'ble Supreme Court in the case of ***Amit Kapoor vrs. Ramesh Chander and another,*** reported in ***(2012) 9 SCC 460,*** have culled out the

following principles to be considered for proper exercise of jurisdiction, particularly with regard to quashing of charge either in exercise of jurisdiction under Section 397 or Section 482 Cr.P.C., as under:

> "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) 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 with the requirements of the offence.
>
> 4) 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.
>
> 5) 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 loathe to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.
>
> 6) 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.
>
> 7) 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.
>
> 8) The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.
>
> 9) 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. It may be purely a civil wrong or purely a criminal offence or a civil wrong as also a criminal offence constituting both on the same set of facts. But if the records disclose commission of a criminal offence and the ingredients of the offence are satisfied, then such criminal proceedings cannot be quashed merely because a civil wrong has also been committed. The power cannot be invoked to stifle or scuttle a legitimate prosecution. The factual foundation and ingredients of an offence being satisfied, the court will not either dismiss a complaint or quash such proceedings in exercise of its inherent or original jurisdiction.

> 10) 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."

56. Their lordships of the Hon'ble Supreme Court in the case of ***Rajiv Thapar and others vrs. Madan Lal Kapoor,*** reported in ***(2013) 2 SCC 330,*** have laid down following principles for quashing of proceedings raised by an accused by invoking the power vested in the High Court under Section 482 Cr.P.C.:

> "(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?
>
> (ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.
>
> (iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/complainant?
>
> (iv) Step four, whether proceeding with the trial would result in an abuse of process of the court, and would not serve the ends of justice?
>
> If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

57. Their lordships of the Hon'ble Supreme Court in the case of ***Binod Kumar and others vrs. State of Bihar and another,*** reported in ***(2014) 10 SCC 663,*** have held that civil liability cannot be converted into a criminal liability as it will amount to abuse of process of the Court.

58. The essential ingredients of criminal conspiracy under Section 120-B IPC are that; (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish the object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, and (d) in the jurisdiction where the statute requires it, an overt act. Their lordships of the Hon'ble Supreme Court in the case of ***Esher Singh vrs. State of A.P,*** reported in ***(2004) 11 SCC 585,*** have held as follows:

> "34. Merely because the accused A-1 was holding the deceased, as alleged, to be responsible for the killing of six Sikh students that per se does not prove conspiracy. Section 120B of IPC is the provision which provides for punishment for criminal conspiracy. Definition of 'criminal conspiracy' given in Section 120A reads as follows:

> "120A- When two or more persons agree to do, or cause to be done,-
>
> (1) an illegal act, or (2) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy;
>
> Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof".

The elements of a criminal conspiracy have been stated to be: (a) an object to be accomplished, (b) a plan or scheme embodying means to accomplish that object, (c) an agreement or understanding between two or more of the accused persons whereby, they become definitely committed to co-operate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means, (d) in the jurisdiction where the statute required an overt act. The essence of a criminal conspiracy is the unlawful combination and ordinarily the offence is complete when the combination is framed. From this, it necessarily follows that unless the statute so requires, no overt act need be done in furtherance of the conspiracy, and that the object of the combination need not be accomplished, in order to constitute an indictable offence. Law making conspiracy a crime, is designed to curb immoderate power to do mischief which is gained by a combination of the minds. The encouragement and support which co-conspirators give to one another rendering enterprises possible which, if left to individual effort, would have been impossible, furnish the ground for visiting conspirators and abettors with condign punishment. The conspiracy is held to be continued and renewed as to encompass all its members wherever and whenever any member of the conspiracy acts in furtherance of the common design. (See: American Jurisprudence Vol.II See 23, p. 559). For an offence punishable under section 120-B, prosecution need not necessarily prove that the perpetrators expressly agree to do or cause to be done illegal act; the agreement may be proved by necessary implication. Offence of criminal conspiracy has its foundation in an agreement to commit an offence. A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and an act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for use of criminal means.

40. The provisions of Section 120A and 120B, IPC have brought the law of conspiracy in India in line with the English Law by making the overt act unessential when the conspiracy is to commit any punishable offence. The English Law on this matter is well settled. Russell on Crime (12 Ed.Vol.I, p.202) may be usefully noted-

> "The gist of the offence of conspiracy then lies, not in doing the act, or effecting the purpose for which the conspiracy is formed, nor in attempting to do them, nor in inciting others to do them, but in the forming of the scheme or agreement between the parties, agreement is essential. Mere knowledge, or even discussion, of the plan is not, per se, enough."

Glanville Williams in the "Criminal Law" (Second Ed. P.382) states-

> "The question arose in an lowa case, but it was discussed in terms of conspiracy rather than of accessoryship. D, who had a grievance against P, told E that if he would whip P someone would pay his fine. E replied that he did not want anyone to pay his fine, that he had a grievance of his own against P and that he would whip him at the first opportunity. E whipped P. D was acquitted of conspiracy because there was no agreement for 'concert of action', no agreement to 'co-operate'.

Coleridge, J. while summing up the case to Jury in Regina v. Murphy [(1837) 173 ER 502 at p. 508] states:

> "I am bound to tell you, that although the common design is the root of the charge, it is not necessary to prove that these two parties came together and actually agreed in terms to have this common design and to pursue it by common means, and so to carry it into execution. This is not necessary, because in many cases of the most clearly established conspiracies there are no means of proving any such thing and neither law nor common sense requires that it should be proved. If you find that these two persons pursued by their acts the same object, often by the same means, one performing one part of an act, so as to complete it, with a view to the attainment of the object which they were pursuing, you will be at liberty to draw the conclusion that they have been engaged in a conspiracy to effect that object. The question you have to ask yourselves is, had they this common design, and did they pursue it by these common means the design being unlawful."

41. As noted above, the essential ingredient of the offence of criminal conspiracy is the agreement to commit an offence. In a case where the agreement is for accomplishment of an act which by itself constitutes an offence, then in that event no overt act is necessary to be proved by the prosecution because in such a situation, criminal conspiracy is established by proving such an agreement. Where the conspiracy alleged is with regard to commission of a serious crime of the nature as contemplated in Section 120B read with the proviso to sub-section (2) of Section 120A, then in that event mere proof of an agreement between the accused for commission of such a crime alone is enough to bring about a conviction under Section 120B and the proof of any overt act by the accused or by any one of them would not be necessary. The provisions, in such a situation, do not require that each and every person who is a party to the conspiracy must do some overt act towards the fulfillment of the object of conspiracy, the essential ingredient being an agreement between the conspirators to commit the crime and if these requirements and ingredients are established, the act would fall within the trapping of the provisions contained in section 120B [See: S.C. Bahri v. State of Bihar (AIR 1994 SC 2420)]

44. The most important ingredient of the offence being the agreement between two or more persons to do an illegal act. In a case where criminal conspiracy is alleged, the court must inquire whether the two persons are independently pursuing the same end or they have come together to pursue the unlawful object. The former does not render them conspirators but the latter does. For the offence of conspiracy some kind of physical manifestation of agreement is required to be established. The express agreement need not

be proved. The evidence as to the transmission of thoughts sharing the unlawful act is not sufficient. A conspiracy is a continuing offence which continues to subsist till it is executed or rescinded or frustrated by choice of necessity. During its subsistence whenever any one of the conspirators does an act or series of acts, he would be held guilty under Section 120-B IPC."

59. There is nothing in the FIR or in the final report to suggest that there was any agreement amongst the parties to accomplish a particular object.

60. Their lordships of the Hon'ble Supreme Court in the case of ***State of Maharashtra vrs. Som Nath Thapa,*** reported in ***(1996) 4 SCC 659,*** have held that to establish a charge of conspiracy knowledge about indulgence in either an illegal act or a legal act by illegal means is necessary.

61. Their lordships of the Hon'ble Supreme Court in the case of ***State through Superintendent of Police, CBI/SIT vrs. Nalini and others and connected matters,*** reported in ***(1999) 5 SCC 253,*** have culled out the following principles governing the law of conspiracy:

"583. Some of the broad principles governing the law of conspiracy may be summarized though, as the name implies, a summary cannot be exhaustive of the principles.

1. Under Section 120A IPC offence of criminal conspiracy is committed when two or more persons agree to do or cause to be done an illegal act or legal act by illegal means. When it is legal act by illegal means overt act is necessary. Offence of criminal conspiracy is exception to the general law where intent alone does not constitute crime. It is intention to commit crime and joining hands with persons having the same intention. Not only the intention but there has to be agreement to carry out the object of the intention, which is an offence. The question for consideration in a case is did all the accused had the intention and did they agree that the crime be committed. It would not be enough for the offence of conspiracy when some of the accused merely entertained a wish, howsoever, horrendous it may be, that offence be committed.

2. Acts subsequent to the achieving of object of conspiracy may tend to prove that a particular accused was party to the conspiracy. Once the object of conspiracy has been achieved, any subsequent act, which may be unlawful, would not make the accused a part of the conspiracy like giving shelter to an absconder.

3. Conspiracy is hatched in private or in secrecy. It is rarely possible to establish a conspiracy by direct evidence. Usually, both the existence of the conspiracy and its objects have to be inferred from the circumstances and the conduct of the accused.

4. Conspirators may, for example, be enrolled in a chain – A enrolling B, B enrolling C, and so on; and all will be members of a single conspiracy if they so intend and agree, even though each member knows only the person who enrolled him and the person whom he enrolls. There may be a kind of umbrella-spoke enrollment, where a single person at the centre doing the enrolling and all the other members being unknown to each other, though they know that there are to be other members. These are theories and in practice it may be difficult to tell whether the conspiracy in a particular case falls into which category. It may, however, even overlap. But then there has

to be present mutual interest. Persons may be members of single conspiracy even though each is ignorant of the identity of many others who may have diverse role to play. It is not a part of the crime of conspiracy that all the conspirators need to agree to play the same or an active role.

5. When two or more persons agree to commit a crime of conspiracy, then regardless of making or considering any plans for its commission, and despite the fact that no step is taken by any such person to carry out their common purpose, a crime is committed by each and every one who joins in the agreement. There has thus to be two conspirators and there may be more than that. To prove the charge of conspiracy it is not necessary that intended crime was committed or not. If committed it may further help prosecution to prove the charge of conspiracy.

6. It is not necessary that all conspirators should agree to the common purpose at the same time. They may join with other conspirators at any time before the consummation of the intended objective, and all are equally responsible. What part each conspirator is to play may not be known to everyone or the fact as to when a conspirator joined the conspiracy and when he left.

7. A charge of conspiracy may prejudice the accused because it is forced them into a joint trial and the court may consider the entire mass of evidence against every accused. Prosecution has to produce evidence not only to show that each of the accused has knowledge of object of conspiracy but also of the agreement. In the charge of conspiracy court has to guard itself against the danger of unfairness to the accused. Introduction of evidence against some may result in the conviction of all, which is to be avoided. By means of evidence in conspiracy, which is otherwise inadmissible in the trial of any other substantive offence prosecution tries to implicate the accused not only in the conspiracy itself but also in the substantive crime of the alleged conspirators. There is always difficulty in tracing the precise contribution of each member of the conspiracy but then there has to be cogent and convincing evidence against each one of the accused charged with the offence of conspiracy. As observed by Judge Learned Hand that "this distinction is important today when many prosecutors seek to sweep within the dragnet of conspiracy all those who have been associated in any degree whatever with the main offenders".

8. As stated above it is the unlawful agreement and not its accomplishment, which is the gist or essence of the crime of conspiracy. Offence of criminal conspiracy is complete even though there is no agreement as to the means by which the purpose is to be accomplished. It is the unlawful agreement, which is the gravaman of the crime of conspiracy. The unlawful agreement which amounts to a conspiracy need not be formal or express, but may be inherent in and inferred from the circumstances, especially declarations, acts, and conduct of the conspirators. The agreement need not be entered into by all the parties to it at the same time, but may be reached by successive actions evidencing their joining of the conspiracy.

9. It has been said that a criminal conspiracy is a partnership in crime, and that there is in each conspiracy a joint or mutual agency for the prosecution of a common plan. Thus, if two or more persons enter into a conspiracy, any act done by any of them pursuant to the agreement is, in contemplation of law, the act of each of them and they are jointly responsible therefor. This

means that everything said, written or done by any of the conspirators in execution or furtherance of the common purpose is deemed to have been said, done, or written by each of them. And this joint responsibility extends not only to what is done by any of the conspirators pursuant to the original agreement but also to collateral acts incident to and growing out of the original purpose. A conspirator is not responsible, however, for acts done by a co-conspirator after termination of the conspiracy. The joinder of a conspiracy by a new member does not create a new conspiracy nor does it change the status of the other conspirators, and the mere fact that conspirators individually or in groups perform different tasks to a common end does not split up a conspiracy into several different conspiracies.

10. A man may join a conspiracy by word or by deed. However, criminal responsibility for a conspiracy requires more than a merely passive attitude towards an existing conspiracy. One who commits an overt act with knowledge of the conspiracy is guilty. And one who tacitly consents to the object of a conspiracy and goes along with other conspirators, actually standing by while the others put the conspiracy into effect, is guilty though he intends to take no active part in the crime.

662. From a survey of cases, referred to above, the following position emerges:

> In reaching the stage of meeting of minds, two or more persons share information about doing an illegal act or a legal act by illegal means. This is the first stage where each is said to have knowledge of a plan for committing an illegal act or a legal act by illegal means. Among those sharing the information some or all may form an intention to do an illegal act or a legal act by illegal means. Those who do from the requisite intention would be parties to the agreement and would be conspirators but those who drop out cannot be roped in as collaborators on the basis of mere knowledge unless they commit acts or omissions from which a guilty common intention can be inferred. It is not necessary that all the conspirators should participate from the inception to the end of the conspiracy; some may join the conspiracy after the time when such intention was first entertained by any one of them and some others may quit from the conspiracy. All of them cannot but be treated as conspirators. Where in pursuance of the agreement the conspirators commit offences individually or adopt illegal means to do a legal act which has a nexus to the object of conspiracy, all of them will be liable for such offences even if some of them have not actively participated in the commission of those offences.

709. In the view I have taken in the light of the above discussions and on examining the said statements of confession and the evidence, both oral and documentary on record, it would be duplication to record here the same reasoning over again on the question of confirmation of conviction of appellants A-1, A-2, A-3, A-9, A-10, A-16 and A-18. Insofar as the conviction of any other appellant is concerned it would serve no practical purpose and will be only of academic interest and an exercise in futility. I, therefore, consider it appropriate to record my respectful agreement with the reasoning and conclusion arrived at by Thomas, J. in confirming the conviction of A-1, A-2, A-3, A-9, A-10, A-16 and A-18 for the aforementioned offences."

62. Their lordships of the Hon'ble Supreme Court in the case of ***K.R.Purushothaman vrs. State of Kerala,*** reported in ***(2005) 12 SCC 631,*** have again reiterated that conspiracy is an agreement between two or more persons for doing an illegal act or an act by illegal means. Unlawful agreement is a sine qua non for constituting offence under IPC and not an accomplishment.

63. Their lordships of the Hon'ble Supreme Court in the case of ***R.S.Nayak Vrs. A.R.Antulay and another,*** reported in ***(1986) 2 SCC 716,*** have held as under:

> "67. Cheating is defined in S. 415 of the IPC and the ingredients for that offence are :
>
> (i) there should be fraudulent or dishonest inducement of a person by deceiving him;
>
> (ii) (a) the person so induced should be intentionally induced to deliver any property to any person or to consent that any person shall retain any property, or
>
> (b) the person so induced should be intentionally induced to do or to omit to do anything which he would not do or omit if he were not so deceived; and
>
> (iii) in cases covered by the second part of (ii), the act or omission should be one which caused or is likely to cause damage or harm to the person induced in body, mind, reputation or property."

64. Their lordships of the Hon'ble Supreme Court in the case of ***Dalip Kaur and others vrs. Jagnar Singh and another,*** reported in ***(2009) 14 SCC 696,*** have held that fraudulent and dishonest intention must exist from the very inception when the promise or representation was made to prove charge under Section 420 IPC. It has been held as follows:

> "8. Sections 405 and 415 of the Indian Penal Code defining `criminal breach of trust' and `cheating' respectively read as under:
>
> "405 - Criminal breach of trust.-Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".
>
> "415. Cheating--Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to `cheat'."
>
> An offence of cheating would be constituted when the accused has fraudulent or dishonest intention at the time of making promise or representation. A pure and simple breach of contract does not constitute an offence of cheating.

10. The High Court, therefore, should have posed a question as to whether any act of inducement on the part of the appellant has been raised by the second respondent and whether the appellant had an intention to cheat him from the very inception. If the dispute between the parties was essentially a civil dispute resulting from a breach of contract on the part of the appellants by non-refunding the amount of advance the same would not constitute an offence of cheating. Similar is the legal position in respect of an offence of criminal breach of trust having regard to its definition contained in Section 405 of the Indian Penal Code."

65. Note No. 23 made by the Governor on dated 21.3.2015, reads as under:

"My Predecessor has elaborated in detail about the position of law well settled but did not express her opinion on the merits of the present case. However, the question to be seen is whether in the present case Shri Prem Kumar Dhumal is entitled for protection under section 197 CrPC."

66. The allegations as contained in the FIR No. 6 of 2014 dated 17.6.2014 and final report do not constitute offence of cheating under Section 420 IPC and criminal conspiracy under Section 120-B IPC and criminal misconduct under Section 13(2) of the Prevention of Corruption Act, 1988. Moreover, the decision to permit the withdrawal of retirement has been taken as per the Rules of Business of Government of Himachal Pradesh, 1971. There is a complete hierarchy provided therein, the manner in which the decisions are to be taken by the Government. Reliance has also been placed upon the two statements made by the Constables, but definitely improvements have been made by these Constables.

67. The allegations contained in the FIR No. 6 of 2014 dated 17.6.2014 and accusations made in the final report even if taken at their face value and accepted in their entirety, neither constitute criminal misconduct nor discloses guilty mind or dishonest intention. It is reiterated that it was purely an administrative decision taken strictly as per the laid down procedure.

68. It cannot also, as per the discussion made hereinabove, be said that the petitioners by any illegal means have obtained for themselves or for any other person any valuable thing or pecuniary advantage or abused their position as public servant by obtaining for themselves or any other person any valuable thing or pecuniary advantage or while holding office as public servant(s) obtained for them any valuable thing or pecuniary advantage without any public interest. The basic ingredients of Section 13(2) of the P.C. Act, 1988 are lacking in the FIR and the final report. The petitioners have not committed any criminal misconduct as per the bare perusal of the contents of FIR and the final report to bring it within the ambit of Section 13(2) of the P.C. Act, 1988. The petitioners have not deceived anyone to deliver any property to any person or to make, alter or destroy the whole or part of the valuable security or anything which was signed or sealed or which was capable of being converted into a valuable security dishonestly. In order to prove case under Section 420 IPC, it is required to be established not only that the accused has deceived someone, but also that the accused must induce a person who was cheated to deliver any property. There is also no agreement between the petitioners to do some illegal act.

69. Now, as far as the case of Sh. Prem Kumar Dhumal is concerned, the Governor has also declined the prosecution sanction under Section 197 of the Code of Criminal Procedure.

70. Prima-facie, there is no evidence against the petitioners and the prosecution will surely fail to prove the charge against the petitioners on the basis of FIR registered against them and in these circumstances, further continuation of proceedings will amount to abuse of the process of the Court.

71. Before parting with the judgment, it would be apt to add that the registration of criminal cases immediately after the change of guards does not augur well for the democracy. It may lead to vicious cycle. The public servant may be scared to take decisions apprehending their involvement at the later stage. The Court hastens to add that public servants must discharge their duties with utmost honesty and integrity. There has to be continuity in the governing process. The registration of FIR even in those cases which are purely civil/administrative in nature against the public servants would also demoralize them. The averment in the present case has also been made against the complainant. Needless to add that once the complaint is filed with the Police Station and the case is registered, the involvement of the informant/complaint is of secondary evidence. The Court would also like to add a caveat that prolonged bitter quarrel or campaign against each other may vitiate the political atmosphere and may result in impeding the engine of development/growth.

72. Accordingly, all the petitions are allowed. FIR No. 6/2014 dated 17.6.2014, titled as State of Himachal Pradesh Versus Prem Kumar Dhumal and others, registered at Police Station SV & ACB, Khalini, Shimla under Section 13(2) of the P.C. Act, 1988 and under Sections 420 and 120-B IPC and final report submitted under Section 173 of the Code of Criminal Procedure in criminal case No. 2-8/7 of 2015, along with the order dated 8.4.2015 of the learned Special Judge (Forests), Shimla are quashed and set aside.

****

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

Rattni Devi .....Appellant

Versus

Asha Rani and others ..... Respondents

FAO No.696 of 2008
Date of decision: 04.12.2015

Motor Vehicles Act, 1988- Section 166- Tribunal had held that deceased was earning Rs.2300/- per month- 1/3rd amount was to be deducted towards personal expenses- loss of dependency will be Rs. 1533 per month- deceased was aged 20 years at the time of accident and multiplier of 16 will be applicable- Tribunal had fallen in error in applying multiplier of '5', - thus claimant will be entitled to Rs.1533 x 12 x 16 = Rs.2,94,336/- along with interest @ 7.5 % per annum. (Para-5 to 8)

For the appellant: Mr.J.R. Poswal, Advocate.

For the respondents: Mr.Pankaj Sharma, Advocate, for respondent No.1.
Nemo for respondent No.2.
Mr.P.S. Chandel, Advocate, for respondent No.3.
Mr.K.S. Banyal, Senior Advocate, with Mr.Shivender Singh, 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 24th September 2008, passed by the Motor Accident Claims Tribunal, Bilaspur, (for short, "the Tribunal"), in MAC Petition No.25 of 2006, titled Anu Kumari and another vs. Asha Rani and others, whereby compensation to the tune of Rs.1,06,980/- and Rs.1,09,000/-, with interest at the rate of 9% per annum, came to be awarded in favour of claimants No.1 and 2, respectively, being the wife and mother of the deceased, (for short the impugned award).

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

3. Claimant No.2 i.e. mother of the deceased has preferred the instant appeal on the ground of adequacy of compensation, Claimant No.1 Anu Kumari (wife), who has been arrayed as proforma respondent in the instant appeal, has chosen not to assail the impugned award. .

4. Thus, the only question to be determined in this appeal is – Whether the amount awarded is adequate or otherwise?

5. I have heard the learned counsel for the parties and have gone through the record. The Tribunal, after referring to the evidence, has rightly held that the deceased was earning Rs.2300/- per month and after deducting 1/3rd towards the personal expenses of the deceased, loss of dependency was rightly taken to be Rs.1533/- per month.

6. However, the Tribunal has fallen in error in applying the multiplier of 5. Admittedly, the age of the deceased at the time of accident was 28 years. As per schedule 2 appended with the Motor Vehicles Act, 1988 and also as per the ratio 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,** multiplier of '16' is just and appropriate multiplier applicable in the instant case.

7. In view of the above discussion, it is held that the claimants lost source of dependency to the tune of Rs.1533 x 12 x 16 = Rs.2,94,336/-.

8. Accordingly, the claimants are awarded Rs.2,94,336/-, with interest at the rate of 7.5% per annum, from the date of the impugned award till realisation.

9. The enhanced amount be deposited by the insurer within a period of 8 weeks from today and on deposit, the amount be released in favour of the claimants forthwith, in equal shares, after proper identification.

10. The appeal stands disposed of accordingly.

****

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

Roshan Lal and others .....Appellants
Versus
Ashwani Kumar and another ..... Respondents

FAO No.10 of 2009
Date of decision: 04.12.2015

Motor Vehicles Act, 1988- Section 166- Tribunal had dismissed the petition on the ground that claimants had failed to prove that driver was driving the vehicle in a rash and negligent manner on the date of accident- challan was presented against the driver before the Court which resulted in the conviction of the driver- therefore, it can be safely concluded that driver was driving the vehicle in a rash and negligent manner- deceased was 60 years of the age at the time of accident and was earning Rs.5,000/- per month from Karyana shop- it can be said by guess work that even a labourer would be earning Rs.150 per day - therefore, income of the deceased can be taken as Rs.4,500/- per month- 1/3rd is to be deducted towards personal expenses- loss of dependency would be Rs.3,000/- per month- multiplier of '5' would be applicable and the claimant would be entitled for compensation of Rs. 3,000 x 12 x 5 = Rs.1,80,000/- along with interest @ 7.5% per annum. (Para-3 to 12)

Cases referred:
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

For the appellants: Mr.Karan Singh Kanwar, Advocate.
For the respondents: Mr.Rajnish K. Lal, Advocate, for respondent No.1.
Ms.Shilpa Sood, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 6th November 2008, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, (for short, "the Tribunal"), in MAC Petition No.123-MAC/2/2006, titled Roshan Lal and others vs. Ashwani Kumar and another, whereby the Claim Petition came to be dismissed, (for short the "impugned award").

2. While dismissing the claim petition, the main ground weighed with the Tribunal was that the Claimants had not proved that Ashwani Kumar had driven the offending vehicle rashly and negligently on the relevant date.

3. On the last date of hearing, it was pointed out that an FIR bearing No.254/2006 under Section 279 and 337 of the Indian Penal Code and Section 187 of the Motor Vehicles Act was registered in regard to the accident in question. Therefore, Mr.J.S. Guleria, learned Assistant Advocate General, was asked to verify and file a detailed report as to against whom the final report was prepared and presented before the court of competent jurisdiction.

4. Today, Mr.V.S. Chauhan, learned Additional Advocate General, stated that the challan was presented before the court of Judicial Magistrate against the driver of the offending vehicle, namely, Ashwani Kumar, and the trial has resulted into conviction of the said driver. He has also placed on record a copy of the judgment passed in the criminal case and also the copy of the FIR, made part of the file.

5. Thus, from the above, it can safely be concluded that the driver of the offending vehicle, namely, Ashwani Kumar, had driven the offending vehicle rashly and negligently on the relevant date.

6. Next question which arises for determination is – To which amount of compensation the claimants are entitled to and from whom?

7. Admittedly, the deceased, namely, Biru Ram, was unmarried and was brother of the claimants. It has been pleaded by the claimants that the deceased was living with them and they were dependant upon him. Thus, the claimants are entitled to the compensation.

8. The claimants in the claim petition have specifically pleaded that the deceased was 60 years at the time of death and was earning Rs.5,000/- per month from running a Karyana shop. Ms.Shilpa Sood, learned counsel for respondent No.2 argued that the deceased was not running a Karyana shop and thus, the claimants have failed to prove the income of the deceased.

9. In today's scenario, even a labourer is earning not less than Rs.150/- per day. Therefore, after exercising the guess work, I deem it proper to hold that the deceased was earning Rs.4,500/- per month at the time of his death and after deducting 1/3rd towards the personal expenses of the deceased, it is held that the claimants have lost source of dependency to the tune of Rs.3,000/- per month.

10. Coming to the applicability of multiplier, the age of the deceased, as pleaded, at the time of accident, was 60 years. As per schedule 2 appended with the Motor Vehicles Act, 1988 and also as per the ratio 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,** multiplier of '5' is just and appropriate multiplier applicable in the instant case.

11. In view of the above discussion, it is held that the claimants lost source of dependency to the tune of Rs.3,000 x 12 x 5 = Rs.1,80,000/-.

12. Accordingly, the claimants are awarded a sum of Rs.1,80,000/- as compensation, with interest at the rate of 7% per annum from the date of the impugned award till realisation.

13. The factum of insurance is not in dispute. Therefore, the insurer is saddled with the liability.

14. The insurer is directed to deposit the entire amount alongwith interest, as awarded, within a period of 8 weeks from today and on deposit, the amount be released in favour of the claimants in equal shares, after proper identification.

15. The appeal is allowed and the impugned award is set aside accordingly. The appeal stands disposed of.

****

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

Sh. Sandeep Thakur . .....Appellant.

Versus

Smt. Khema Sharma and others ...Respondents

FAO (MVA) No. 412 of 2009

Date of decision: 4th December, 2015

Motor Vehicles Act, 1988- Section 149- Claimant has not questioned the award on the ground of inadequacy of compensation- appeal was preferred on the ground that Tribunal had wrongly discharged the insurer- held, that concern of the claimant is to get compensation either from the owner or the insurer- the claimant having been awarded compensation cannot be stated to be an aggrieved person and only owner can prefer the appeal- appeal dismissed. (Para-3 to 5)

For the appellant: Mr.V.S. Chauhan, Advocate.

For the respondents: Mr. B.C. Verma, Advocate, for respondents No. 1 and 2.
Ms. Sheetal Kimta, Advocate, for respondents No. 3 and 4.
Mr.Aman Sood, Advocate, for respondent No.5.
Mr.Praneet Gupta, Advocate, for respondent No.6.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 28.2.2009, made by the Motor Accident Claims Tribunal Shimla, H.P. in MACC No. 22-S/2 of 2007, titled *Shri Sandeep Sharma versus Smt. Khema Sharma and others*, for short "the Tribunal", whereby compensation to the tune of Rs.2,62,250/- alongwith interest @ 9% per annum was awarded in favour of the claimant and owner came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Respondents have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The claimant has not questioned the impugned award on the ground of adequacy of compensation, thus it has attained finality so far it relates to him with regard to adequacy of compensation.

4. The learned counsel for the claimant has argued that the Tribunal has fallen in an error in determining issue No.3 and discharging the insurer and saddling the owner with the liability. I wonder how this argument can be advanced by the claimant whose concern is only to get compensation either from the owner or from the insurer. The claimant is not, in fact, aggrieved by the impugned award. The owner should have filed the appeal, if at all, he was aggrieved.

5. Having said so, the appeal merits dismissal, is accordingly dismissed and the impugned award is upheld.

6. Registry is directed to release the amount in favour of the claimant, strictly, as per the terms and conditions contained in the impugned award, through payee's cheque account.

7. Send down the record, forthwith, after placing a copy of this judgment.

****

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

Smt. Shakuntla Devi and another . .....Appellants.
Versus
M/s Lime Chemical Factory and others ...Respondents

FAO (MVA) No. 409 of 2009
Date of decision: 4th December, 2015

Motor Vehicles Act, 1988- Section 166- Claimant No.1 was aged 50 years and claimant No. 2 was aged 55 years at the time of accident- multiplier of '11' would be applicable- deceased was working as a labourer and his income can be taken as Rs.4500/- per month by guess work- 50% amount was to be deducted towards his personal expenses- thus, loss of dependency will be Rs. 2550/- per month and the claimants would be entitled to Rs.2,97,000/- (Rs.2250x12x11) with interest. (Para-7 and 8)

Cases referred:
Sarla Verma and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant: Mr. Deepak Kaushal, Advocate.
For the respondents: Mr. Karan Singh Kanwar, Advocate, for respondents No. 1 and 2.
Ms. Devyani Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 2.1.2009, made by the Motor Accident Claims Tribunal-II Sirmaur District at Nahan, H.P. in MAC Petition No. 34-N/2 of 2007, titled *Smt. Shakuntla Devi and another versus M/s Lilme chemical Factory and others*, for short "the Tribunal", whereby compensation to the tune of Rs.1,42,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Owner, insurer and insured have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Heard. Perused.

5. The amount awarded is meager for the following reasons.

6. The record do disclose that the claimant No.1 was 50 years of age and claimant No.2 was roughly 55 years of age at the time of accident which is not in dispute. In view of the 2nd Schedule of the Motor Vehicles Act, for short "the Act, read with ***Sarla***

Verma and others versus Delhi Transport Corporation and 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 was "11" which was rightly applied by the Tribunal.

7. It is pleaded by the claimants that the deceased was earning Rs.5000/- per month. It can be safely held that the income of the deceased was Rs.4500/- per month while treating him as a labourer and 50% was to be deducted towards his personal expenses, keeping in view ***Sarla Verma and Reshma Kumaris'*** cases supra. Thus, it can be safely held that the claimants have lost source of dependency to the tune of Rs.2250/- per month.

8. Having said so, the claimants are entitled to Rs.2250x12x11= Rs.2,97,000/-.

9. The insurer is directed to deposit the enhanced amount with 7.5% interest from today, within six weeks. On deposit, the same be released to the claimants, strictly, in terms of the conditions contained in the impugned award.

10. Accordingly, the appeal is disposed of. The impugned award is modified, as indicated above.

11. Send down the record, forthwith, after placing a copy of this judgment.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sh. Thakur Singh S/o Sh. Keshwanand & others ....Petitioners.

Versus

Sh. Prem Sharma S/o Sh. Deep Ram& others. ....Non-Petitioners.

CMPMO No. 334 of 2015
Decided on: 4.12.2015.

Constitution of India, 1950- Article 227- CMP was filed before the Court in the month of June, 2015 which has not been disposed of- hence, direction issued to dispose of the same on or before 4.1.2016 in accordance with law.

For the Petitioners : Mr. Inder Sharma, Advocate.
For the Non-Petitioners No. 1 to 3 : Mr. Anupinder Rohal, Advocate.
For non-petitioners No. 4. Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Heard. Petitioners have not challenged any specific order of learned Additional District Judge-I Mandi H.P. Campt at Karsog. The petitioners have sought relief that CMP No. 112 of 2015 titled Thakur Singh & others vs. Prem Sharma & others pending in Civil Appeal No. 64 of 2015 before the learned Additional District Judge-I Mandi Camp at Karsog H.P. be disposed of expeditiously. It is prima facie proved on record that CMP No. 112 of 2015 filed in the month of June 2015. It is well settled law that all the Courts are under legal obligation to dispose of miscellaneous applications expeditiously. In view of the above stated facts without touching merits of the case in any manner learned first appellate Court i.e. learned Additional District Judge-I Mandi H.P. Camp at Karsog is directed to

dispose of CMP No. 112 of 2015 filed in Civil Appeal No. 64 of 2015 on or before 4.1.2016 in accordance with law. CMPMO No. 334 of 2015 filed under Article 227 of the Constitution of India is disposed of. Pending applications if any also disposed of. Dasti copy.

****

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

Union of India and another. ...Appellants.

Versus

Er. Deep Chand Mehta. ...Respondent.

RSA No. 646 of 2005
Reserved on: 1.12.2015
Decided on: 4.12.2015

Code of Civil Procedure, 1908- Section 100- Appellants filed a suit for recovery of outstanding telephone bill in the sum of Rs. 94,939/- against the defendants pleading that defendants had not paid the telephone bills from November, 1995 to May, 1997 - defendants contested the suit on the plea that they had requested to disconnect the telephone connection through the registered letters dated 27.2.1995 and 16.11.1995 but no action was taken- hence, claim is not maintainable- trial Court dismissed the suit and First Appellate Court dismissed the appeal- in second regular appeal held, that in view of Section 7-B of Indian Telegraph Act, 1985 a dispute with respect to the records of call and payment of bills was referable to an Arbitrator and the jurisdiction of Civil Court was barred- further held, that once letters with request to disconnect the telephone connection were sent on the correct address, a presumption regarding their delivery arises under Section 27 of General Clauses Act - since, plaintiffs had not rebutted this presumption, therefore, no bill could have been raised- appeal dismissed. (Para-1 to 13)

Cases referred:

Makhani Devi Banka vs. Union of India, AIR 1981 Orissa 11

Govindbhai Premjibhai Chovatia vs. Chief General Manager, Gujarat Telecom Circle, Ahmedabad and others, AIR 1996 Gujarat 153

For the Appellants : Mr. Ashok Kumar, Asstt. Solicitor General of India with Mr. Angrez Kapoor, 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 Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 31.8.2005 rendered by the District Judge, Kinnaur Civil Division at Rampur Bushahr in Civil Appeal No. 13 of 2005.

2. "Key facts" necessary for the adjudication of this appeal are that appellants-plaintiffs (hereinafter referred to as the "plaintiffs" for convenience sake) filed a suit for recovery of Rs. 94,939/- against the respondent-defendants (hereinafter referred to as the "defendants" for convenience). According to the averments made in the plaint, telephone connection bearing No. 34160 was provided to the defendants at their request at Rampur

Bushahr. Defendants availed and used the telephone facility. However, they did not pay the telephone bills for the period from November, 1995 to May, 1997 amounting to Rs. 94,939/-. Necessary bills were issued but the same were not paid by the defendants.

3. Suit was contested by defendant No.1. According to the stand taken by defendant No.1, the business was closed well before November, 1995. The company sent letter dated 24.8.1995 through U.P.C. and registered letters dated 27.2.1995 and 16.11.1995 to the officials of plaintiffs at Rampur Bushahr whereby it was intimated to disconnect their telephone connection. However, no action was taken by the officials of the plaintiffs. Defendant No.2 has also filed written statement. According to him, he was simply in the employment of defendant No.1 from October, 1993 to March, 1995. Telephone was never installed by him.

4. Issues were framed by the Civil Judge (Junior Division), Rampur Bushahr on 13.4.2004. He dismissed the suit on 28.8.2004. Plaintiff filed an appeal before the District Judge, Rampur Bushahr against the judgment and decree dated 28.8.2004. He dismissed the same on 31.8.2005. Hence, the present appeal. It was admitted on the following substantial questions of law:

1. **Whether the courts below have travelled beyond the evidence and have based judgment on conjectures and surmises, thereby vitiating the judgments and decree of both the courts below?**
2. **Whether the both courts below have properly interpreted the section 7-B of Indian Telegraph Act, 1985 specially when there is no dispute concerning Telegraph line or apparatus or appliance as it was sent for recovery only thereby vitiating the judgment and decree of both the courts below?**
3. **Whether the courts below have properly decided the issue of jurisdiction and thereby vitiating the judgment and decree of both the courts below?**

5. Mr. Ashok Sharma, learned Assistant Solicitor General of India, on the basis of the substantial questions of law framed, has vehemently argued that the courts below have travelled beyond the evidence and section 7-B of the Indian Telegraph Act, 1985 was not attracted. He has lastly contended that the Civil Court had the jurisdiction to decide the *lis* between the parties.

6. Mr. G.D. Verma, learned Senior Advocate has supported the judgments and decrees passed by both the courts below.

7. Proprietor of defendant No.1 Champa Lal Jain has died during the pendency of the appeal and her name was deleted vide order dated 7.10.2009.

8. I have heard the learned counsel for the parties and have gone through the records carefully.

9. Since all the substantial questions of law are interconnected and interlinked the same are taken up together for determination to avoid repetition of discussion of evidence.

10. PW-1 Gian Dass has categorically admitted that letter Ex.DA dated 24.8.1995, registered letter Ex.DC dated 27.9.1995 and letter Ex.DE dated 16.11.1995 were sent by defendant No.1 to the Assistant Engineer, Telecommunication Department, Rampur Bushahr under U.P.C. Ex.PB dated 24.8.1995, postal receipt Ex.DD dated 27.9.1995 and

U.P.C. dated 16.11.1995. These were correctly addressed. Thus, it is presumed under section 27 of the General Clauses Act that the same were delivered to the addressee. According o letter Ex.DA, Ex.DC and Ex. DE, request for disconnecting telephone No.34160 provided to the company at its office at Chuhabag (Rampur Bushahr). It was incumbent upon the plaintiffs to prove that what action has been taken on these letters. PW-1 Gian Dass has admitted that these letters were not shown to him by the officials of the plaintiffs' Department Rampur Bushahr. The plaintiffs also could not prove that defendant No.2 was in the employment of defendant No.1. It has come in the statement of DW-1 N.K. Mittal and DW-2 Deep Chand that business premises of defendant No.1 were locked by the landlord. It is in these circumstances, defendant No.1 had sent communication to the plaintiffs to disconnect the telephone connection. The plaintiffs under rule 443 of the Indian Telegraph Rule, 1951 are required to disconnect the telephone connection forthwith if anyone fails to pay the bills. It was always open to the plaintiffs to disconnect the telephone connection between November, 1995 to May, 1997.

11. Learned Single Judge of the Orissa High Court in ***Smt. Makhani Devi Banka*** vs. ***Union of India***, AIR 1981 Orissa 11 has held that the telephone set provided to subscriber being apparatus within section 7-B (1) the claim is covered by that section and the civil court's jurisdiction to entertain it stands ousted. Learned Single Judge has held as under:

> **"[4] The legislative intention behind in-corporation of Section 7-B of the Act seems to be that disputes relating to telephone lines, appliances or apparatus between the subscriber and the telegraphs authority should be arbitrated upon and finality has been attached to the award. There is no dispute before me that the telephone set provided to the defendant as a subscriber is an apparatus within the meaning of Sub-section (1) of Section 7-B of the Act. Sub-section (1) is in wide terms and any dispute concerning the apparatus is covered by it. The bills in question related to the user of the apparatus. In the circumstances, I see no justification to accept the stand of learned Standing Counsel for the Union of- India that the dispute in question was not covered by Sub-section (1) of Section 7-B of the Act.**
>
> **[5] Sub-section (2) of Section 7-B clearly shows that the Civil Court's jurisdiction is ousted in regard to disputes covered by Sub-section (1). Since I have taken the view that the dispute in question is one which would come within the ambit of Section 7-B (1) of the Act, the Civil Court would have no jurisdiction to try the suit. The learned Subordinate Judge relied upon a single Judge decision of the Allahabad High Court in the case of Raghubar Dayal Manodia v. Union of India, AIR 1970 All 143. The Allahabad High Court was examining the matter under Article 226 of the Constitution and the observations made therein were with reference to the constitutional jurisdiction of the Court. I do not think, any support is available from that decision for disposing of the present dispute."**

12. The Division Bench of Gujarat High Court in ***Govindbhai Premjibhai Chovatia*** vs. ***Chief General Manager, Gujarat Telecom Circle, Ahmedabad and others***, AIR 1996 Gujarat 153 has held that dispute with Department of Telecommunications regarding recording of calls, remedy is before arbitrator as provided under section 7-B of Telegraph Act and the civil suit is barred. The Division Bench has held as under:

"[8] In our opinion, Sec. 7-B of the Act has to be widely construed. Section 7-B, like any arbitration clause, provides that if any dispute concerning any telegraph line, appliance or apparatus arises between the telegraph authority and the person for whose benefit the line, appliance or apparatus is or has been provided, the dispute would be determined by arbitration. A dispute with regard to the recording of the calls would necessarily fall within the ambit of Sec. 7-B of the said Act. In this connection we are fortified by the decisions of the different High Courts, which have held that the provisions of Sec. 7-B of the Act would be applicable. These decisions are reported at 1964 MPLJ 831; AIR 1982 Delhi, 111 (Union of India v. Usha Spinning & Weaving Mills Ltd.); AIR 1977 Delhi 132 (M/s. Om Oil & Oilseeds Exchange Ltd. v. Union of India); AIR 1977 Orissa 48 (Nityananda Sahu v. Post Master General Orissa, Bhubaneswar); AIR 1981 Orissa 11 (Smt. Makhani Devi Banka v. Union of India); AIR 1980 Kerala 201 (P. S. Anthappan v. The District Manager, Telephones).

[9] The learned single Judge was, therefore, right in coming to the conclusion that an adequate alternative remedy, under the Telegraphs Act by way of arbitration, was available. In fact, due to the existence of Sec. 7-B, even the jurisdiction of the Civil Courts under Sec. 9 of the Code of Civil Procedure, would be regarded as impliedly ousted. Therefore, even a Civil suit challenging the correctness of the bills so raised would not be maintainable in a Civil Court. It is no doubt true that the interim order had been issued requiring the appellant-petitioner to pay only 25% of the bill to be paid. It is pertinent to note that now it has been held by a catena of decisions that the demand which has been raised by such tax authorities providing public facilities should not be lightly interfered with or stayed. The Court should rarely, if ever, interfere with the payment of the bills which are raised. Of course, if there is dispute with regard to the amount which is being demanded that dispute has to be decided in accordance with law but merely because a dispute is raised should be no ground to grant the stay of the demand. The proper exercise of the jurisdiction would be to see that the payment of the bill as demanded is made and if the grievance is upheld in Arbitration the excess amount paid can be adjusted in future bills and if need arises or the Court so determines, even the interest on the excess amount paid can be awarded. The public Corporation do not and cannot continue to function and provide the requisite services without due payments being made. Even the direction of providing bank guarantee in place of payment of tax is of no assistance because public Corporations cannot run merely on bank guarantees."

13. The courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by both the courts below.

14. The substantial questions of law are answered accordingly.

15. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Vijay Kumar .....Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

CWP No.6825 of 2013.
Date of decision: 04.12.2015.

Constitution of India, 1950- Article 226- petitioner appeared in interview for the post of Jal Rakshak and was recommended for appointment- corrigendum was issued on the ground that there was clerical mistake in the date of birth of the petitioner- respondent No.4 who was next in the merit was ordered to be appointed in place of the petitioner- petitioner challenged the order by filing writ petition- held, that petitioner had not challenged the selection criteria- he has also not contested the fact regarding the mistake of his age- petitioner would get less marks than the respondent No. 4 on correction of date of birth- therefore, his appointment was rightly cancelled. (Para-10 and 11)

For the Petitioner : Mr.Onkar Jairath, Advocate.

For the Respondents : Mr.Virender Kumar Verma, Additional Advocate General with Mr.Vikram Thakur, Deputy Advocate General, for respondents No.1 and 2.

Mr.Sandeep Chauhan, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (Oral).

This writ petition has been filed for the grant of following substantive reliefs:-

"i) That a writ in the nature of Certiorari or any other appropriate writ, order or directions may kindly be issued quashing the Corrigendum dated 25.8.2012 (Annexure P-7) and Resolution dated 22.10.2012 (Annexure P-8).

ii) That a writ in the nature of Mandamus or any other appropriate writ, order or directions may kindly be issued directing the Respondents to allow the Petitioner to work as Jal Rakshak in Gram Panchayat Rajoul specifically Water Scheme Pheti Rajoul, Tehsil Jawali, Distt. Kangra (H.P.) in the interest of justice."

2. In 2006, the State of Himachal Pradesh issued a scheme thereby transferring the Rural Drinking Supply Schemes of the rural areas for their maintenance and operation to the Gram Panchayats. The object thereof was to strengthen the three tier Panchayati Raj Institutions.

3. In 2012, the revised guidelines for transfer of operation and maintenance of the Rural Drinking Supply Schemes, Panchayati Raj Institutions, came to be formulated, whereby the concerned Gram Panchayats were authorized by the Government to engage suitable persons (Jal Rakshak), who were paid a fixed honorarium of `750/- per month which was lateron revised to `1350/- per month.

4. On 15.03.2012, the State of Himachal Pradesh through the Irrigation and Public Health Department issued guidelines/instructions regarding the procedure to be adopted for selection of 'Jal Rakshak'. In terms of these instructions, the Assistant Engineer

(I&PH) of the concerned Sub Division was made the Chairman of the Selection Committee and the Pradhan of the concerned Gram Panchayat and Junior Engineer of the concerned Section (I&PH) had been made its members.

5. In pursuance to these guidelines, the respondents in June, 2012 initiated the process of filling up the posts of 'Jal Rakshak' in Gram Panchayat, Rajoul and issued a public notice. The petitioner alongwith other eligible candidates applied for the same and was called for interview. On 25.07.2012, the Selection Committee recommended the name of the petitioner and on the basis of such recommendations, the Gram Panchayat on 23.08.2012 passed resolution No.5 whereby it unanimously decided to offer the appointment to the petitioner.

6. However, on 25.08.2012, a corrigendum came to be issued by respondent No.2 whereby the services of the petitioner were ordered to be terminated on the ground that there was a clerical mistake in the date of birth of the petitioner which instead of 24.01.1971 had been recorded as 31.03.1982 and consequently respondent No.4 who was next in the merit was ordered to be appointed in place of the petitioner.

7. The petitioner has sought quashing of this corrigendum alongwith subsequent resolution passed by the Panchayat offering appointment to respondent No.4 on various grounds as taken in the memo of petition.

8. The official respondents have filed their reply to the petition wherein they have raised various preliminary objections and that apart it has been specifically averred that since the name of the petitioner had been wrongly recommended, the petitioner could not be permitted to take any advantage of the same. After correction of the date of birth and on the basis of the revised marks scored by all the candidates, it was found that the petitioner had got 77 marks, whereas, respondent No.4 had scored 79 marks and, therefore, being higher in merit was offered the appointment.

9. Respondent No.4 has filed separate reply justifying therein his appointment on the ground of his being higher in merit.

I have heard the learned counsel for the parties and have also gone through the records of the case.

10. At the outset, it may be observed that the petitioner has neither challenged the selection criteria nor contested the factual position regarding the mistake of his age. Bearing in mind these two important facts, it would be noticed that as per the criteria of selection, the candidates depending upon their age were to be awarded the following marks:-

1.0 Physical fitness:	**Marks**	**Maxi Marks**	**Total Marks**
1.1 Age		**Max Marks 15**	
18-19	10		
20-22	11		
23-25	12		
26-36	15		
37 to 39	14		
40 to 42	13		
43 to 45	12		
>45	9		

11. The initial age of the petitioner at the time of selection was recorded as 30 years, whereas, his actual age was 41 years. On the other hand, the age of respondent No.4 was 30 years and accordingly the petitioner got 13 marks as his age fell between 40 to 42 years, whereas, respondent No.4 was awarded 15 marks as he fell in the age group of 26-36 years.

12. Shri Onkar Jairath, learned counsel for the petitioner, has vehemently argued that respondent No.4 could not have been considered let alone be selected as he was not the resident of the concerned Panchayat. This contention is without force because the respondent No.4 has annexed copies of IRDP/BPL certificates issued by Gram Panchayat, Rajoul which clearly indicate and establish that respondent No.4 infact is a resident of the area falling under Gram Panchayat, Rajoul.

13. No other point urged or arises for consideration.

14. As a sequel of the aforesaid discussion, there is no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application (s), if any, also stands disposed of.

****

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

Gulshan Kumar .....Petitioner

Versus

State of H.P. .....Respondent.

Cr.M .P(M) No. 1481 of 2015
Decided on: 7th December, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 395, 307, 323, 324, 326 read with Section 34 Indian Penal Code-petitioner is facing trial for more than two years and is still in judicial custody- previous application for bail was rejected with the direction to the trial Court to conclude the trial on or before 30th September, 2015- the direction was not complied by the trial Court and in comments being called, the reason disclosed was that the defence Counsel had not agreed to the dates suggested by the trial Court- held, that petitioner is in custody for more than two years and though, he is a resident of Punjab State yet can be released on bail on imposing certain conditions- petition allowed. (Para-2 to 8)

For the petitioner: Mr. Jagdish Vats, Advocate.

For the respondent: Mr. D.S. Nainta and Mr. Virender Verma, Additional AGs with Mr. Pushpinder Jaswal, Dy. AG for the respondent.
ASI Rajinder Kumar, Police Station Palampur, District Kangra, H.P. present in person.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge. (Oral)

Heard.

2. Petitioner is an accused in FIR No.259/2012 registered under Sections 395, 307, 323, 324, 326 read with Section 34 of the Indian Penal Code in Police station,

Palampur District Kangra, H.P. He has been arrested in this case on 18.12.2012 along with his co-accused and is still in judicial custody. One of his co-accused Amit Kumar has been ordered to be released on bail by a Co-ordinate Bench of this Court. The accused-petitioner along with his co-accused Rajat and Deepak, are still in judicial custody.

3. An application Cr.M.P.(M) No.495 of 2015 filed by the accused-petitioner previously came to be listed before this Court on 19th May, 2015, when dismissed with the following observations:-

> (7) "True it is that the accused-petitioner is in judicial custody for a period over two years. The trial has now commenced and listed for recording remaining prosecution evidence on 04.07.2015. He being an outsider may abscond, if admitted on bail. Therefore, in the given facts and circumstances though this application deserves dismissal, however a direction to the trial Court to conclude the proceedings in the trial at the earliest, would serve the ends of justice.
>
> (8). The application is, therefore, dismissed. There shall be a direction to the trial Court to conclude the proceedings in the trial at the earliest, preferably by the quarter ending 30th September, 2015."

4. It is thus seen that the trial Court was directed to conclude the proceedings in the trial at the earliest, preferably by the quarter ending 30th September, 2015. Since the trial Court has failed to conclude the proceedings as directed, therefore, the comments of Learned Additional Sessions Judge have been called. The perusal of the comments now received reveals that the proceedings in the trial could not be completed due to rush of work and non- co-operation of learned counsel representing the accused who did not agree for listing of trial during the circuit of the Court at Palampur or Baijnath. Any how, the comments so furnished are not satisfactory as learned trial Judge should have expedited the proceedings in the trial at the earliest as directed. In the event of there being non-co-operation by the defence counsel or anyone else coercive method should have been adopted to conclude the proceedings. The complainant and two more witnesses namely Baldev Singh and Ravi Kumar were already examined on 19.5.2015 as recorded in the order on that day passed in Cr.MP.(M) No. 495 of 2015. Now as per the comments received only the witnesses from Sr. No.1 to 13 in the list of witnesses stands examined meaning thereby that after 19.5.2015 till date only 10 witnesses have been examined. Learned trial Court should have accelerated the proceedings in the trial as besides the accused, two more accused are still languishing in jail for the last three years in this case. Any how the proceedings in the trial be now completed and the same disposed of finally by the quarter ending 30.6.2016

5. Now coming to the question as to whether the accused-petitioner is entitled to be admitted on bail or not, no doubt the allegations against him and his co-accused are not only heinous but serious in nature because while his co-accused Amit Kumar allegedly strangulated the complainant with a rope, the accused-petitioner and his other co-accused had inflicted injuries on his person with sharp edged weapon. However, at this stage,the statements of the witnesses at Sr. No. 1 to 13 of the list of witnesses including that of complainant stand recorded and as the accused-petitioner is in judicial custody for a period about three years and the trial is likely to take some more time for its completion, it may not be in the interest of justice to confine him behind the bar any further well before if ultimately held guilty by the Trial Court on the completion of the trial . Above all he is an young man of 22 years of age having his wife and minor daughter to support. No doubt, he belongs to Tehsil Mukerian, District Hoshiarpur (Punjab),however, while admitting him on bail, suitable conditions qua restricting his movement and also to ensure his presence during the course of further proceedings in the trial can be imposed upon him.

6. The application is, therefore, allowed. Consequently the accused-petitioner is ordered to be admitted on bail subject to his furnishing personal bond in the sum of Rs.50,000/- (rupees Fifty thousand) with one surety in the like amount to the satisfaction of learned trial Judge. The accused-petitioner shall further abide by the following conditions:

that he shall:-

(a) make himself available for the purpose of trial on each and every date of hearing and in case prevented to do so due to any unforeseen circumstances shall seek exemption from appearance by filing appropriate application in the trial Court;

(b) not temper with the prosecution evidence and 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;

(d) not leave the territory of India without the prior permission of the Court.

(e) shall keep on reporting to the Station House Officer Police Station, Palampur once in a calender month to apprise the said Officer about his whereabouts during the pendency of trial.

7. It is clarified that if the petitioner misuses his liberty or violate any of the conditions imposed upon him, the investigating agency shall be free to move this Court for cancellation of the bail.

8. 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 this petition alone. The petition stands disposed of.

An authenticated copy of this order be sent to Additional Sessions Judge-III, Kangra at Dharamshala for future guidance and compliance. Copy ***dasti.***

****

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

Kapil Sharma .....Appellant
Versus
Babita Sharma .....Respondent

FAO(HMA) No. 625/2008
Reserved on: 4.12.2015
Decided on. 7.12.2015

Hindu Marriage Act, 1955- Section 13- Appellant sought dissolution of marriage on the grounds of cruelty and desertion alleging that respondent had been compelling him to hand over his entire salary to her and to live separately from his parents- he further alleged that respondent used to shut herself in a room to deny access to the appellant- respondent had also lodged false FIR under Section 498-A of IPC in which appellant was acquitted by the Court- respondent denied the allegations of the appellant and alleged that appellant and his family members use to harass her for bringing insufficient dowry- appellant left her in her

parental house in June, 2003 and did not come when she gave birth to still birth twins and even at their burial- trial Court dismissed the petition holding that the appellant had deserted the respondent- in appeal held, that allegations levelled by appellant against the respondent are sketchy and vague- Appellant had not even joined the respondent when twins were being buried despite information- mere request by the respondent to live separately from the parents of appellant will not amount to cruelty- further held, that appellant had not examined any of his family members or the neighbours to substantiate the allegations of cruelty levelled by him against the respondent- petition was rightly dismissed by the trial Court- appeal dismissed.(Para-15 to 20)

Cases referred:
Shobha Rani v. Madhukar Reddi, AIR 1988 SC 121
Samar Ghosh vs. Jaya Ghosh, (2007) 4 SCC 511
Manisha Tyagi vs. Deepak Kumar, 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi, (2010) 4 SCC 476

For the Appellant : Mr. Rahul Verma, vice Counsel.
For the Respondent : Mr. Balbir Singh, vice Counsel.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 20.10.2008 rendered by learned Additional District Judge, Fast Track Court, Chamba, District Chamba, Himachal Pradesh in HMA No. 20/08/07.

2. "Key facts" necessary for the adjudication of the present appeal are that the appellant-petitioner (hereinafter referred to as 'appellant" for convenience sake) filed a petition under Section 13 of the Hindu Marriage Act against the respondent for dissolution of marriage on the grounds of cruelty and desertion. Marriage between the parties was solemnised on 9.8.2002 according to the Hindu rites. Parties lived together as husband-wife. Respondent from the first day started compelling the appellant to handover entire salary to her and to live separately from the parents of appellant. Appellant refused to do. Respondent started insulting and mis-behaving with him. Respondent, in order to create panic, had locked herself in the room and did not open the same despite repeated requests. She told the appellant to leave her at her parents' house. A case under Section 498-A IPC was registered against the appellant and his family members for demanding a sum of `2.50 Lakh to purchase car. Complaint was filed after a period of one year. Appellant and his family members had to obtain anticipatory bail. Learned Chief Judicial Magistrate acquitted them on 25.11.2006. She has not allowed the appellant to perform sexual intercourse deliberately and intentionally just to cause mental torture to him. She remained indifferent towards him. Family members of the respondent did not inform him about the delivery. She used to pick up quarrels with him and his family members. Respondent is an M.A. and B.Ed., whereas appellant is simply a JBT Teacher. Father of the appellant was working as Peon, whereas, father of the respondent had retired as Superintendent from NHPC. She has deserted him without there being any reasonable cause for more than four years. He has not condoned the acts of cruelty and desertion committed by respondent.

3. Petition was contested by the respondent. She has not deserted the appellant. She has never treated the appellant with cruelty. Appellant and his family

members started harassing her for bringing insufficient dowry. She has been deprived of food and clothing. Appellant used to beat her and used filthy language. Appellant left her at Bus Stand Kiyani in June 2003 and threatened her to arrange for a sum of `2.50 Lakh from her parents. He wanted to purchase a car. Appellant never visited her at the time of delivery.

4. Issues were framed by the learned Additional District Judge on 6.12.2007. He dismissed the petition on 20.10.2008. Hence, this appeal.

5. Mr. Rahul Verma, Advocate, has vehemently argued that the acts of respondent have caused mental and physical cruelty to his client. She has deserted him without any reasonable cause.

6. Mr. Balbir Singh, Advocate, has supported judgment dated 20.10.2008.

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

8. Smt. Naramdeshwari PW-1 has proved the copy of FIR No. 50/04 dated 26.2.2004 under Sections 498-A and 506 IPC registered by Police Station Sadar, District Chamba, Himachal Pradesh.

9. According to HC Ramesh Kumar, PW-2 chargesheet was put up in the Court on 13.4.2004 on the basis of FIR No. 50/04 dated 26.2.2004.

10. Anil Kumar, Criminal Ahlmad PW-3 has proved statement of Babita Ext. PW-3/A and Jagdish Sharma, Ext. PW-3/B recorded in the Court of Chief Judicial Magistrate, Chamba in case titled State versus Kapil Sharma.

11. Appellant has appeared as PW-4. He has led his evidence by way of filing an affidavit Ext. PW-4/A. In his cross-examination he testified that respondent used to quarrel with him. He has further specifically admitted that he had left the respondent at her parents' house at Kiyani in June 2003. He also admitted that he has not met the respondent after June 2003 and did not meet her in the hospital. He has proved on record the copy of judgment dated 25.11.2006 rendered by Chief Judicial Magistrate, Chamba vide Ext. PA.

12. Respondent has appeared as RW-1. She has led her evidence by filing affidavit Ext. RW-1/A. She was living separately from the appellant for the last five years. She has denied the suggestion that she has treated the appellant with cruelty.

13. Jagdish RW-2 has led his evidence by filing affidavit Ext. RW-2/A. He has supported the version of RW-1.

14. Manoj Kumar RW-3 has led his evidence by filing affidavit Ext. RW-3/A. According to him, appellant left the respondent at Bus Stand Kiyani. Respondent gave birth to still twins. He has gone to the house of the appellant to inform about the delivery. However, neither the appellant nor any of his family members came to attend the burial.

15. The marriage between the parties was solemnised on 9.8.2002. They have remained together till June 2003. Allegations with respect to mental and physical cruelty levelled by appellant are vague and sketchy. It is the appellant who has left the respondent at her parents' place. He has never visited her again. He has not even gone to see his wife at the time of delivery. He has not even attended the burial of the twins though informed specifically by RW-3 Manoj Kumar. Case of the appellant was that the respondent used to misbehave with him and his family members. Appellant has not produced any of his family

members as witnesses in the case. Statement made by the appellant that the respondent used to misbehave with him and his family members is a self-serving statement. He has not even examined any neighbourer to substantiate the allegations made in the petition against the respondent. Appellant has also not produced any witness from neighbourhood to prove that respondent locked herself in the room and threatened to commit suicide. Mere request by the respondent to live separately from his parents will not amount to cruelty. It is true that the FIR was registered against appellant and his family member. They were acquitted on 25.11.2006 vide Ext. PA by the Chief Judicial Magistrate. Appellant has not led any evidence to prove that complaint filed against them was in any manner, false. Respondent, in her affidavit has categorically denied that false report was lodged against the members of the appellant's family. Allegations leveled by the appellant against respondent that she did not allow appellant to perform sexual intercourse, are false. However, fact of the matter is that the respondent gave birth to twins. They have lived together upto June 2003. Appellant can not be permitted to take advantage of his own wrongs. It is appellant who has deserted the respondent. Appellant has also failed to prove that the respondent after solemnisation of marriage has treated him with physical and mental cruelty.

16. Their Lordships of the Hon'ble Supreme Court in case **Shobha Rani v. Madhukar Reddi** reported in **AIR 1988 SC 121** have explained the term "cruelty" as under:

> **"4. Section 13(1)(i-a) uses the words "treated the petitioner with cruelty". The word "cruelty" has not been defined. Indeed it could not have been defined. It has been used in elation to human conduct or human behaviour. It is the conduct in relation to or in respect of matrimonial duties and obligations. It is a course of conduct of one which is adversely affecting the other. The cruelty may be mental or physical, intentional or unintentional. If it is physical the court will have no problem to determine it. It is a question of fact and degree. If it is mental the problem presents difficulty. First, the enquiry must begin as to the nature of the cruel treatment. Second, the impact of such treatment in the mind of the pouse. Whether it caused reasonable apprehension that it would be harmful or injurious to live with the other. Ultimately, it is a matter of inference to be drawn by taking into account the nature of the conduct and its effect on the complaining spouse. There may, however, be cases where the conduct complained of itself is bad enough and perse unlawful or illegal. Then the impact or the injurious effect on the other spouse need not be enquired into or considered. Insuch cases, the cruelty will be established if the conduct itself is proved or admitted.**
>
> **5. It will be necessary to bear in mind that there has been marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the Court should not search for standard in life. A set of facts stigmatised as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they**

attach importance. We, the judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties. It would be better if we keep aside our customs and manners. It would be also better if we less depend upon precedents. Because as Lord Denning said in Sheldon v. Sheldon, [1966] 2 All E.R. 257 (259) "the categories of cruelty are not closed." Each case may be different. We deal with the conduct of human beings who are not generally similar. Among the human beings there is no limit to the kind of conduct which may constitute cruelty. New type of cruelty may crop up in any case depending upon the human behaviour, capacity or incapability to tolerate the conduct complained of. Such is the wonderful/realm of cruelty."

17. Their Lordships of the Hon'ble Supreme Court in **Samar Ghosh vs. Jaya Ghosh** reported in **(2007) 4 SCC 511**, have enumerated some instances of human behaviour, which may be important in dealing with the cases of mental cruelty, as under:

"98. On proper analysis and scrutiny of the judgments of this Court and other Courts, we have come to the definite conclusion that there cannot be any comprehensive definition of the concept of 'mental cruelty' within which all kinds of cases of mental cruelty can be covered. No court in our considered view should even attempt to give a comprehensive definition of mental cruelty.

99. Human mind is extremely complex and human behaviour is equally complicated. Similarly human ingenuity has no bound, therefore, to assimilate the entire human behaviour in one definition is almost impossible. What is cruelty in one case may not amount to cruelty in other case. The concept of cruelty differs from person to person depending upon his upbringing, level of sensitivity, educational, family and cultural background, financial position, social status, customs, traditions, religious beliefs, human values and their value system.

100. Apart from this, the concept of mental cruelty cannot remain static; it is bound to change with the passage of time, impact of modern culture through print and electronic media and value system etc. etc. What may be mental cruelty now may not remain a mental cruelty after a passage of time or vice versa. There can never be any strait-jacket formula or fixed parameters for determining mental cruelty in matrimonial matters. The prudent and appropriate way to adjudicate the case would be to evaluate it on its peculiar facts and circumstances while taking aforementioned factors in consideration.

101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the

cases of 'mental cruelty'. The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive.

(i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.

(ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.

(iii) Mere coldness or lack of affection cannot amount to cruelty, frequent rudeness of language, petulance of manner, indifference and neglect may reach such a degree that it makes the married life for the other spouse absolutely intolerable.

(iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

(v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.

(vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger

or apprehension must be very grave, substantial and weighty.

(vii) Sustained reprehensible conduct, studied neglect, indifference or total departure from the normal standard of conjugal kindness causing injury to mental health or deriving sadistic pleasure can also amount to mental cruelty.

(viii) The conduct must be much more than jealousy, selfishness, possessiveness, which causes unhappiness and dissatisfaction and emotional upset may not be a ground for grant of divorce on the ground of mental cruelty.

(ix) Mere trivial irritations, quarrels, normal wear and tear of the married life which happens in day to day life would not be adequate for grant of divorce on the ground of mental cruelty.

(x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill-conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.

(xi) If a husband submits himself for an operation of sterilization without medical reasons and without the consent or knowledge of his wife and similarly if the wife undergoes

vasectomy or abortion without medical reason or without the consent or knowledge of her husband, such an act of the spouse may lead to mental cruelty.

(xii) Unilateral decision of refusal to have intercourse for considerable period without there being any physical incapacity or valid reason may amount to mental cruelty.

(xiii) Unilateral decision of either husband or wife after marriage not to have child from the marriage may amount to cruelty.

(xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty.

18. Their Lordships of the Hon'ble Supreme Court in **Manisha Tyagi vs. Deepak Kumar** reported in **2010(1) Divorce & Matrimonial Cases 451**, have explained the term 'cruelty' as under:

"24. This is no longer the required standard. Now it would be sufficient to show that the conduct of one of the spouses is so abnormal and below the accepted norm that the other spouse could not reasonable be expected to put up with it. The conduct is no longer required to be so atrociously abominable which would cause a reasonable apprehension that would be harmful or injurious to continue the cohabitation with the other spouse. Therefore, to establish cruelty it is not necessary that physical violence should be used. However, continued ill-treatment cessation of marital intercourse, studied neglect, indifference of one spouse to the other may lead to an inference of cruelty. However, in this case even with aforesaid standard both the Trial Court and the Appellate Court had accepted that the conduct of the wife did not amount to cruelty of such a nature to enable the husband to obtain a decree of divorce."

19. Their Lordships of the Hon'ble Supreme Court in **Ravi Kumar vs. Julumidevi** reported in (2010) 4 SCC 476, have explained the term 'cruelty' as under:

"19. It may be true that there is no definition of cruelty under the said Act. Actually such a definition is not possible. In matrimonial relationship, cruelty would obviously mean absence of mutual respect and understanding between the spouses which embitters the relationship and often leads to various outbursts of behaviour which can be termed as cruelty. Sometime cruelty in a matrimonial relationship may take the form of violence, sometime it may take a different form. At times, it ma be just an attitude or an approach. Silence in some situations may amount to cruelty.

20. Therefore, cruelty in matrimonial behaviour defies any definition and its categories can never be closed. Whether the husband is cruel to his wife or the wife is cruel to her husband has to be ascertained and judged by taking into account the entire facts and circumstances of the given case and not by any predetermined rigid formula. Cruelty in matrimonial case can be of infinite variety – it may be subtle or even brutal and may be by gestures and word. That possible explains why Lord Denning in Sheldon v. Sheldon held that categories of cruelty in matrimonial case are never closed.

21. This Court is reminded of what was said by Lord Reid in Gollins v. Gollins about judging cruelty in matrimonial cases. The pertinent observations are (AC p.660)

> **".. In matrimonial cases we are not concerned with the reasonable man as we are in cases of negligence. We are dealing with this man and this woman and the fewer a priori assumptions we make about them the better. In cruelty cases one can hardly ever even start with a presumption that the parties are reasonable people, because it is hard to imagine any cruelty case ever arising if both the spouses think and behave as reasonable people."**

22. " About the changing perception of cruelty in matrimonial cases, this Court observed in Shobha Rani v. Madhukar Reddi at AIR p. 123, para 5 of the report: (SCC p.108, para 5)

> **"5. It will be necessary to bear in mind that there has been (a) marked change in the life around us. In matrimonial duties and responsibilities in particular, we find a sea change. They are of varying degrees from house to house or person to person. Therefore, when a spouse makes complaint about the treatment of cruelty by the partner in life or relations, the court should not search for standard in life. A set of facts stigmatized as cruelty in one case may not be so in another case. The cruelty alleged may largely depend upon the type of life the parties are accustomed to or their economic and social conditions. It may also depend upon their culture and human values to which they attach importance. We, the Judges and lawyers, therefore, should not import our own notions of life. We may not go in parallel with them. There may be a generation gap between us and the parties."**

20. In view of the discussion and analysis made herein above, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

****

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

Renu Baljee & Ors. ...Petitioners/tenants.

Versus

Shiv Charan and others ...Respondents/landlords.

CMP No.18694 of 2014 & CMP No. 15463 of 2014 in
CR No.138 of 2014.
Reserved on: 17.11.2015.
Decided on: 07.12.2015

H.P. Urban Rent Control Act, 1987- Section 24- Rent Controller passed a decree for eviction which was affirmed by the Appellate Authority- tenant prayed for the stay of eviction order and the landlord prayed for awarding use and occupation charges- held, that the order of eviction can be stayed subject to the payment of the use and occupation charges by the tenant from the date of passing of order of eviction- area of the similar premises was 500 sq. feet and the amount was payable @ Rs.40250/- equivalent to Rs. 80.50 per sq. feet- area of the premises occupied by tenant is 5600 square feet- thus, amount of Rs.1,35,240/- would be reasonable qua the premises in occupation of the tenant- eviction stayed subject to the deposit of use and occupation charges by 15 days of every month.

Cases referred:

Atma Ram Properties (P) Ltd. Versus Federal Motors (P) Ltd., (2005) 1 SCC 705

State of Maharashtra & Anr. Versus Super Max International Private Limited & Ors., (2009) 9 SCC 772

For the petitioners: Mr. Ramakant Sharma, Sr. Advocate alongwith Basant Thakur, Advocate.

For the respondents No. 1 to 3 : Mr. Neeraj Gupta, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The landlords of premises nomenclatured as Baljees Restaurant, 26, The Mall, Shimla, instituted before the Rent Controller (4), Shimla a petition for eviction of the petitioners herein/tenants from the demised premises. On the pleadings of the parties at lis the learned Rent Controller formulated the hereinafter extracted issues for rendition of findings thereupon.

(i) Whether demised premises are required bonafide by the petitioners for rebuilding and reconstruction, which cannot be carried out without demised premises being vacated, as alleged? OPP.

(ii) Whether present petition is barred under Section 18 of the H.P. Urban Rent Control Act, 1987, as alleged? OPR.

(iii) Whether petitioners have not approached the Court with clean hands, if so its effect? OPR.

(iv) Whether petitioners are estopped from filing the present petition by their act conduct and acquiescence, as alleged? OPR.

(v) Whether present petition is not maintainable, as alleged? OPR.

(vi) Whether reconstruction of demise premises cannot be done by the petitioners in view of restriction imposed by State Government, as alleged? OPR.

(vii) Whether present petition is not properly verified, as alleged? OPR.

(viii) Whether the present petition is bad for non compliance of mandatory provision of law, as alleged? OPR.

(ix) Relief.

On an appraisal of evidence by it as stood adduced before it, it rendered a decree of eviction of the petitioners herein/tenants from the demised premises. The order of eviction of the petitioners herein/tenants from the demised premises as stood rendered by the Rent Controller (IV), Shimla stood assailed by the petitioner herein/tenants by preferment of an appeal therefrom before the Appellate Authority, IV, Shimla. The latter affirmed the order of eviction of the petitioners herein/tenants from the demised premises as stood rendered by the learned Rent Controller (IV), Shimla. The tenants/petitioners herein laid a legal onslaught to the concurrently rendered orders of their eviction from the demised premises by both the Rent Controller (4), Shimla and by the Appellate Authority, IV, Shimla by theirs instituting the instant petition before this Court bearing Civil Revision No.138 of 2014. At the stage contemporaneous to the institution by the petitioners herein/tenants of the instant Civil Revision an application bearing CMP No.15463 of 2014 stood also instituted by them wherein relief of operation of the impugned order of 2.6.2014 rendered by the Appellate Authority-IV, Shimla in Rent Appeal No.31-S/14 of 2014/2012 being stayed was asked for from this Court. On 20.10.2014, this Court was pleased to till further orders allow the relief claimed in CMP No.15463 of 2014 by the petitioners herein/tenants. However, during the pendency of the revision petition before this Court, the landlords/respondents herein also instituted in the Registry of this Court CMP No.18694 of 2014 canvassing therein relief of the petitioners herein/tenants being liable to pay to the former use and occupation charges qua the demised premises at the rate of Rs.25,50,000/- per mensem from the date of rendition of an order of their eviction therefrom by the learned Appellate Authority, IV, Shimla till the handing over of its actual, vacant and peaceful possession by the petitioners herein/tenant to the former.

2. The application was responded by the petitioners herein/tenants wherein it was canvassed qua the claim of use and occupation charges at the rate of Rs.25,50,000/- per mensem reared against them by the respondents herein/landlords in the petition at hand being exorbitant. An adjudication by this Court of the claim ventilated in CMP No. 18694 of 2014 by the respondents herein/landlords for use and occupation charges qua the demised premises from the petitioners herein/tenants being a pre condition for this Court making absolute its orders of 20.10.2014 whereby it temporarily stayed the operation of the impugned concurrent renditions of orders of eviction of the petitioners herein/tenants from the demised premises of both the learned Appellate Authority, IV, Shimla as well as of learned Rent Controller, IV, Shimla, gains succor from a judgment of the Hon'ble Apex Court reported in (2005) 1 SCC 705 titled as **Atma Ram Properties (P) Ltd. Versus Federal Motors (P) Ltd.**, the relevant paragraphs whereof are extracted herein-after:-

> "19. To sum up, our conclusions are:
>
> (1) while passing an order of stay under R. 5 of Or. 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would in its opinion reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and in so far as those proceedings are concerned. Such terms, needless to say, shall be reasonable;

(2) in case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in cl. (1) of Sec. 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree;

(3) the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date.

[20] In the case at hand, it has to be borne in mind that the tenant has been paying Rs. 371.90 p. rent of the premises since 1944. The value of real estate and rent rates have skyrocketed since that day. The premises are situated in the prime commercial locality in the heart of Delhi, the capital city. It was pointed out to the High Court that adjoining premises belonging to the same landlord admeasuring 2000 sq. ft. have been recently let out on rent at the rate of Rs. 3,50,000.00 per month. The Rent Control Tribunal was right in putting the tenant on term of payment of Rs. 15,000.00 per month as charges for use and occupation during the pendency of appeal. The Tribunal took extra care to see that the amount was retained in deposit with it until the appeal was decided so that the amount in deposit could be disbursed by the appellate Court consistently with the opinion formed by it at the end of the appeal. No fault can be found with the approach adopted by the Tribunal. The High Court has interfered with the impugned order of the Tribunal on an erroneous assumption that any direction for payment by the tenant to the landlord of any amount at any rate above the contractual rate of rent could not have been made. We cannot countenance the view taken by the High Court. We may place on record that it has not been the case of the tenant- respondent before us, nor was it in the High Court, that the amount of Rs. 15,000.00 assessed by the Rent Control Tribunal was unreasonable or grossly on the higher side."

3. The extraction aforesaid lends amplifying fortification to the inference aforesaid of this Court being enjoined to render an adjudication upon the claim ventilated in petition bearing No. CMP No.18694 of 2014 qua the entitlement of the respondents herein/landlords of use and occupation charges qua the demised premises from the petitioners herein/tenants as a pre condition for this Court making absolute its order of temporarily staying the operation of the impugned concurrent renditions of orders of eviction of the petitioners herein/tenants from the demised premises of both the learned Appellate Authority, IV, Shimla as well as of learned Rent Controller, IV, Shimla, especially when the inference aforesaid is also garnerable from the verdict of the Hon'ble Apex Court reported in **State of Maharashtra & Anr. Versus Super Max International Private Limited & Ors.,** (2009) 9 SCC 772. The inevitable ensuing effect of the afore extracted relevant paragraphs of the verdict of the Hon'ble Apex Court with a contemplation therein of the landlord of the demised premises being foisted with an indefeasible right to claim rendition of an adjudication by this Court on his apposite application for use and occupation charges from the tenant qua the demised premises as a pre condition for this Court making absolute its ad interim rendition staying the operation of the impugned concurrent renditions of orders of eviction of the petitioners herein/tenants from the demised premises of both the learned Appellate Authority, IV, Shimla as well as of learned Rent Controller, IV, Shimla, is also of the landlord being fastened with a concomitant right to seek a determination from this Court

of a quantification qua use and occupation charges payable by the tenants to him in departure from the contractual rate of rent defrayable qua the demised premises by the tenant to the landlord which rather remains intact or is effective only qua the period preceding the rendition of a decree of eviction on 7.3.2012 by the learned Rent Controller, IV, Shimla of the petitioners herein/tenants from the demised premises. Obviously, hereafter this Court is beset to solve the legal conundrum qua (a) the period wherefrom the entitlement of the landlord to claim use and occupation charges from the tenants qua the demised premises commences or arises (b) the parameters which are enjoined to be borne in mind by this Court in quantifying use and occupation charges defrayable by the tenants to the landlords qua the demised premises. The answer to its commencement or the stage when a right thereof accrues in favour of the landlords for theirs staking a claim for use and occupation charges from the tenants qua the demised premises stands purveyed by the rendition of the Hon'ble Apex Court in **Atma Ram (supra),** the relevant paragraph 19 stands extracted herein-after:-

> 19. (2) in case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in cl. (1) of Sec. 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree;
>
> (3) the doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date."

with an explicit mandate encapsulated therein of on the tenancy of the tenant in the demised premises facing termination on rendition of a decree of eviction against him besides with an express postulation therein of the tenant therein being then liable to pay use and occupation charges qua the demised premises to the landlord in departure from the contractual rent payable qua it renders the date of termination of tenancy of the tenant in the demised premises constituted by rendition of a decree of his eviction therefrom to be the apposite stage wherefrom the landlord is vested with an inherent right to stake a claim for use and occupation charges qua the demised premises from the tenant or for reiteration it earns a conclusion of the right of the landlord to stake a claim for use and occupation charges from the tenants/petitioners herein qua the demised premises standing aroused or standing sprouted on a rendition on 7.3.2012 by the Rent Controller (IV), Shimla of a decree of eviction of the tenants/petitioners herein from the demised premises. In aftermath when thereupon hence the tenancy of the tenant in the demised premises stood terminated for inviting an inference of thereat the right aforesaid inhering in the landlord standing commenced besides with an expostulation in the hereinabove relevant extracted paragraphs of the renditions of the Hon'ble Apex Court of the doctrine of merger carrying no legal consequence in postponing the date of termination of tenancy especially even when the rendition of a decree of eviction of the tenants from the demised premises by the Rent Controller is meted concurrence by the Appellate Authority gives sinewed leverage to an obvious inference of the landlords being foisted with a legal right to claim from the tenants/petitioners herein qua the demised premises use and occupation charges from the date of rendition of an order of their eviction therefrom by the Rent Controller, IV, Shimla on 7.3.2012. The aforesaid conclusion hence begets an answer to the date of commencement of or of the stage wherefrom this Court is legally encumbered to assess qua

the demised premises the use and occupation charges payable thereto by the tenants/petitioners herein to the landlords/respondents herein. In consequence, the espousal of the respondents herein/landlords of theirs having an inherent right standing ensued in their favour from the renditions of the Hon'ble Apex Court to claim use and occupation charges from the tenants/petitioners herein qua the demised premises from the date of rendition of an order of their eviction therefrom by the Appellate Authority in concurrence with the order of their eviction therefrom by the learned Rent Controller (IV), Shimla, stands dispelled. The concomitant legal effect thereof is of any quantification by this Court of use and occupation charges defrayable by the tenants/petitioners herein to the landlords qua the demised premises being enjoined to stand anvilled upon material denoting rent earned by premises adjoining the demised premises besides preponderantly such rent earned by alike premises adjoining the demised premises being in close contemporanity vis-à-vis the commencement of or the accrual of a right qua its defrayment to the landlords/ respondents herein by the tenants/petitioners herein qua the demised premises inasmuch as on 7.3.2012 whereat with the tenancy of the petitioners herein/tenants in the demised premises standing effacement by a rendition of a decree of their eviction therefrom by the learned Rent Controller, IV, Shimla a right hence accrued in favour of the respondents/landlords to claim from the petitioners herein/tenants use and occupation charges qua the demised premises.

4. While applying the principle of this Court being enjoined to only un-earth apposite material unfolding portrayals of rent fetched by premises adjoining the demised premises besides earning thereof preeminently being in contemporanity viz-a-viz the stage of termination of tenancy of the tenants/ petitioners herein in the demised premises which occurred on 7.3.2012 under a rendition of the learned Rent Controller, IV, Shimla, necessarily then (i) Lease deed comprised in Annexure R-1/A appended to the petition at hand disclosing its having stood executed besides registered with the competent registering authority on 30.7.2014 whereas the termination of tenancy of tenants in the demised premises occurred on 7.3.2012 wherefrom an indefeasible right of the landlords to claim use and occupation charges from the tenants qua the demised premises stood spurred constitutes it to be an inapposite parameter for borrowing or for reckoning there-from the value of the demised premises, for hence determining use and occupation charges payable qua the demised premises by the tenants/petitioners herein to the landlords/respondents herein. On the other hand, the material constituted in Annexure A-1 appended to CMP No.9910 of 2015 which is a lease deed qua commercial premises adjoining the demised commercial premises hence alike the latter premises though standing registration on 13.5.2008 hence prior to the termination of tenancy of the tenants in the demised premises which effect qua the demised premises stood sequelled on 7.3.2012 under a rendition of a decree of their eviction therefrom by the learned Rent Controller, IV, Shimla nonetheless when clause (4) thereof manifests a recital of rent qua it bearing a rate of Rs.40,250 from 1.5.2011 to 30.4.2014 obviously when the latter period also encompasses the rendition of the learned Rent Controller, IV, Shimla where-under tenancy of the petitioners herein/tenants in the demised premises stood terminated where from computation of use and occupation charges defrayable qua it by the petitioners herein/tenants to the landlords/respondents herein is to commence especially when a right thereof stood then aroused in favour of the landlords respondents herein rather constitutes the apt reckoner for computing the value of the demised premises besides would obviously aid this Court in determining use and occupation charges payable by the petitioners herein/tenants to the landlords/respondents herein qua the demised premises herein. While according reverence to Annexure A-1 appended to CMP No.9910 of 2015 it is imperative to bear in mind the factum of the covered area of the commercial premises adjoining the demised premises comprised in Annexure A-1 being 500 square feet whereas the area of the demised premises

as disclosed in Annexure P-1 at Page 198 is 5385 square feet. This Court hence is required to initially calculate the rent per square ft. payable under clause (a) of Annexure P-1 by the lessee therein to his lessor. Given the factum of the area recited in Annexure P-1 being 500 sqft. and with rent qua it payable by the lessee therein to his lessor being @ Rs.40250/- for a period encompassing termination of tenancy of the petitioner herein/tenant in the demised premises obviously the rate of rent per square feet payable by the lessee therein to his lessor is Rs.40250÷500 Sqft. = 80.50 per square feet. However, the rent aforesaid fetched by premises adjoining the demised premises cannot stand omnibusly applied by this Court in determining use and occupation charges qua the demised premises. For purveying assistance to this Court in its determining use and occupation charges qua the demised premises on its adopting Annexure A-1 as an apt parameter, the learned counsel for the contesting parties have relied upon a judgement reported in **Atma Ram supra** relevant paragraph 20 whereof is extracted hereinafter

> [20] In the case at hand, it has to be borne in mind that the tenant has been paying Rs. 371.90 p. rent of the premises since 1944. The value of real estate and rent rates have skyrocketed since that day. The premises are situated in the prime commercial locality in the heart of Delhi, the capital city. It was pointed out to the High Court that adjoining premises belonging to the same landlord admeasuring 2000 sq. ft. have been recently let out on rent at the rate of Rs. 3,50,000.00 per month. The Rent Control Tribunal was right in putting the tenant on term of payment of Rs. 15,000.00 per month as charges for use and occupation during the pendency of appeal. The Tribunal took extra care to see that the amount was retained in deposit with it until the appeal was decided so that the amount in deposit could be disbursed by the appellate Court consistently with the opinion formed by it at the end of the appeal. No fault can be found with the approach adopted by the Tribunal. The High Court has interfered with the impugned order of the Tribunal on an erroneous assumption that any direction for payment by the tenant to the landlord of any amount at any rate above the contractual rate of rent could not have been made. We cannot countenance the view taken by the High Court. We may place on record that it has not been the case of the tenant- respondent before us, nor was it in the High Court, that the amount of Rs. 15,000.00 assessed by the Rent Control Tribunal was unreasonable or grossly on the higher side."

as also upon a verdict of the Hon'ble Apex Court reported R.K.Bansal versus Jag Pravesh Sharma [2012 (2) RCR (Rent) 203, the relevant paragraph-4 stands extracted herein-after:-

> "4. The learned Single Judge of the High Court directed the Petitioner-tenant to pay Rs. 25,000/- per month with effect from 18th May, 2010 during the pendency of the Revision Petition noticing the fact that the suit property was situated in a prime commercial area of Delhi. The arrears were directed to be paid within a period of one month. The order of the High Court in the aforesaid petition is set out as under-
>
> RC. REV. 226/2010
>
> Today counsel for the Petitioner says that the Petitioner will pursue this petition on merits. In view of this, counsel for both the parties submit that revision petition can be fixed for final hearing on some actual date. Accordingly list this revision petition for final hearing in the category of 'After Notice Miscellaneous Matters' on 15th December, 2011.
>
> CM APPL 17100/201 Learned Senior Counsel for the Respondent-landlord says that as a condition for stay of execution of the impugned eviction order, if at all this Court is inclined to grant that relief the Petitioner-tenant is

> directed to pay charges for use and occupation of the tenanted premises at the present market rate keeping in view the decision of the Hon'ble Supreme Court in Atma Ram Properties (P) Ltd. v. Federal Motors Pvt. Ltd., 2005 1 SCC 705. He also says that the present day market rent of the two shops in question would be around Rs. 50,000/- per month. Counsel for the Petitioner-tenant while not disputing that he is not liable to pay charges for use and occupation over and above the agreed contractual rent says that the market rent of two shops would not be more than Rs. 10,000/- per month.
>
> Without going into detailed enquiry as to what would be the recent rent of the premises in question, which are stated to be in Qutab Road, a prime commercial area these days in Delhi, I direct the Petitioner to pay to the Respondent-landlord charges for use and occupation@ Rs. 25,000/- per month from the date of passing of the impugned eviction order till the disposal of this petition. This would be a condition of stay of dispossession of the Petitioner-tenant from the premises in question. The arrears shall be cleared within a month and from September, 2011 onwards the aforesaid amount shall be paid to the Respondent on or before 7th of each month. In case of default, the Petitioner shall become liable to be evicted forthwith. The amounts paid by the Petitioner shall be subject to the final outcome of the revision petition. This application stands disposed of accordingly."

as theirs constituting the apt parameters for guiding this Court in assessing use and occupation charges payable by the tenants to the landlord qua the demised premises. Given the verdict of the Hon'ble Apex Court in **Atma Ram supra** wherein qua commercial premises therein as is the demised premises herein with its carrying a covered area of 1000 square feet, the Hon'ble Apex Court while bearing in mind the factum of commercial premises adjoining it carrying a covered area of 2000 square feet and its earning a rent of Rs.3,50,000/- per month upheld the order of the Rent Control Tribunal assessing qua the demised premises therein use and occupation charges at the rate of Rs. 15,000/- per month. In other words, even when the rent earned by commercial premises adjoining the demised commercial premises therein with its carrying a covered an area of 2000 sq.ft was @ 3,50,000/- per mensem or hence when it earned rent @ Rs.175/- per square feet the Hon'ble Apex court upheld the order of the Rent Control Tribunal assessing qua the demised commercial premises therein use and occupation charges at Rs.15,000/- per mensem for a covered area of 1000 square feet or upheld the order of the Rent Control Tribunal assessing qua the demised commercial premises therein use and occupation charges @ Rs.15/- per square feet per mensem. Hence, the Hon'ble Apex Court while upholding the assessment by the learned Tribunal of use and occupation charges per square feet qua the demised commercial premises therein on the anvil of rent per square feet payable qua commercial premises adjoining it hence obviously also upheld the order of the learned Tribunal in its drastically reducing the rent fetched by the premises adjoining the demised commercial premises therein while computing use and occupation charges qua the demised commercial premises therein payable by the tenant therein to his landlord. Nonetheless an expostulation in the afore-referred verdict of the Hon'ble Apex Court of quantification of use and occupation charges qua the demised premises being both reasonable and fair apart therefrom any quantification thereof being neither excessive nor punitive is yet to be borne in mind by this Court especially when given the prime location of the demised commercial premises any fullest reliance thereupon may not be apt nor just as it would beget the consequence of this Court assessing qua the demised premises herein use and occupation charges payable qua it by the tenants to the landlords which are grossly disproportionate

besides a gross under valuation of the rent earning capacity of the demised commercial premises herein.

5. Both the aforesaid verdicts of the Hon'ble Apex Court stand relied upon by the landlord relied upon by the landlord for on their anvil his having a tenable right to foster a claim for quantification by this Court of use and occupation charges payable to him by the tenants / petitioners herein qua the demised premises. In the relevant paragraph of the rendition of the Hon'ble Apex Court, the Hon'ble Apex Court had assessed qua the demised premises therein use and occupation charges payable by the tenant to his landlord at the rate of Rs.25,000/- per mensem even when the landlord therein had staked a claim for use and occupation charges payable qua it to him by the tenant in the sum of Rs.50,000/- per mensem whereas the latter had agreed to pay use and occupation charges qua the demised premises to him quantified at Rs.10,000/- per mensem. A reading of the hereinabove extracted relevant apt paragraphs of the judgement of the Apex Court make a vivid disclosure of it having not embarked upon any detailed inquiry embedded upon any apposite material for it to conclude therein of the tenant therein being liable to pay to his landlord use and occupation charges qua the demised premises therein quantified at Rs.25,000/- per mensem. Even in the absence of any apposite material existing before the Hon'ble Apex Court it yet halved the use and occupation charges claimed qua the demised premises by the landlord from his tenant. Tritely with the judgement of the Hon'ble Apex Court reported in Atma Ram supra relevant paragraphs whereof stand extracted hereinabove having upheld the drastic reduction meted by the learned Tribunal vis.a.vis the rent earned by premises adjoining the demised premises therein in hence coming to quantify qua the demised premises therein use and occupation charges payable qua it by the tenant to his landlord yet the gross besides a drastic reduction meted by the learned Tribunal qua the rent earned by the premises adjoining the demised premises therein whereupon it computed use and occupation charges qua the demised premises therein may not aid this Court in quantifying use and occupation charges payable by the petitioners herein to the landlords qua the demised premises herein especially when the demised premises herein exist in a prime commercial locale of Shimla whereof use and occupation charges necessarily ought to bear a semblance of hence theirs both being fair, reasonable besides compatible to the commercial locale where the demised commercial premises exist. Even the computation by the Hon'ble Apex Court in its verdict reported in 2012 (2) RCR (Rent) 203, of use and occupation charges qua the demised premises therein being not hinged or harboured upon any apposite material for hence the quantification by the Hon'ble Apex Court therein of use and occupation charges payable by the tenant to his landlord qua the demised premises therein purveying inflexible guidance to this Court especially when for reasons meted hereinabove the arrival of the sum therein payable as use and occupation charges by the tenant therein to his landlord qua the demised premises therein was on its merely halving the claim reared by the landlord qua use and occupation charges from his tenant qua the demised premises therein. As a corollary even the quantification of use and occupation charges therein by the Hon'ble Apex court qua the demised premises therein when stood not embedded upon any tangible material before it for constituting any assessment therein of use and occupation charges by it qua the demised premises acquiring a sinewed ratio decidendi necessarily no inflexible guidance emanates therefrom for its adoption by this Court in assessing use and occupation charges payable by the tenants to the landlords qua the demised premises herein. In view of the aforestated parameters adopted by the Hon'ble Apex Court in its afore referred verdicts not purveying any rigid or inflexible formula for adoption by this Court in quantifying use and occupation charges payable qua the demised premises by the tenant/tenants to the landlord/landlords, this Court has to yet given the location of the demised premises herein in a prime commercial locale ensure its judicial determination of use and occupation charges qua it, being both reasonable as well as just besides in

commensuration to its commercial locale. Apart therefrom this Court has to bear in mind its judicial determination of use and occupation charges qua the demised premises being shorn off any semblance of it being either punitive or its being in gross disproportion viz.a.viz the contractual rent qua it. Even in the above exercise the gross distinctivity intra se the halving of by the Hon'ble Apex Court in its verdict rendered in 2012 (2) RCR (Rent) 203 of use and occupation charges from the one claimed by its landlord to the one determined payable qua the demised premises therein by the tenant therein to his landlord vis.a.vis. the drastic reduction as meted by the learned Tribunal inter se the rent fetched by premises adjoining the demised commercial premises therein in hence rendering a determination qua use and occupation charges payable by the tenant to his landlord qua the demised premises therein especially when hence its determination stood affirmed by the Hon'ble Apex Court in its judgement reported in Atma Ram (Supra) does only add to the difficulty of this Court in assessing a fair and just sum of money payable as use and occupation charges by the tenants to their landlords bereft of any element of any gross under valuation thereof or its being punitive. However, the difficulty can be over come in case this Court proceeds to adopt the golden rule of balancing both the above referred verdicts of the Hon'ble Apex Court. The balance would be struck in case less than halving of the rent enunciated in Annexure A-1 appended to CMP No.9910 of 2015 stands adopted as the formula for thereupon assessing use and occupation charges payable by the tenants to the landlords qua the demised premises herein especially when the adoption of the above formula would not beget any drastic reduction viz.a.viz the portrayals in Annexure A-1 with a quantification by this Court of use and occupation charges qua the demised premises. Naturally then a reduction of 70% from the rate of rent of Rs.80.50 per square feet payable qua premises adjoining the demised premises is both sagacious besides would be reasonable for adoption for assessing use and occupation charges qua the demised premises carrying a carpet area of 5600 square feet. On adoption of the aforesaid method/formula the use and occupation charges payable by the tenants to the landlords qua the demised premises stand assessed in a sum of Rs.1,35,240/- per mensem. Apart therefrom the aforesaid amount would not be punitive arising from its being grossly disproportionate to the contractual rate of rent qua the demised premises constituted in a sum of Rs. 14,908/-. On the other hand it would be a just as well as a reasonable determination of use and occupation charges payable qua the demised premises by the tenants to the landlords. The applications are disposed of in the following terms:-

w.e.f. 7.3.2012, i.e. the date of rendition of a decree of eviction by the Rent Controller, IV, Shimla of the tenants/petitioners herein from the demised premises, upto 31.12.2015 the tenants shall be liable to pay or deposit use and occupation charges qua the demised premises to the landlords in the sum of Rs.1,35,240/- per mensem. On the amount aforesaid standing deposited within one month in the Registry of this Court an FDR in the name of the Registrar General shall be drawn which shall be renewable after six months. However, its disbursement shall be subject to the final out come of the instant revision petition.

w.e.f. 1st January, 2016 the tenants shall continue to pay or deposit use and occupation charges qua the demised premises in the Registry of this Court comprised in a sum of Rs.1,35,240/- by the 15th day of every month. The aforesaid amount on standing deposited in the Registry of this Court an FDR in the name of the Registrar General shall be drawn which shall be renewable after six months. However, its disbursement shall be subject to the final outcome of the revision petition. While depositing the entire aforesaid sums the petitioners herein shall be entitled to claim adjustment qua contractual rate of rent if already paid qua the demised premises to the respondents herein/landlords.

In case the petitioners herein/tenants in the demised premises omit to comply with the hereinabove enumerated conditions then the ad-interim order of this Court temporarily staying the operation of the rendition of a decree of their eviction from the demised premises by the Appellate Authority-(IV), Shimla, shall stand automatically vacated and it shall be open to the respondents/landlords to forthwith launch proceedings in the competent Court for execution of the decree of eviction of the petitioners herein/tenants from the demised premises. However, in case the petitioner herein/tenants comply with the hereinabove imposed conditions, the ad-interim order of this Court temporarily staying the order of eviction of the tenants/petitioners herein from the demised premises shall become absolute.

****

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

Sh. Sonam Angroop .....Appellant.

Versus

Sh. Khub Ram and others. .....Respondents.

RSA No. 356 of 2004
Decided on: 7th December, 2015

Specific Relief Act, 1963- Section 38- Suit land was allotted as Nautor to 'R'- it was succeeded by his legal heirs on his death- legal heirs sold the suit land to the plaintiffs who were recorded owner in possession- the defendant started interfering in possession of the plaintiffs on which they filed a suit for permanent prohibitory injunction- defendant claimed that he is in possession of the suit land since 1952 and has become owner by way of adverse possession- suit was dismissed by the trial Court- additional issues were framed by the Appellate Court and the case was remanded to trial Court- trial Court discarded the plea of the adverse possession and decreed the suit for possession- appeal was dismissed by the Appellate Court- it was duly proved on record that land was allotted to 'R'- it was succeeded by his legal heirs on his death- legal heirs had sold the suit land to the plaintiff- this was duly recorded in the revenue record- as well the increase in the area of the suit land had occurred during the settlement operation- it is negligible and will not render the identity of the suit land doubtful- defendant has not led any evidence to prove that house was constructed by him in the year - he admitted that suit land is vacant on the spot- mere long possession is not equivalent to adverse possession- hence, Court had rightly negated the plea of adverse possession- appeal dismissed. (Para-15 to 28)

Cases referred:

State of Rajasthan versus Harphool Singh (Dead) through is LRs (2000) 5 SCC, 652
Karnataka Board of Wakf versus Government of India and others 2004(4) Scale, 856
Ashok Kumar versus Hardyal and others, 1995(1) Sim.L.C 79.
Inder Dass versus State of Himachal Pradesh 1995(1) S.L.J 699
Gajinder Singh and others versus Narotam Singh and others, 1996(1) S.L.J 428
Tilak Raj versus Bhagat Ram and another, 1997 (1) Sim.L.C. 281
Badri Prakash versus Krishan Gopal 2004(Suppl.) Current Law Journal (HP) 399
Om Parkash versus Kulbhushan and others, 2002(2) S.L.J. 1806

For the appellant: Mr. Raman Sethi, Advocate.
For the respondents: Mr. Ajay Kumar Dhiman, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Aggrieved by the judgment and decree dated 5.5.2004 passed by learned District Judge, Kullu in Civil Appeal No. 17/2004, the appellant (hereinafter referred to as the 'defendant') has filed the present appeal for quashing and setting aside the same.

2. The bone of contention in the present lis is a piece of land measuring 0-00-96 hectares bearing Khasra No. 1216, Khewat No. 115, Khatauni No. 146 situated in Phati Bari, Kothi Baragarh, Tehsil Manali, District Kullu as recorded in Misal Hakiyat for the year 2000-01 Ext. P-2/DW-1/D. The suit land was granted in 'Nautor' to one Sh. Ram Nath, as is apparent from the order of mutation dated 17.03.1985 Ext. DW-1/A. He died intastate and the suit land as such was inherited by his legal heirs Smt. Mohni Devi and Smt. Maya Devi, daughters, whereas Sh. Bhope Chand, son in equal shares. The mutation of inheritance No. 1128 was attested and sanctioned in their names, as is apparent from entries below remarks column in the Jamabandi for the year 1992-93, Ext. DW-1/E. The suit land was sold by aforesaid Mohni Devi, Maya Devi and Bhope Chand to the respondents (hereinafter referred to as the 'plaintiffs'). The plaintiffs came to be recorded as owners in possession of the suit land, as is apparent from the entries in the Misal Hakiyat for the year 2000-01 Ext. P-2/DW-1/D. Later on the defendant allegedly started causing interference in the suit land. He threatened the plaintiffs to take possession of the suit land forcibly and raise some construction thereon. They requested him to desist from such unlawful activities but of no avail, hence the suit for the decree of permanent prohibitory injunction restraining thereby the defendant from causing any interference over the suit land or taking possession thereof forcibly. In the alternative, a decree for possession of the suit land in the event of defendant succeeds in dispossessing the plaintiffs therefrom during the pendency of the suit, was also sought.

3. The defendant in the written statement has raised preliminary objections such as the suit is not maintainable, barred by limitation, plaintiffs are estopped from filing the suit, they have no locus standi to file and maintain the same and that they have not approached the Court with clean hands, hence not entitled to the relief of injunction discretionary in nature. Also that the suit is not properly valued for the purpose of jurisdiction. The suit land has not been properly identified and that the defendant being in open, peaceful and continuous possession of the suit land since 1952 has acquired title by way of adverse possession.

4. On merits, it is reiterated that the suit land has not been properly identified. It is denied that the plaintiffs are owners in possession thereof, however, it is admitted that the suit land though was granted as 'Nautor' to one Ram Nath, however, neither said Sh. Ram Nath nor his legal heirs ever occupied the same nor were competent to alienate or dispose of the same to any third person. It is also submitted that neither deceased Ram Nath nor his legal heirs and for that matter even the present plaintiffs had never cultivated the suit land. The same is stated to be in possession of the defendant.

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

1. Whether the plaintiffs are entitled for the relief of permanent prohibitory injunction as prayed for? OPP.

2. Whether the plaintiffs are enttield for the alternative relief of mandatory injunction as prayed for? OPP
3. Whether the plaintiffs are not in possession of the suit land, if so, its effect? OPD.
4. Whether the suit is time bar as alleged? OPD.
5. Whether the plaintiffs are estopped to file the present suit by their act, conduct and deed as alleged? OPD.
6. Whether the plaintiffs have no locus-standi to file the present suit and the suit is not maintainable as alleged? OPD.
7. Whether the suit is not properly valued for the purposes of court fee and jurisdiction as alleged? OPD.
8. Relief.

6. After holding full trial, the suit was dismissed. In appeal learned lower appellate Court has framed Issue No. 7-A and remanded the case to learned trial Court. The additional issue reads as follows:

7-A. If issue No. 1 is proved in affirmative whether the plaintiff in the alternative is entitled for the relief of possession, as alleged? OPP.

7. Learned trial Court also framed one more additional issue No. 7-B which reads as follow:

7-B. Whether the defendant became owner by way of adverse possession as alleged? OPD.

8. The parties were allowed to produce evidence and on completion of the record, learned trial Court while deciding issues No. 1, 2, 4, 7 and 7-B in negative had decided issue No. 3 in affirmative. Consequently, the plaintiffs were held to be in possession of the suit land and found to have been forcibly dispossessed from the suit land recently. Therefore, while discarding the plea of adverse possession raised by the defendant has decreed the suit for possession of the suit land while answering issue No. 7-A in favour of the plaintiffs.

9. The judgment and decree dated 22.12.2003 passed by learned trial in the suit, was further assailed before learned lower appellate Court and the appeal filed by the defendant has also been dismissed vide judgment and decree under challenge in the present appeal.

10. The legality and validity of the impugned judgment and decree has been questioned on the grounds inter-alia that the findings recorded by both Courts below are contrary to the entries in the revenue record qua the suit land. Also that there is no link evidence to show that it is the suit land alone which was granted in 'Nautor' to Sh. Ram Nath. On the other hand, the defendant has been held to be in possession of the suit land. Therefore, the plaintiffs have no right, title or interest thereon, as such, the suit should have been dismissed. The plea of adverse possession raised by the defendant is stated to be erroneously brushed aside. The suit could have not been decreed as the identification of the suit land is not at all proved. The suit land was not a part of the land granted in 'Nautor' by the State Government to deceased Ram Nath.

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

Whether on account of misappreciation of the pleadings, misreading and misconstruction of the oral as well as documentary evidence available on record, the findings recorded by both Courts below are erroneous and, as such, the judgment and decree impugned in this appeal being perverse and vitiated is not legally sustainable?

12. Learned counsel representing the defendant while taking this Court to the judgment and decree under challenge has strenuously contended that when as per the findings recorded by learned trial Court it was not possible to ascertain as to which of the party is in possession of the suit land, decree for possession could have not been passed in favour of the plaintiffs. Also that the identification of the suit land is not at all established. The increase in its area also remained unexplained. Though, the plaintiffs have denied the existence of four billo trees and one 'Aroo' (apricot) tree over the suit land, however, the suggestion given to defendant in his cross-examination that such trees have not been planted over the suit land and rather grown up there, belies their stand that no such trees were in existence over the suit land. Therefore, according to learned counsel, in view of self-contradictory and unreliable evidence produced by the plaintiffs, no decree could have been passed. On the strength of ratio of the judgment of the Hon'ble Supreme Court in ***State of Rajasthan*** versus ***Harphool Singh (Dead) through is LRs (2000) 5 SCC, 652***, it has been urged that the High Court in Regular Second Appeal can interfere with the concurrent findings also, in case the evidence available on record has been mis-interpreted and mis-understood by both Courts below.

13. On the other hand, learned counsel representing the plaintiffs has strenuously contended that both Courts below while appreciating the evidence available on record in its right perspective have rightly decreed the suit and the concurrent findings so recorded cannot be reversed in second appeal.

14. The aforesaid substantial question of law arises for determination in the present lis or not has to be seen in the light of the evidence available on record.

15. Now, if coming to the law laid down by the Apex Court in ***Harphool Singh's*** case supra, there can't be any quarrel qua the same for the reason that High Court in Regular Second Appeal can always interfere with the concurrent findings recorded by both Courts below on misconstruction and misreading of the evidence available on record.

16. The present, however, is not a case where the Courts below can be said to have mis-appreciated or misconstrued the evidence available on record for the reason that as per the case of the defendant himself, suit land measuring 0-2-0 bigha bearing Khasra No. 960(old) was granted 'Nautor' by the State Government to deceased Ram Nath. He has himself produced on record copy of Jamabandi for the year 1987-88, Ext. DW-1/A. As per his own case, said Sh. Ram Nath died and he was succeeded by his daughters and son. The mutation of inheritance No. 1128, as is apparent from the entries below remarks column of Ext. DW-1/E was attested and sanctioned in their favour, therefore, they became owners in possession of the suit land. Further entries below remarks column of Ext. DW-1/E reveal that aforesaid legal heirs of deceased Ram Nath had sold the land further to S/Sh. Khub Ram and Ludar Chand (plaintiffs herein) and mutation No. 1256 was attested and sanctioned in their favour on 31.12.1998. As per the entries in Misal Hakiyat Bandobast Jadeed for the year 2000-01 Ext. P-2/DW-1/D during the settlement, the old Khasra No. 960 of the suit land was allotted new Khasra number 1216 and while under the old Khasra number its area was in biswas i.e. two biswas, under the new Khasra number it has been reflected in hectares. Therefore, when land measuring 2 biswas under old Khasra number

960 was allotted as 'Nautor' to deceased Ram Nath and this Khasra number during settlement was denoted by new Khasra number 1216, it cannot be said by any stretch of imagination from the evidence on record that the identity of the suit land has not been established. True it is that area of the suit land is increased few biswansi i.e. 08 biswansi. Such increase has resulted on account of settlement operation carried out in the area where the suit land is situated. Otherwise also, the increase being in biswansi is negligible and the same not render the identity of the suit land doubtful, particularly when the Misal Hakiyat Bandobast Jadid produced by the defendant himself reveals that the old Khasra Number of the suit land i.e. 960 was denoted by new Khasra No. 1216. Therefore, the identity of the suit land is fully established and on this score, the defendant has failed to make out any case seeking intervention of this Court in the present appeal.

17. Now, if coming to the plea of adverse possession raised by the defendant in written statement, before coming to the evidence qua this aspect of the matter he produced it is deemed appropriate to discuss here as to under what circumstances the plea of adverse possession can be said to have been proved in legal parlance. The apex Court in ***Harphool Singh's*** case supra has held that concrete proof of open, hostile and continuous possession is required in order to substantiate a claim of perfection of title by adverse possession. The relevant portion of this judgment is reproduced as under:

> "When the property was a vacant land before the alleged construction was put up, to show open and hostile possession which could alone in law constitute possession adverse to the State, in this case, some concrete details of the nature of occupation with proper proof thereof would be absolutely necessary and mere vague assertions cannot by themselves be a substitute for such concrete proof required of open and hostile possession. Even if the plaintiff's allegations and claims, as projected in the plaint, are accepted in toto, the period of so-called adverse possession would fall short by 5 years of the required period. There is no scrap of proper or concrete material to prove any such possession of the plaintiff's father nor was there any specific finding supported by any evidenced, in this regard."

18. The apex Court in ***Karnataka Board of Wakf*** versus ***Government of India and others 2004(4) Scale, 856*** has further held as under:

> "10. Now we will turn to the aspect of adverse possession in the context of the present case. Appellants averred that the plea of the respondent based on title of the suit property and the plea of adverse possession area mutually exclusive. Thus findings of the High Court that the title of Government of India over the suit property by way of adverse possession is assailed.
>
> 11. In the eye of law, an owner would be deemed to be in possession of a property so long as there is no intrusion. Non-use of the property by the owner even for a long time won't affect his title. But the position will be altered when another person take possession of the property and asserts a right over it. Adverse possession is a hostile possession by clearly asserting hostile title in denial of the title of true owner. It is a well-settled principle that a party claiming adverse possession must prove that his possession is 'nec vi, nec clam, nec precario', that is, peaceful, open and adequate in continuity, in publicity and in extent to show that their possession is adverse to the true owner. It must start with a wrongful disposition of the rightful owners and be actual, visible, exclusive, hostile and continued over the statutory period. (see: S.M. Karim v. Bibi Sakinal AIR 1964 SC 1254, Parsinni v. Sukhi (1993) 4 SCC 375 and D.N. Venkatarayappa v. State of

Karnataka (1997) 7 SCC 567). Physical fact of exclusive possession and the animus possidendi to hold as owner in exclusion to the actual owner are the most important factors that are to be accounted in cases of this nature. Plea of adverse possession is not a pure question of law but a blended one of fact and law. Therefore, a person who claims adverse possession should show (a) on what date he came into possession, (b) what was the nature of his possession, (c) whether the factum of possession was known to the other party, (d) how long his possession was open and undisturbed. A person pleading adverse possession has no equities in his favour. Since he is trying to defeat the rights of true owner, it is for him to clearly plead and establish all facts necessary to establish his adverse possession."

19. Our own High Court has also held so in ***Ashok Kumar*** versus ***Hardyal and others, 1995(1) Sim.L.C 79***. The relevant portion of this judgment is also re-produced as under:

"Needless to say, adverse possession should have the characteristic of adequacy, continuity and exclusiveness. There is again no dispute to the proposition that the onus to establish these characteristics is on the person claiming adverse possession. In order to appreciate the evidence in this particular behalf, the entire evidence brought on record has to be scrutinized inasmuch as, at this stage of trial, the onus of proving such an issue looses all significance and the real controversy between the parties has to be determined on the basis of the entire evidence on record."

20. Similar is the ratio of the judgment of our own High Court in ***Inder Dass*** versus ***State of Himachal Pradesh 1995(1) S.L.J 699***. The relevant portion of this judgment is re-produced as under:

"The elements which convert the peaceful possession into adverse possession are that it is actual, open, notorious, exclusive and continuous for a period of twelve years in case of private property and for a period of thirty years in the case of Government property."

21. Our own High Court in ***Gajinder Singh and others*** versus ***Narotam Singh and others, 1996(1) S.L.J 428*** has again held that in order to prove the plea of adverse possession, the possession must be peaceful, open and continuous and also required to be adequate in continuity and in publicity. Additionally, such possession must be actual, visible, exclusive, hostile and continuous for over the statutory period. It has also been held in this judgment that in order to succeed in the plea so raised, the party is required to prove as to on what date, he/she came into possession and what was the period of such adverse possession. The relevant portion of this judgment is also re-produced as under:

"There is no dispute to the proportion that adverse possession is that possession which is peaceful, open and continuous and this possession is required to be adequate in continuity and in publicity. Not only that, it must be actual, visible, exclusive, hostile and continuous for over the statutory period. The hostile character of the possession can be inferred by the animus of the person setting up adverse possession. Before a party can succeed in establishing his title on the basis of adverse possession, he must show on what day he came into possession and what was the period of such adverse possession. Thus there must be clear assertion of hostile title. This possession must be to the knowledge of the owner."

22. Mere long possession is not enough to prove the plea of adverse possession. It is held so by our own High Court in ***Tilak Raj*** versus ***Bhagat Ram and another, 1997 (1) Sim.L.C. 281***.

23. In another judgment, ***Badri Prakash*** versus ***Krishan Gopal 2004(Suppl.) Current Law Journal (HP) 399***, this Court has again held as under:

> "Howsoever long may have been the possession unless overt acts, with hostile animus are also simultaneously established, mere long possession by itself does not establish adverse possession. A person claiming adverse possession, a litigant like defendant against its real/true owner, he has to establish it beyond any shadow of doubt, because there is no right, much less equity in his favour."

24. Similar is the ratio of the judgment in ***Om Parkash*** versus ***Kulbhushan and others, 2002(2) S.L.J. 1806*** as in this case the statement of the defendant that he is in possession for more than 31 years has been held to be absolutely meaningless because as per the ratio of the judgment there must be specific point of time from where limitation for calculation of the period prescribed for adverse possession starts. Not only this, the party raising the plea of adverse possession has also to show the overt acts committed by him holding out himself to be owner of the property in question to the knowledge and exclusion to the true owner.

25. Now, if coming to the defendant's case in the preliminary objections, his stand is that he is in open and continuous possession over the suit land since the year 1952. Now, if coming to the evidence available on record, though he is in possession of the suit land since the year 1952, however, he has constructed the house thereon in the year 1975. There is no evidence that house has been constructed by him over the suit land in the year 1975. True it is that in the Jamabandi Ext. DW-1/A and also copy of register Ext. DW-1/B (sic.), the suit land has been recorded as 'Gair Mumkin Abadi', however, as per Misal Hakiyat Bandobast Jadid for the year 2000-01 the same has been recorded as 'Banjar Kadim'. The defendant also admits that the suit land is vacant on the spot. He has not stated anything that he has constructed house thereon. Therefore, even if he is in possession of the suit land since the year 1952, the same cannot be said to be adverse as he has miserably failed to prove that from what point of time, the limitation for calculation of the period prescribed for adverse possession starts. Not only this, the party raising the plea of adverse possession has also to prove the overt acts attributed to him holding him to be owner of the property in question openly and in exclusion of the true owners. Mere assertions in the written statement that he is in open, peaceful and continuous possession of the suit land since the year 1952 and while in the witness box that though he is in possession of the suit land right from the year 1952, however, constructed a house thereon in the year 1975 are not sufficient to prove the plea of adverse possession.

26. If coming to the statement of DW-2, as per his version, the defendant has recently stacked stones over the suit land and pegging his cattle over the land in question for the last 25 years. This is not the case of the defendant that he has stacked the stones or has been pegging his cattle in the suit land. Above all, DW-2 seems to have no knowledge about the location of the suit land and he has deposed about own land of the defendant. This alone is the evidence produced by the defendant, which in my opinion, is not sufficient to prove the plea of adverse possession. True it is that he has been held to be in possession of the suit land, however, the findings so recorded cannot be relied upon to arrive at a conclusion that he has acquired title in the suit land by way of adverse possession.

27. On the other hand, the evidence available on record reveals that he tried to take forcible possession of the suit land near and around the institution of the suit and as such, the plaintiffs' case is nearer to the factual position. Therefore, both Courts below have not committed any illegality or irregularity while arriving at a conclusion that the defendant has failed to prove the plea of he having acquired title over the suit land by way of adverse possession with the help of cogent and reliable evidence. Since he has no right, title or interest in the suit land and has illegally dispossessed the plaintiffs therefrom, therefore, the decree of possession of the suit land has rightly been passed in favour of the plaintiffs and against the defendant. Substantial question of law is accordingly answered.

28. In view of what has been said hereinabove, no legal question what to speak of substantial question of law arise for determination in the present appeal. Consequently, the judgment and decree under challenge is affirmed and the appeal dismissed, however, with no orders so as to costs.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE P.S.RANA, J.

State of H.P. .....Appellant.
Versus
Ranjit Singh & another .....Respondents.

Cr.M.P.(M) No. 1230 of 2015. And
Cr. Appeal No.522 of 2015.
Decided on: December 07, 2015.

N.D.P.S. Act, 1985- Section 20 and 29- Accused were found in possession of 1.537 kg. and 1.501 kg. of charas- PW-1 stated that person carrying rukka did not return with the case file- however, PW-8 stated that a person carrying rukka returned with the case file- PW-1 stated that case property was packed and sealed before sending rukka to the Police Station- PW-8 stated that case property was sealed after the return of the case file – there are major contradictions regarding the place where accused were apprehended- the manner in which accused were intercepted and search, sealing and sampling procedure were completed at the spot- held, that accused were rightly acquitted by the trial Court- appeal dismissed.

(Para-7 to 9)

For the appellant: Mr. V.S.Chauhan, Addl. AG with Mr. Neeraj K. Sharma, Dy. AG.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Cr.M.P.(M) No. 1230 of 2015.

Leave to appeal is granted. The application is disposed of. The appeal be registered.

Cr. Appeal No. 522 of 2015.

This appeal has been instituted at the instance of the State against the judgment dated 5.5.2015, rendered by the learned Special Judge, Kullu, H.P. in Sessions

Trial No. 114 of 2013 (286 of 2013), whereby the respondents-accused were charged with and tried for offences punishable under Sections 20 and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act) and under Sections 181 and 196 of the M.V.Act. Respondent-accused Govind was acquitted of the offence under Section 20 of the ND & PS Act, 1985. Accused Ranjit Singh, who was already declared as Proclaimed Offender, it was ordered that if he was apprehended, the trial against him would commence. The case property was ordered to be retained in the safe custody of the Police Station Sadar, Kullu.

2. The case of the prosecution, in a nut shell, is that on 13.4.2013, the police party headed by Sh. Raman Kumar Meena, IPS (Probationer), officiating as SHO, PS Sadar, Distt. Kullu, had laid Naka at Chilla Mod. PSI Sunil, PSI Ankur Sharma, ASI Mohan Lal and Const. Ramesh were the other members of the Naka party. At about 8:20 PM, a motor cycle bearing number HP-33A-6859 came from Manikaran side. It was signaled to stop. Two persons were occupying the motorcycle. During search of bag of accused Ranjit Singh, one taped packet containing charas wrapped in plastic wrappers was found. It weighed 1.537 kg. The recovered stuff alongwith wrappers was put into the same bag. It was sealed with cloth parcel sealed with six seals of impression "T". The carry bag of accused Govind was also searched and three taped packets, two of them were containing chocolate shaped and third one with ball shaped charas. It weighed 1.501 kg. The sealing proceedings were completed on the spot. The I.O. prepared rukka and sent to the Police Station Sadar through PSI Ankur Sharma for registration of FIR. On the basis of the rukka, FIR was registered. The case property was deposited with MHC, Police Station, Sadar, Distt. Kullu. He sent the same to FSL, Junga, for chemical examination. The investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 8 witnesses to prove its case. The accused were also examined under Section 313 Cr.P.C to which they pleaded not guilty. The accused have also examined DW-1 Moti Ram, Up-Pradhan of Gram Panchayat Punthal in their defence. The learned Trial Court acquitted the accused Govind on 5.5.2015. Hence, the present appeal.

4. Mr. V.S.Chauhan, learned Addl. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused.

5. We have gone through the impugned judgment and records of the case carefully.

6. The case of the prosecution is that at about 8:30 PM the accused were intercepted by the police when they were coming towards Bhuntar from Manikaran side. Their bags were searched. It contained charas. The search, sampling and sealing proceedings were completed on the spot. Rukka was sent to the Police Station, on the basis of which FIR was registered.

7. According to the statement of PW-8 I.O. Raman Kumar Meena, the police party left the Police Station, Sadar, at 2:45 PM. They went to Akhara bazaar and then to Dhalpur College. After staying for about three hours in Dhalpur College area, the police party went to Gammon Bridge and remained there for one hour. They conducted traffic checking at Dhalpur as well as Gammon Bridge area. PW-1 PSI Ankur Sharma has testified that the police party has left the Police Station at 7:30 PM. They went straight to Chilla mod. No traffic checking was conducted in between. Thus, there is variance in the statements of PW-8 I.O. Raman Kumar Meena and PW-1 PSI Ankur Sharma. According to

PW-1 PSI Ankur Sharma, the police party left the Police Station at 7:30 PM but according to PW-8 I.O. Raman Kumar Meena, they left the Police Station at 2:45 PM.

8. PW-1 PSI Ankur Sharma testified that he took the rukka Ext. PW-8/A to the Police Station, Sadar in the official vehicle for registration of FIR. He handed over the same to MHC of the Police Station, who recorded FIR. However, by then, he had already sent the vehicle back to the spot and had no means to return to the spot with police file. He remained in the Police Station, Sadar, and when PW-8 I.O. Raman Kumar Meena returned, he gave police file to him. The sum and substance of the statement of PW-1 PSI Ankur Sharma is that he did not come back to the spot with the police file. However, PW-8 I.O. Raman Kumar Meena, in his cross-examination, testified that PW-1 PSI Ankur Sharma was sent at 11:15 PM with rukka and he returned with police file at around 12:00 in the mid night. Thereafter, the sealing proceedings were completed. According to PW-1 PSI Ankur Sharma, the case property was packed and sealed before sending rukka PW-8/A to the Police Station. However, PW-8 I.O. Raman Kumar Meena has deposed that the case property was packed after return of PW-1 PSI Ankur Sharma at 12:00 mid night. There are major contradictions in the statements of PW-1 PSI Ankur Sharma and PW-8 I.O. Raman Kumar Meena, the manner in which the accused were intercepted, search, sealing and sampling proceedings were completed on the spot.

9. Accordingly, there is no merit in this appeal and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

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

Cr. Appeal No. 628/2015
Decided on: 7.12.2015

N.D.P.S. Act, 1985- Section 18- Search of cowshed of accused was conducted during which 15 kg of poppy husk was recovered- DW-1 Panchayat Sahayak has proved the copy of Parivar Register which shows that family of the accused comprises of six members - house was in possession of the family members- prosecution has failed to prove the exclusive possession of the accused- hence, he cannot be convicted of the possession of 15 kg. of poppy husk. (Para-8 to 10)

Case referred:
State of Himachal Pradesh v. Asha Rani and others 2014 (3) Him. L.R. (DB) 1615

For the Appellant: Mr. V.S. Chauhan, Additional Advocate General with Mr. Neeraj K. Sharma, Deputy Advocate General.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

The present appeal is instituted against Judgment dated 19.2.2015, rendered by learned Special Judge, Solan, District Solan, HP camp at Nalagarh in Session

Trail No. 7-NL/7 of 2010, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for commission of offence under Section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake) has been acquitted.

2. Case of the prosecution in a nutshell is that a police party comprising of ASI Kalyan Singh (PW-16), ASI Bahadur Singh (PW-4), HC Kamal Nain (PW-12), HHC Roop Singh, C. Ashok Kumar, Constable Desh Raj (PW-14) and Constable Sher Singh (PW-6) were present at Malku Majra on patrolling duty at about 11 am, when a secret information was received that the accused was dealing in contraband and in case search of the house of accused is conducted then huge quantity of contraband could be recovered. Reasons of belief were recorded in Ext. PW-6/A under Section 42 (2) of the Act. These were reduced into writing by ASI Kalyan Singh PW-16, which was forwarded to the Superintendent of Police Baddi through Constable Sher Singh. A raiding party was constituted in which Jeet Ram (PW-1) and Lajja Ram (PW-2) were associated and all the members of the raiding party went towards the house of accused in village Malku Majra. Accused was present in the house. His consent for search was obtained upon Ext. PW-1/A. Thereafter search of the house of the accused was conducted, however, nothing incriminating was recovered. Search of cowshed of the accused was undertaken and a white coloured plastic sack was recovered which on opening was found to be containing poppy husk. Constable Desh Raj PW-4 was deputed to bring weight and scale from the shop of one Shadi Khan PW-3. The contraband weighed 15 kgs. Whole of the contraband was put back in the plastic sack and sealed with seal impression 'A'. Specimen of seal used was taken separately and seal impression was also affixed over the NCB form Ext. PW-15/A. Rukka Ext. PW-7/A was prepared and forwarded to Police Station Baddi through Constable Desh Raj whereupon FIR Ext. PW-7/B was registered at Police Station Baddi. The case property alongwith sample seal were produced before Inspector Liaq Ram PW-15, Additional SHO, Police Station Baddi, who had resealed the plastic sack with seal impression 'C'. Relevant columns of NCB form were filled in by Liaq Ram and impression of seal Ext. PW-15/B was taken separately. Case property was deposited alongwith sample seal and NCB form in the Malkhana with HHC Achhar Singh PW-7, who made entry in the Malkhana register. Case propety was sent to FSL Junga, through Constable Bahadur Singh PW-8. He deposited the same with FSL Junga. The chemical examiner report is Ext. PW-16/F. Special Report is Ext. PW-5/A.

3. Prosecution has examined as many as 17 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. According to him, he was falsely implicated. He was acquitted on 19.2.2015. Hence, this appeal.

4. Mr. V.S. Chauhan, Additional Advocate General, has vehemently argued that the prosecution has duly proved its case against the accused.

5. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. Case of the prosecution, in a nutshell, is that on a secret information on 28.4.2010, , at about 11 am, ASI Kalyan Singh PW-16 alongwith other police officials went to the house of accused at Malku Majra. Jeet Ram PW-1 and Lajja Ram, PW-2 met them on the way. They were associated in the raiding party. They went to the house of the accused. Accused was present. No incriminating material was found in the house of the accused. However, they went to the cowshed of the accused adjacent to the house of the accused. Poppy husk was recovered from the cowshed. It weighed 15 kgs. Raid was conducted on the basis of a secret information. Prosecution has fully complied with Section 42 (2) of the Act.

7. PW-1 Jeet Ram and PW-2 Lajja Ram have not supported the prosecution case. They were declared hostile. However, fact of the matter is that they have admitted their signatures on the seizure memo Ext. PW-1/A to Ext. PW-1/D. Recovery of the contraband is from the cowshed. Plastic sack containing poppy husk was recovered as a result of the search of cowshed as per the statements of PW-4 Bahadur Singh, Kamal Nain PW-12, Desh Raj PW-14 and Kalyan Singh PW-16. However, fact of the matter is that no identification of the cowshed allegedly belonging to the accused was obtained from any of the inhabitants of the locality. PW-1 Jeet Ram and PW-2 Lajja Ram have categorically denied that search of the cowshed of accused was conducted in their presence and contraband was recovered. Accused was not the lone member of the family. It was necessary for the prosecution to prove that the cowshed was in exclusive possession of the accused, from which contraband was recovered. Kalyan Singh PW-16, in his cross-examination, has admitted that the family of the accused may be comprising of 4-5 members. This fact has also not been denied by Bahadur Singh PW-4, Kamal Nain, PW-12 and Constable Desh Raj PW-14. It has also come in the examination of all these witnesses that cowshed belonging to accused was situated on the side of the common path of the village. It was open. No door was fixed. No lock was put on the door of the cowshed. No key was ever recovered from the accused prior to the conducting of search.

8. Suresh Kumar DW-1 Panchayat Sahayak has proved the copy of Parivar Register Ext. D-1. According to Ext. D-1, family of the accused comprises of six members. Cowshed can safely be presumed to be in joint possession of the family members. Each member had access to the cowshed. Moreover, since the cowshed was situated on path used by villagers, other villagers had access to the cowshed. Prosecution has failed to prove that the cowshed was in exclusive possession of the accused. No suggestion was put to PW-1 Jeet Ram and PW-2 Lajja Ram that the cowshed from which contraband was recovered was in exclusive possession of the accused and the other family members residing with accused had no access to the cowshed.

9. A Division Bench of this Court in **State of Himachal Pradesh v. Asha Rani and others** reported in 2014 (3) Him. L.R. (DB) 1615 has held that the contraband was recovered from kitchen of the house of accused which was not proved to be in exclusive possession of the accused and there was no evidence on record showing that the other members of the family of the accused had not access to the kitchen in question. Thus it can not be inferred on the basis of evidence on record that the accused was consciously aware of place of keeping of contraband and since other family members of the accused had also access to the kitchen from where the recovery of the contraband was effected it cannot be held that the contraband recovered was in exclusive possession of the accused. The Division Bench has held as under:

> 22. The prosecution case, too, gets ridden with in veracity , in , the face of the purported place of search, seizure and recovery of contraband, having not been proved, to be in the exclusive possession of the accused alone, and, the same being inaccessible to other family members. In the face of absence of evidence marking the fact, that, There were no members other than the accused, constituting the inmates of the house, as such, it has to be inferred that the said portion of the house was accessible to other residents/inmates of the house. It has to be also concluded, in sequel, that, when persons other than the accused also reside there and had access to the kitchen, rendered the kitchen, from where contraband was purportedly recovered, to, be accessible to them also. In aftermath, it has to be inferred that the accused cannot be held to be consciously aware of the place of keeping of contraband or theirs not being in its exclusive possession. Consequently it, is, construed that other members of the family of the accused, who, too had access to

kitchen, where from recovery of contraband, was, effected, hence, may have taken to place it there. For reiteration, when that portion of the house of the accused, was, accessible, to, others family members of the accused, therefore, it cannot be said that the said portion, from which contraband, was, recovered, was, in the exclusive possession of the accused, who alone, had exclusive knowledge, qua, its being placed there, hence, consequently, they alone are vicariously liable for the act, as alleged against them. The reasons, as, afforded by the learned trial Court, in, acquitting the accused, do not, suffer from any infirmity, or, perversity. Consequently reinforcingly, it can be formidably concluded, that, the findings of learned trial Court, are, well merited, and, do not merit interference.

10. Thus, the accused could not be said to be held guilty of being owner in exclusive possession of the plastic sack containing 15 kg poppy husk.

11. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

The Officer Commanding Central Ration Stand ...Petitioner

Versus

Mohan Singh ...Respondent

CWP No. 6044 of 2010
Reserved on: 3.12.2015
Date of decision: 7.12.2015.

Industrial Disputes Act, 1947- Section 25- Respondent claimed himself to be a casual worker working with the petitioner department- he further pleaded that petitioner department is an industry within the meaning of Industrial Disputes Act- a specific issue was framed, whether petitioner is an industry or not- labour court held that the petitioner is an industry- order was challenged on the ground that petitioner does not fall within definition of industry- held, that Supreme Court had held that an employee working in the canteen stores department does not fall within definition of a government servant- further, respondent was engaged for limited purpose of loading or unloading arms during the war- therefore, he will not fall within definition of workman- petition accepted and the award set aside. (Para-6 to 10)

Cases referred:

Union of India & Ors Vs. M.Aslam & Ors (2001) 1 SCC 720

R.R. Pillai (Dead) through L.Rs Vs. Commanding Officer, Headquarters Southern AIR Command (U) and ors (2009) 13 SCC 311

Bangalore Water Supply and Sewerage Board Vs. A. Rajappa & ors, (1978) 2 SCC 213 SCC 213

State of U.P. Vs. Jaibir Singh, 2005 Vol.V SCC 1

For the Petitioner: Mr. Ashok Sharma, Assistant Solicitor General of India with Mr.Nipun Sharma, Advocate for the petitioner.

For the Respondent: Mr. Hamender Chandel, Advocate, for the respondent.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J,

By means of this petition, petitioner has assailed the award passed by the Presiding Officer, Central Government Industrial Tribunal-cum-Labour Court, whereby he directed the respondent to be reinstated with back wages within one month from the date of publication of the award.

2. Brief facts of the case are that the respondent claimed himself to be a casual labourer working with the petitioner department since 19.4.1989. He further alleged that the petitioner department was an industry under the Industrial Disputes Act (for short the 'Act') and had without caring for the provisions of the Act, terminated his services in July, 2000.

3. Following reference was sent for adjudication to the learned Tribunal:

"Whether the Central Ration Stand, Subathu is an Industry as per I.D. Act, 1947?. If so, whether action of the management of the Central Ration Stand, Subathu in terminating the services of Shri Mohan Singh son of Sh. Jagdish Singh, Casual Labour w.e.f. 23.7.2000 is legal and just?. If not, to what relief the workman is entitled to and from which date?"

4. The parties filed their pleadings and led evidence in support thereof and on the basis of the same, the learned Tribunal passed the impugned award. The award has been assailed mainly on the ground that the petitioner was not an industry and, therefore, the respondent could not have been treated to be a workman. It was averred that engagement of the respondent was for a specified period during Kargil war for loading and unloading of equipments of Armed forces. None of the functions and duties being discharged by the petitioner could be said to be of an industrial character and, therefore, in such circumstances, the Tribunal has virtually usurped jurisdiction and passed the impugned award.

5. In reply to the petition, respondent has averred that the petitioner department was an industry and the respondent being an admitted worker of the petitioner was, therefore, a workman within the definition of the Act.

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

6. The learned Tribunal, on the basis of the judgment passed by the Hon'ble Supreme Court in **Union of India & Ors** Vs. **M.Aslam & Ors (2001) 1 SCC 720** concluded that the respondent could claim the privilege of a workman being a government servant while working in the canteen.

7. It appears that the Tribunal was totally oblivious to the fact that the judgment in Aslam's case (supra) holding the canteen employees to be government servant was specifically set aside by a larger Bench of Hon'ble three Judges in **R.R. Pillai (Dead) through L.Rs** Vs. **Commanding Officer, Headquarters Southern AIR Command (U) and ors (2009) 13 SCC 311,** wherein the Hon'ble Supreme Court while over ruling the

judgment made in Aslam's case (supra), held that the employees of unit-run canteens (URCs) run in Army, Navy and Armed Forces are not the government servants.

8. That apart, it would also be noticed that the respondent had led no evidence whatsoever to show as to how the petitioner could be termed to be an industry. It would further be noticed that the learned Tribunal has relied upon the judgment of the Hon'ble Supreme Court in **Bangalore Water Supply and Sewerage Board Vs. A. Rajappa & ors,** reported in **(1978) 2 SCC 213** SCC 213 to conclude that the industrial character of an organization could be seen on the basis of activities carried on and the functions discharged by it. Since the function of the canteen was to provide service to the military persons by supplying certain commodities of public utilities, therefore, it was an industry.

9. Notably, the Tribunal again appears to be oblivious to the fact that insofar as the judgment of the Hon'ble Supreme Court in Bangalore Water Supply's case (supra) is concerned, same is pending for re-consideration before a larger Bench of the Hon'ble Supreme Court in view of the order passed by the Constitution Bench of the Hon'ble Supreme Court instead of **State of U.P.** Vs**. Jaibir Singh,** reported in **2005 Vol.V SCC 1**. Not only this, once it was the case of the petitioner that the respondent's services were taken only for a brief stint that too for the purpose of loading and unloading the Arms during the Kargil War, it is not understood as to on what basis the Tribunal concluded that the respondent had been serving in the unit-run canteen to provide service to the military persons by supplying certain commodities or public utility. Thus, the award passed by the Tribunal is contrary to the record and, therefore, suffers from perversity and is accordingly set aside.

10. However, before parting, it may be noticed that the respondent had earlier approached the Central Administrative Tribunal, which had directed the respondent to approach the petitioner for the redressal of his grievance. However, as per the reply filed by the petitioner before the Industrial Court, it appears that the respondent did not approach the petitioner for the redressal of his grievance. Therefore, it is clarified that the dismissal of this petition would not stand in the way of the petitioner in considering the case of the respondent for grant of any relief to which he may be entitled to under the law.

11. With the aforesaid observations, the petition is disposed of along with all pending applications, leaving the parties to bear the costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWPIL No. 15 of 2014
a/w CWP No. 3428 of 2015
Date of Order: 08.12.2015

CWPIL No. 15 of 2014

Court on its own motion ...Petitioner.

Versus

State of H.P. & others ...Respondents.

CWP No. 3428 of 2015

S.K. Shad ...Petitioner.

Versus

State of Himachal Pradesh & others ...Respondents.

Constitution of India, 1950-Article 226- Matter qua the encroachments made on the National Highway right from Kalka to Shimla and raising of the construction on both sides of the National Highway, particularly in and around Barog including the Bye pass- Deputy Commissioners, Shimla and Solan, directed to provide all requisite information and documents to the concerned respondents enabling them to submit report- status reports to be filed by all concerned respondents on next date. (Para 4 to 11)

CWPIL No. 15 of 2014

Present: Mr. J.L. Bhardwaj, Advocate, as Amicus Curiae.

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 7 and 10 to 12.

Mr. Shrawan Dogra, Senior Advocate, with Mr. Hamender Chandel, Advocate, for respondent No. 8.

Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Amrita Messie, Advocate, for respondent No. 9.

CWP No. 3428 of 2015

Mr. S.D. Gill, Advocate, for the petitioner.

Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. 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 *(Oral)*

CWPIL No. 15 of 2014

Respondents No. 3 and 8 have filed affidavits. While going through the affidavits, it appears that the respondents have not done the needful as was required in terms of the directions passed by this Court from time to time.

2. Keeping in view the affidavit filed by respondent No. 3, we deem it proper to implead the National Highway Authority of India through its Project Director, Implementation Unit, Shimla; Principal Secretary (Town and Country Planning) to the Government of Himachal Pradesh, Shimla; Director, Town and Country Planning, SDA Complex, Kasumpti, and the Superintending Engineer, Sewerage Circle, Shimla, as party-respondents, shall figure as respondents No. 9 to 12 in the array of respondents.

3. Issue notice to newly added respondents No. 9 to 12. Ms. Amrita Messie, Advocate, and Mr. J.K. Verma, learned Deputy Advocate General, waive notice on behalf of respondent No. 9 and respondents No. 10 to 12, respectively.

4. All the respondents are directed to file fresh status/ compliance reports in terms of the orders passed by this Court from time to time.

5. In addition to this, respondent No. 3 is directed to remove all the encroachments after following due process of law, the mention of which has been made in the affidavit, dated 05.12.2015.

6. The Appellate Authority, which is seized of the appeals in terms of the said affidavit, is also directed to decide the appeals within fifteen days and report compliance.

7. The revenue authorities, particularly the Deputy Commissioners, Shimla and Solan, are directed to provide all requisite information and documents to the concerned respondents enabling them to submit report about the construction(s) which has/have been made on the National Highway from Kalka to Shimla, particularly in and around Barog and relating to the Bye-pass.

8. The National Highway Authority of India and all its officers, who are manning the posts in Shimla and Solan are directed to report about the encroachments made on the National Highway right from Kalka to Shimla. The National Highway Authority of India is also directed to submit a detailed report as to who has granted the sanction for raising the construction(s) on the both sides of the National Highway, particularly in and around Barog including the Bye-pass.

9. Respondent No. 8 has filed affidavit, dated 05.12.2015, which is cryptic. At the first glance, we were of the view to draw action against the Commissioner concerned, but deem it proper to direct respondent No. 8 to file a fresh affidavit and submit details about the violations and encroachments made and action drawn.

10. It is made clear that the status/compliance reports/ affidavits should contain all the details and not like that the matter will be looked into, as is recorded in the affidavit, dated 05.12.2015.

11. The status/compliance reports/affidavits be filed within two weeks. List on **28th December, 2015.** In default, the respondents to appear in person on the next date of hearing.

12. Registry to furnish complete set of paper-book to the learned counsel appearing on behalf of newly added respondent No. 9 within two days.

CWP No. 3428 of 2015

13. List alongwith CWPIL No. 15 of 2014.

Copy of this order be supplied **dasti** to the learned counsel for the parties.

****

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

Ganga Ram. ...Appellant.

Versus

Luharu Ram. ...Respondent.

RSA No. 256 of 2005
Reserved on: 7.12.2015
Decided on: 8.12.2015

Specific Relief Act, 1963- Section 20- Defendant agreed to sell his share to the plaintiff for Rs.1,15,000/- - he agreed to execute the sale deed on the receipt of balance amount of Rs.5,000/- from the plaintiff- defendant denied the agreement or the receipt of the sale consideration- suit was decreed by the trial Court- an appeal was preferred which was dismissed- the record shows that plaintiff remained ready and willing to perform his part of the agreement- notice was issued to the defendant to execute sale deed- a sum of Rs.5,000/- was deposited in the court- plaintiff also appeared before Sub Registrar but defendant did

not execute the sale deed- held, that execution of the agreement was proved and the suit was rightly decreed by the trial Court. (Para-13 to 16)

Cases referred:
Sukhbir Singh and others vs. Brij Pal Singh and others Bihar, AIR 1996 SC 2510
Motilal Jain vs Smt. Ramdasi Devi and others, AIR 2000 SC 2408

For the Appellant : Mr. Ravinder Thakur, Advocate.
For the Respondent: Mr. Sunil Mohan Goel, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This Regular Second Appeal is directed against the judgment and decree dated 17.2.2005 rendered by the District Judge, Kullu in Civil Appeal No. 85 of 2004.

2. "Key facts" necessary for the adjudication of this appeal are that respondent-plaintiff (hereinafter referred to as the "plaintiff" for convenience sake) filed a suit against the appellant-defendant (hereinafter referred to as the "defendants" for convenience sake) for specific performance. According to the averments made in the plaint, defendant was recorded as owner in possession of land measuring 1 bigha 14 biswansis being 4/5 share in Khasra No. 786/3. He agreed to sell his share for consideration of Rs. 1,15,000/- to the plaintiff. He received a sum of Rs. 1,10,000/- as earnest money. He executed agreement on 6.2.2003 in the presence of the witnesses. It was agreed that sale deed would be executed on or before 6.5.2003 on receipt of balance amount of Rs. 5,000/- from the plaintiff. Plaintiff was always ready and willing to perform his part of the agreement. He tendered Rs. 5,000/- to the defendant for execution of sale deed. However, he delayed the matter. Plaintiff issued notice to the defendant on 28.4.2003 requiring him to execute sale deed on 6.5.2003. Plaintiff was present in the office of Sub Registrar, Kullu on 6.5.2003. However, defendant did not come.

3. Suit was contested by the defendant. Defendant has admitted that he was owner of the suit property. He has denied that he had agreed to sell the suit land to the plaintiff for consideration of Rs. 1,15,000/-. He has also denied that he received Rs. 1,10,000/- from the plaintiff.

4. Issues were framed by the Civil Judge (Senior Division), Kullu on 8.1.2004. He decreed the suit on 23.9.2004 for possession by way of specific performance of agreement Ex.PW-2/A. Defendant filed an appeal before the District Judge, Kullu against the judgment and decree dated 23.9.2004. He dismissed the same on 17.2.2005. Hence, the present appeal. It was admitted on 22.8.2005 on the following substantial questions of law:

1. **Whether the courts below are justified in granting a decree in favour of respondent/plaintiff in the absence of requisite pleadings and proof about readiness and willingness to perform part of the alleged contract at all material times by the respondent/plaintiff?**
2. **Whether the Ld. Trial court has failed to appreciate that consideration is passed whereas endorsement acknowledging the receipt of amount was not signed by the defendant?**

3. **Whether the transaction on the face of it is fictitious?**

5. Mr. Ravinder Thakur, learned counsel for the appellant, on the basis of the substantial questions of law framed, has vehemently argued that the plaintiff has failed to prove that he was ready and willing to perform his part of contract. He has also contended that his client has never received earnest money. The transaction on the face of it was fictitious.

6. Mr. Sunil Mohan Goel, learned counsel for the respondent has supported the judgments and decrees passed by both the courts below.

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

8. Since all the substantial questions of law are interconnected and interlinked the same are taken up together for determination to avoid repetition of discussion of evidence.

9. Plaintiff has appeared as PW-1. According to him, defendant agreed to sell the suit land in the sum of Rs. 1,15,000/-. He executed agreement to sell. The agreement to sell was scribed by Sita Ram, Document Writer in the presence of Bhoop Singh and Nirat Ram, which was admitted to be correct by both the parties and after admitting the contents of the agreement as true and correct both the parties signed the same. A sum of Rs. 1,10,000/- was paid to the defendant in presence of witnesses. The defendant agreed to execute and register the sale deed within three months. He was ready and still ready and willing to make the payment of remaining amount of sale consideration to get the sale deed executed in his favour. He also deposited Rs. 5,000/- in the court vide challan Ex.PA.

10. PW-2 Sita Ram is the Document Writer. He has scribed the agreement to sell Ex.PW-2/A on 6.2.2003. It was scribed at the instance of defendant. The defendant agreed to sell the suit land in the sum of Rs. 1,15,000/- in favour of the plaintiff. The agreement was scribed by him and the contents of the same were read over and explained to the parties. The plaintiff paid a sum of Rs. 1,10,000/- as earnest money and promised to pay remaining amount of sale consideration of Rs. 5,000/- at the time of execution of sale deed. Defendant singed the agreement to sell on 6.2.2003 in the presence of Bhoop Singh and Nirat Ram and Loharu Ram also signed the agreement. The agreement to sell was entered by him in the register kept and maintained by him.

11. PW-3 Bhoop Singh is one of the attesting witnesses to the agreement to sell Ex.PW-2/A. He has supported the version of PW-1 Loharu Ram and PW-2 Sita Ram. According to him, defendant agreed to sell the suit land in the sum of Rs. 1,15,000/- to the plaintiff. Agreement was written by PW-2 Sita Ram. The contents of the same were read over by PW-2 Sita Ram. The parties, after admitting the same to be correct, signed the agreement to sell. Defendant received a sum of Rs. 1,10,000/- as earnest money. The agreement was scribed at the instance of defendant.

12. Defendant has appeared as DW-1. In his cross-examination, he has admitted that he has no enmity with PW-2 Sita Ram and PW-3 Bhoop Singh. He has not led any evidence to show that the agreement to sell Ex.PW-2/A was forged or fictitious. Rather, agreement to sell Ex.PW-2/A also bears endorsement regarding receipt of Rs. 1,10,000/-.

13. It has also come on record that the plaintiff always remained ready and willing to perform his part of contract. Notice was also issued to the defendant to execute sale deed on or before 6.5.2003. A sum of Rs. 5,000/- was deposited in the court. The plaintiff was present in the office of Sub-Registrar, Kullu but the defendant did not come to

execute the sale deed. Defendant had agreed to sell the suit land for a consideration of Rs. 1,15,000/-. He had received a sum of Rs. 1,10,000/- as earnest money, as per endorsement. The plaintiff has also averred and proved that he was ready and willing to perform his part of contract.

14. Their Lordships of the Hon'ble Supreme Court in ***Sukhbir Singh and others*** vs. ***Brij Pal Singh and others*** Bihar, AIR 1996 SC 2510 have held that law is not in doubt and it is not a condition that the respondent should have ready cash with him. The fact that he attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioner to attend the office of the Sub-Registrar is a positive fact to prove that he had necessary funds to pass on consideration and had with him the needed money for payment at the time of registration. Their Lordships have held as under:

> "[5] Law is not in doubt and it is not a condition that the respondents should have ready cash with them. The fact that they attended the Sub-Registrar's office to have the sale deed executed and waited for the petitioners to attend the office of the Sub-Registrar is a positive fact to prove that they had necessary funds to pass on consideration and had with them the needed money with them for payment at the time of registration. It is sufficient for the respondents to establish that they had the capacity to pay the sale consideration. It is not necessary that they should always carry the money with them from the date of the suit till date of the decree. It would, therefore, be clear that the courts below have appropriately exercised their discretion for granting the relief of specific performance to the respondents on sound principles of law."

15. Their Lordships of the Hon'ble Supreme Court in ***Motilal Jain*** vs ***Smt. Ramdasi Devi and others***, AIR 2000 SC 2408 have held that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfill his part of the obligations under the contract which is subject matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit of specific performance of contract for sale.

> "[9] That decision was relied upon by a three Judges Bench of this Court in Syed Dastagir's case (1999 AIR SCW 2959 : AIR 1999 SC 3029) (supra), wherein it was held that in construing a plea in any pleading, Courts must keep in mind that a plea is not an expression of art and science but an expression through words to place fact and law of one's case for a relief. It is pointed out that in India most of the pleas are drafted by counsel and hence they inevitably differ from one to the other; thus, to gather true spirit behind a plea it should be read as a whole and to test whether the plaintiff has performed his obligations, one has to see the pith and substance of the plea. It was observed, "Unless a statute specifically requires a plea to be in any particular form, it can be in any form. No specific phraseology or language is required to take such a plea. The language in Section 16(c) of the Specific Relief Act, 1963 does not require any specific phraseology but only that the plaintiff must aver that he has performed or has always been and is willing to perform his part of the contract." So the compliance of "readiness and willingness" has to be in spirit and substance and not in letter and form." It is thus clear that an averment of readiness and willingness in the plaint is not a mathematical formula which should only be in specific words. If the

averments in the plaint as a whole do clearly indicate the readiness and willingness of the plaintiff to fulfill his part of the obligations under the contract which is subject-matter of the suit, the fact that they are differently worded will not militate against the readiness and willingness of the plaintiff in a suit of specific performance of contract for sale."

16. Both the courts below have correctly appreciated the oral as well as documentary evidence led by the parties and there is no need to interfere with the well reasoned judgments and decrees passed by both the courts below.

17. The substantial questions of law are answered accordingly.

18. In view of the analysis and discussion made hereinabove, there is no merit in the present appeal and the same is dismissed. Pending application(s), if any, also stands disposed of. There shall, however, be no order as to costs.

****

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

Kr. Uday Singh and others. .....Appellants.

Versus

Kali Ram and ors. .....Respondents.

RSA No. 125 of 2003.
Reserved on: 7.12.2015.
Decided on: 8.12.2015.

Specific Relief Act, 1963- Section 38- Plaintiffs claimed that they are owners in possession of the suit land- HPPWD started construction of the road and carried out alignment of the road through the suit land- defendants denied that road was passing through the suit land and claimed that road was passing through the Government land- the suit was decreed by the trial Court and appeal was dismissed- held, that the State had taken a specific plea that road was not being constructed through the suit land- ownership and possession of the plaintiffs were not denied- the State cannot use the land without acquiring the same- Court had correctly appreciated the oral and documentary evidence on record- appellants who were not party to the case, had filed an application before First Appellate Court- same was allowed by First Appellate Court- appellants should have filed separate suit for redressal of their grievances instead of filing the application. (Para-15)

For the appellant(s): Mr. K.D.Sood, Sr. Advocate, with Mr. Rajnish K. Lall, Advocate.
For the respondents: Mr. G.D.Verma, Sr. Advocate, with Mr. B.C.Verma, Advocate, for respondents No. 1(a), 1(b), 1(d), 1(e), 1(g) and 2.
Mr. Parmod Thakur, Addl. Advocate General, for resps No. 3 & 4.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned Addl. District Judge, Shimla, H.P., dated 2.1.2003, passed in Civil Appeal No. 76-S/13 of 2000.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the predecessor-in-interest of plaintiff-respondent No. 1 Sh. Kali Ram and Chajju Ram have filed a suit against the respondents-defendants No. 3 & 4, namely, State of Himachal Pradesh and Executive Engineer for permanent prohibitory injunction from constructing Nerwa Paban road over the land defined in Khata Khatauni No. 5/6 comprising Kh. No. 1457, measuring 9-2 bighas and Khata Khatauni No. 6/7 min, comprising Kh. No. 1508/1506, measuring 4-11 bighas, situated in Chak Mukhranldi, Pargana, Peauntra, Tehsil Chopal, Distt. Shimla, H.P. (hereinafter referred to as the suit land). According to the averments contained in the plaint, they alongwith the proforma defendants were in possession of the suit land. There is an orchard over the suit land. The H.P. PWD, started the construction of Nerwa Paban road in the year 1995 and alignment of the road through the suit land was also carried out.

3. The suit was contested by defendants No. 3 & 4. It was admitted that the plaintiffs have raised orchard over the suit land. The road in question was being constructed through the Government land. The orchard of the plaintiffs was at a distance of 25 meters away from the road. It was denied that the road was passing through Kh. No. 1508/1506. The proforma defendants did not contest the suit.

4. The learned Sub Judge Ist Class, Chopal, Distt. Shimla, framed the issues on 29.6.1999. The suit was decreed vide judgment dated 30.9.1999. The appellants, who were not parties to the Civil Suit No. 23-1 of 1996 moved an application under Order 41 Rule 1 CPC for permission to assail the decree. The application was allowed by the learned first appellate Court on 6.1.2002. The learned Addl. District Judge, Shimla, dismissed the appeal on 2.1.2003. Hence, this regular second appeal.

5. The regular second appeal was admitted on 3.4.2003 on the following substantial questions of law:

> "1. Whether the findings of the Courts below are perverse, based on misreading of oral and documentary evidence, particularly writ petition marked "X", Jamabandi PW-1/B, PW-1/C and Tatima PW-1/D and ignores admissible and relevant evidence, demarcation report and the statement of plaintiff in the demarcation proceedings marked A & B?
>
> 2. Whether in view of the fact that the plaintiff had admitted that no part of the road was on Kh. No. 1457 and on demarcation were proved that the road was 25 ft. away from the land of the plaintiff and the Nerwa Pawan road had only been inaugurated was being used by the general public including the appellant, the plaintiff was entitled to the discretionary relief of injunction contrary to the public interest involved?"

6. Mr. K.D.Sood, Sr. Advocate, appearing on behalf of the appellants, on the basis of the substantial questions of law framed, has vehemently argued that the Courts below have not correctly appreciated the oral as well as documentary evidence, including revenue record. He then contended that the plaintiffs were not entitled for grant of discretionary relief of permanent prohibitory injunction. On the other hand, Mr. G.D.Verma, Sr. Advocate, for the respondents has supported the judgments and decrees of the learned Courts below.

7. Since both the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

8. I have heard the learned Senior Advocates and have also gone through the judgments and records of the case carefully.

9. PW-1 Chajju Ram deposed that the suit land is about 13-½ bighas. It was comprised in Kh. No. 1457 and 1508/1506. The apple orchard was existing on the suit land. The defendant while constructing Nerwa-Paban road used bulldozer over the suit land without the consent of the plaintiff. Notice Ext. PW-1/A was also issued to the defendants. He has placed on record copy of jamabandis Ext. PW-1/B and PW-1/C on record.

10. PW-2 Lachhmi Singh has corroborated the statement of PW-1 Chajju Ram. According to him also, defendants were threatening to raise construction over the suit land without acquiring the land.

11. PW-3 Parmanand deposed that defendants were constructing road over the suit land without paying compensation. The plaintiffs have never given consent for the construction of road.

12. PW-4 Kali Ram has also corroborated the statement of PW-1 Chajju Ram. He also deposed that the defendants have not acquired the land nor any notice was served in this behalf. The fruit bearing apple orchard existed over the suit land.

13. PW-5 Gulab Singh has supported the version of the plaintiffs. According to him, the defendants were threatening to raise construction of road through the suit land.

14. DW-1 P.K.Tandon and DW-2 A.D.Dhiman, have denied that defendants were raising construction of Nerwa-Paban road through the suit land.

15. According to DW-2 A.D. Dhiman, the construction of the road was undertaken in the year 1995 to 1997 and the land of the plaintiffs was at a distance of 25 meters from the road. No loss was caused to the apple orchard of the plaintiffs. The defendants, in their written statement, have taken a specific stand that no road was carved out through Kh. No. 1508/1506 belonging to the plaintiffs and the road was constructed through the existing mule road. Thus, the plea raised by the appellants that plaintiffs were obstructing the construction of the road cannot be believed. The suit land could not be used by the State without acquiring the same. It is also proved from Ext. PW-1/B, copy of Jamabandi for the year 1987-88 and PW-1/C that the plaintiffs are the owners of the suit land. According to this revenue record, there existed apple orchard over the suit land and some part of the land is also cultivable. The Courts have correctly appreciated the oral as well as the documentary evidence, available on record. The appellants were not party to the lis decided by the learned Sub Judge, Chopal on 30.9.1999. In case they were aggrieved, they should have filed separate suit for redressal of their grievances. The substantial questions of law are answered accordingly.

16. Consequently, there is no merit in this appeal and the same is dismissed. No costs.

****

BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Tulsi Ram Bhatia .....Appellant.

Versus

State of H.P. and others .....Respondents.

LPA No.193 of 2010
Decided on: 08.12.2015.

Constitution of India, 1950- Article 226- Appellant was transferred from one station to another station by the Department but he proceeded on medical leave and thereafter on earned leave and did not join- subsequently Government cancelled the transfer- appellant had to return to the station from where he was transferred- appellant joined the station but did not hand over the charge as required under Service Rules- he handed over the charge after a huge delay- ACR of the appellant contained the remarks 'lazy and delays' which were communicated to the appellant-feeling aggrieved, appellant filed Writ Petition, which was dismissed by the Writ Court- in appeal held, that since appellant had not handed over the charge for considerable long period- therefore, remarks 'lazy and delays' were rightly recorded in his ACRs- further held, that Court cannot sit as Court of appeal to reassess the ACRs recorded by Officer concerned- Writ Court had rightly recorded the findings- appeal dismissed. (Para-1 to 7)

For the appellant: Ms.Ranjana Parmar, Senior Advocate, with Ms.Komal, Advocate.

For the respondents: Mr.Shrawan Dogra, Advocate General, with M/s Romesh Verma & Anup Rattan, Addl.A.Gs., and J.K. Verma, Dy.A.G., for respondents No.1, 2 and 4.
Mr.Tarun Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral):

This appeal is directed against the judgment, dated 5th April, 2010, passed by a learned Single Judge of this Court in CWP(T) No.3194 of 2008, titled Tulsi Ram Bhatia vs. H.P. State of H.P. and others, whereby the writ petition came to be dismissed, (for short, the impugned judgment).

2. Short controversy involved in this appeal is that the appellant was transferred from Bharari Sub Division to Junga Sub Division. The appellant did not join on the transferred station and rather proceeded on medical leave and thereafter on earned leave. In the interregnum, in terms of the instructions issued by the Government, the transfers effected stood cancelled. Therefore, the appellant had to report back at Bharari. The appellant joined at Bharari, but had not handed over the charge as required under the Service Rules. The appellant handed over the charge after huge delay, the mention of which has been made in paragraph 3 of the reply to the writ petition, filed by the respondents. It is apt to reproduce paragraph (e) of the reply, hereunder:

> *"(e) It is denied that the applicant did not work during his incumbency in Bharari Sub Division w.e.f. 20.7.1993 to 21.2.1994. So far the adverse remarks recorded in the A.C.R. of the official are concerned these remarks are as per the actual assessment made by Reporting Officer and reviewing officer which are as under.*
>
> *Lazy and delays.*
>
> *To justify these adverse remarks it is brought to the notice of this Hon'ble Court that the applicant was relieved from Bharari Sub Division to Join Junga Sub Division w.e.f. 16.4.1993 but he did not hand over the charge of record specially of MB's which is most important record of the department, despite issue of repeated letters as well as telegrams from the Assistant Engineer Bharari Sub Division as well as from the Executive Engineer Ghumarwin Division. The charge has however been handed over by the applicant to his successor on 11.1.1996, as reported by the Assistant Engineer Bharari Sub Division vide his letter No.346 dated 22.6.1996. This conduct of the applicant clearly establishes that the applicant is lazy and delays the*

matters because he took about 33 months just to hand over the charge which was to be handed over at least within three days and even after re-joining on 20.7.93, he took approximately 28 months."

3. Though the appellant had not performed his duties and remained on leave, still he remained under the control of respondent No.3 R.K. Kait. Another aspect of the matter is that the appellant had not handed over the charge for a considerable long period, as is clear from the reply filed by the respondents and extracted above, therefore, entries – 'lazy and delays' - has rightly been made in the Annual Confidential Report of the appellant.

4. In view of the above, the officer i.e. appellant was under the control of the Reporting Officer.

5. Thus, this Court cannot sit as court of appeal to reassess the Annual Confidential Reports for the concerned period, which have rightly been recorded by the officer concerned.

6. The Writ Court has rightly made the discussion and has rightly recorded the findings.

7. Having said so, no interference is required. Accordingly, the instant appeal merits dismissal and the same is dismissed as such, alongwith pending CMPs, if any.

****

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

M/s Tata Teleservices Limited & anr. .....Petitioners.
Versus
Sh. Jagdish Lal & anr. ..... Respondents.

Civil Revision No. 167 of 2015.
Date of decision: December 9, 2015.

Code of Civil Procedure, 1908- Order 7 Rule 11- Plaintiffs instituted a suit against the defendants in which no damages were claimed – they filed a subsequent suit claiming damages of Rs.10 lacs- defendants claimed that the facts on which subsequent suit was filed were in existence on the date of filing of the previous suit and subsequent suit was barred- hence, it was prayed that subsequent suit be rejected under Order 7 Rule 11 CPC- this application was dismissed by the trial Court- held, that Court had not committed any error in dismissing the application for the reasons that the cable was laid by the defendants in the land of the plaintiff without his consent- earlier suit was filed for mandatory injunction for removing the cable and restoring the suit to its original condition- now defendants have claimed the damages under various heads- the question of payment of damages would only arise after the determination of the controversy regarding the laying of the cable- revision dismissed. (Para-2 to 7)

Cases referred:
Sadhu Singh and others v. Pritam Singh and another, AIR 1976 Punjab & Haryana 38
State Bank of India vs. Gracure Pharmaceuticals Ltd. 2014 AIR (SC) 731

For the petitioners : Mr. Sandeep Dutta, Advocate.

For the respondent No. 1: Mr. K. D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Challenge herein is to the order dated 3.8.2015 passed by Learned Civil Judge (Junior Division), Solan in an application Under Order 7 Rule 11 of the Code of Civil Procedure filed by the petitioners herein (defendants in the trial Court). The complaint is that in the suit bearing No. 153/1 of 2005 instituted by respondent No. 1 herein (plaintiff in the trial Court) damages were not claimed against the petitioners-defendants. However, now in the subsequent suit Annexure P-5, he has claimed damages to the tune of `10,00,000/- against the petitioner-defendants. It has, therefore, been claimed that the facts on which subsequent suit has been filed were in-existence on the day when previous suit bearing No. 153/1 of 2005 (Annexure P-3) was filed. Also that the failure on the part of respondent No. 1-plaintiff to claim damages in the previously instituted suit debar him from filing the fresh suit under Order 7 Rule 11 of the Code of Civil Procedure.

2. Having gone through the record and also the submissions made on both sides, it would not be improper to conclude that Learned trial Judge has not committed any illegality or irregularity while dismissing the application vide order, under challenge in this petition, for the reasons that admittedly the cable was laid by the petitioners-defendants in the land of respondent No. 1-plaintiff without his consent. In the judgment and decree Annexure P-4 passed in the previously instituted suit this fact stands established and it is for this reason that the suit has been decreed for the relief of mandatory injunction directing thereby the defendants to remove the fiber cables laid in the land belonging to respondent No. 1-plaintiff. The judgment and decree annexure P-4 has attained finality as admittedly the petitioners-defendants have now removed the cable from the land of respondent No. 1-plaintiff.

3. It is worth mentioning that in the plaint Annexure P-3 the relief of mandatory injunction directing the petitioners-defendants to remove the cable from the land of respondent No. 1-plaintiff and also to restore the land in its original position was claimed and the opportunity was sought to claim the damages later on by filing a separate suit.

4. Now if the plaint Annexure P-5 which pertains to the subsequent suit pending disposal in the trial Court perused the same reveals that respondent No. 1-plaintiff has claimed the damages caused to him under different heads detailed below para-9 thereof. The same reads as follows:

> *"A. Damages on account of measne profits for illegal use and occupation and causing obstruction to sue, enjoy and occupy the suit property since 2005 till date @ Rs 5000-00 per month. The plaintiff restricts his claim under this head for the last three years i.e. from 16.01.2010 till realization and recovery of the same which comes @ Rs 180000-00.*
>
> *B. Damages on account of increase in cost of construction and construction material @ Rs 3 lac only.*
>
> *C. Damages on account of cost of restoration of the suit property to its original position for the purposes of construction of building Rs 50000-00 only.*
>
> *D. Damages on account of expenses to engage professional, experts and civil engineers/structure engineers @ Rs 20000-00.*

E. Damages on account of obstruction to use, enjoy and occupy the building since 2006 till date @ Rs one lakh only per year. The plaintiff restricts his claim under this head for the last three years i.e. from 16.01.2010 till realization and recovery of the same which comes @ Rs 300000-00.

F. Cost of litigation Civil Suit No. 1153/1 of 2005 @ Rs 50000-00.

G. Mental agony, pain and suffering as well as harassment @ Rs 100000-00."

5. In the considered opinion of this Court, the question that respondent No.1-plaintiff is entitled to any damage would have only arisen after the determination of controversy qua laying of cable in the land of respondent No.1-plaintiff. The same has now been decided in the previously instituted suit vide judgment and decree Annexure P-4. Therefore, in the peculiar circumstances, the cause of action to claim the damages accrued in favour of respondent No.1-plaintiff after the decision of the previous suit.

6. The present is a case where the provisions contained under Order 7 Rule 11 of the Code of Civil Procedure are not at all attracted. In a similar case titled ***Sadhu Singh and others v. Pritam Singh and another, AIR 1976 Punjab & Haryana 38,*** a Full Bench of Punjab and Haryana High Court has held that the subsequent suit filed for claiming the damages after the decree of possession is passed as maintainable and not barred under Order 7 Ruule 11 or Order 2 Rule II of the Code of Civil Procedure. On behalf of the petitioners reliance has been placed on the judgment dated 22.11.2013 of the Apex Court in ***State Bank of India vs. Gracure Pharmaceuticals Ltd. 2014 AIR (SC) 731.*** However, the facts in the case before the Apex Court were different to that in the present case and as such the ratio of law laid down therein is not applicable.

7. In view of what has been said hereinabove, this petition fails and the same is accordingly dismissed. Consequently the order under challenge is affirmed.

8. Pending application(s) also stands disposed of.

9. An authenticated copy to learned trial Court for record.

****

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

The Executive Officer, Municipal Council, Nahan & another .....Appellants.

Versus

Prem Chand .....Respondent.

RSA No. 482 of 2005.
Reserved on: 8.12.2015.
Decided on: 9.12.2015.

Specific Relief Act, 1963- Section 38- Plaintiff filed a civil suit claiming that he is owner in possession of the suit land which is recorded as gair mumkin rasta- he had affixed a gate to prevent the access of cattle- defendant denied to remove the gate- a fresh notice was issued to defendant for removal of the gate- defendant claimed that there was a passage over the suit land which was being used by habitants of the area- suit was dismissed by the trial Court- an appeal was preferred which was allowed- plaintiff is recorded to be owner in possession in the revenue record- defendant had never applied for the change of entry- there

is not material on record to show that path was made pucca by Municipal Corporation from its own funds- defendant had no right to interfere with the suit land and suit was rightly decreed by Appellate Court – appeal dismissed. (Para-11 to 17)

Cases referred:
Narsing Dass vrs. State of H.P. and others, AIR 1977 HP 84
Devi Singh vrs. Municipal Corporation, Hyderabad, AIR 1972 SC 2510,
Gowardhandas Rathi vrs. Corporation of Calcutta and another, AIR 1970 Calcutta 539
M/S Super Steels, Ahmedabad vrs. Ahmedabad Municipal Corporation, Astodia, AIR 1981 Gujarat 230,

For the appellant(s): Mr. Vivekanand, Advocate.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Sirmaur, H.P. dated 9.6.2005, passed in Civil Appeal No. 62-CA/13 of 2004.

2. "Key facts" necessary for the adjudication of this regular second appeal are that respondent-plaintiff (hereinafter referred to as the plaintiff) has instituted suit for permanent prohibitory injunction against the appellants-defendants (hereinafter referred to as the defendants) restraining them from interfering in the land comprised in Khewat/Khatauni No. 148/363, Kh. No. 1107, measuring 12.32 sq. meters, situated at Mohalla Amarpur, Nahan, Distt. Sirmour, H.P. and also from implementing the notices No. 1926 dated 26.7.2001 and 2497 dated 22.9.2001. According to the plaintiff, he was owner-in-possession of the suit land which is recorded as "Gair Mumkin Rasta" in the revenue record. The defendants have no right, title or interest in the same. The house of the plaintiff is situated in the adjoining land of Kh. Nos. 1151 to 1153. The plaintiff has affixed a gate on the suit land in order to prevent the access of cattle etc. The defendants tried to get the gate removed. The defendants vide letter dated 26.7.2001 issued notice under Sections 184 and 183(2) of the H.P. Municipal Act, 1994 (hereinafter referred to as the Act, for short). These were duly replied by the plaintiff on 15.8.2001. The suit land was not mentioned in the notice. The plaintiff has not affixed any gate on Municipal land or street nor any land or street exists there. The defendants again issued notice under Section 239 of the Act for removing the gate from the Municipal lane. The action of the defendants was not only illegal but without jurisdiction.

3. The suit was contested by the defendants. On merits, it was claimed that there existed a public path over Kh. No. 1107. It was used by inhabitants of the surrounding area and public at large.

4. The learned trial Court framed the issues on 16.5.2002. The suit was dismissed vide judgment dated 29.10.2004. The plaintiff, feeling aggrieved, preferred an appeal against the judgment and decree dated 29.10.2004. The learned District Judge, Sirmaur at Nahan, allowed the same on 9.6.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 16.9.2005:

"1. Whether the first appellate Court erred in law in holding that the property in dispute is not a public path?

2. Whether the judgment of the first appellate Court is vitiated by mis-application of the ratio in AIR 1977 HP, 84?

3. Whether the plaintiff could file the suit without notice in terms of the provisions of Section 43 of the Himachal Pradesh Municipal Act, 1994?"

6. Mr. Vivekanand, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the ratio of the law laid down in AIR 1977 HP 84, has not been correctly applied by the learned District Judge. He also argued that notice was also required to be issued under Section 43 of the Municipal Council Act, 1994 before institution of the suit.

7. I have heard Mr. Vivekanand, Advocate and have also gone through the judgments and records of the case carefully.

8. Since all the substantial questions of law are inter-connected, hence are taken up together for discussion to avoid repetition of evidence.

9. The plaintiff has appeared as PW-1. He has produced on record copy of jamabandi for the year 1996-97 Ext. PA, certified copy of judgment dated 2.1.2001 passed by the learned Distt. Judge, Sirmaur at Nahan in Civil Misc. Appeal No. 41-CMA/14 of 2000 Ext. PB, and notices of the defendants Ext. PC and PD and reply thereto Ext. PE and certified copy of order dated 15.6.2000 passed by the learned District Judge, Sirmaur at Nahan in Civil Appeal No. 92-CA/13 of 2000/99 Ext. PH. According to him, he was owner-in-possession of the suit land and adjoining to it, he has constructed a house over land comprised in Kh. Nos. 1151 to 1153 in the year 1962. The suit land is a "Gair Mumkin Rasta". It was made *pucca* by him. The defendants have never raised any objection at that time.

10. Sh. R.R.Sharma, DW-1 has placed on record certified copy of judgment dated 20.3.2000 passed by this Court in Civil Suit No. 103/1 of 1998/96 Ext. DA. According to him, the suit land is a path and the same was metalled by the defendants in the year 1987-88 out of the Municipal funds and the plaintiff has no right to cause construction over it. The path was used by the inhabitants of the surrounding and the public at large. In his cross-examination, he admitted that the Municipal Council, Nahan has not taken any steps to get the suit land entered in the revenue record as public path.

11. According to the jamabandi for the year 1996-97 Ext. PA, the area of dispute is only 12.32 sq. meters. The plaintiff is recorded as owner-in-possession of the disputed path in the revenue record. The defendants have not rebutted the same. The Executive Officer Sh. R.R.Sharma, DW-1 has also admitted in his cross-examination that in the revenue record, Kh. No. 1107 is recorded in the ownership and possession of the plaintiff as "Gair Mumkin Rasta". The Municipal Council, Nahan has never applied for change of entry before any authority including revenue authority from "Gair Mumkin Rasta" to public path. There is no evidence placed on record by the defendants as to when the disputed path vested in the Municipal Council. DW-1 Sh. R.R.Sharma, has deposed that the road was metalled by the Municipal Council. However, he has admitted that he could not produce any record to prove that. Even in Ext. PC and PD, there is no mention of the khasra number. The first appellate Court has correctly applied the ratio of the judgment in the case of ***Narsing Dass vrs. State of H.P. and others,*** reported in ***AIR 1977 HP 84.*** The learned Single Judge, while interpreting Sections 2(22) (b) and 55 (1)(g) of the Himachal Pradesh Municipal Act, has held as under:

"3. It is plain from Sections 4 and 5 of the Himachal Pradesh Public Premises and Land (Eviction and Rent Recovery) Act, 1971 that an order of eviction is contemplated where a person is in unauthorised occupation of any public premises. By virtue of the definition in Section 2 (e) of the Act, the expression "public premises" includes premises belonging to a Municipal Corporation. The Divisional Commissioner has held the land to belong to the Municipal Corporation on the footing that it is a vacant space beside a public street. It seems to me that the relevant provisions of the statute have not been noticed in their entirety. In order to vest in the Municipal Corporation under Section 55 (1) (g) of the Himachal Pradesh Municipal Act the land must be a public street. A "public street," as defined by Section 2 (22) (b) of the Act, is a street which has been "levelled, paved, metalled, channelled, sewered or repaired out of municipal or other public funds" (subject to the exceptions mentioned in the definition) or is a street declared by the committee to be, or becomes under the Act, a public street. To be a "street," for the purpose of the Act, it must be, according to Section 2 (22) (a):

> "any road, footway, square, court, alley or passage, accessible, whether permanently or temporarily to the public, and whether a thoroughfare or not; and shall include every vacant space, notwithstanding that it may be private property and partly or wholly obstructed by any gate, post, chain or other barrier, if houses, shops or other buildings abut thereon, and if it is used by any person as a means of access to or from any public place or thoroughfare, whether such persons be occupier of such buildings or not, but shall not include any part of such space which the occupier of any such building has a right at all hours to prevent all other persons from using as aforesaid; ....."

The Divisional Commissioner has not found the land to be a road, footway, square, court alley or passage. He has treated it as a street on the ground that it is a vacant space beside a public street. Now, not every vacant space can be described as a street. It must be vacant space where houses, shops or other buildings abut thereon, and if it is used by any person as a means of access to or from any public place or thoroughfare, except that it cannot include space which the occupier of any such building has a right at all hours to prevent other persons from using. If the land satisfies that description, it can be considered as a "street" Then every street is not ,a "public street." A street must have been levelled, paved, metalled, channelled, sewered or repaired out of municipal or other public funds, or it must have been declared by the committee, or should have become under the Act, a public street. Those several considerations must be satisfied before the land in question can be identified as a public street. The limited consideration applied by the Divisional Commissioner does not suffice as a basis for the conclusion that the land constitutes a public street. Accordingly, the impugned order of the Divisional Commissioner must be held vitiated by an error of law on the face of the record."

12. The disputed path is 80 ft. long and 8 ft. wide. The disputed path is only 12.32 sq. meters. The plaintiff, while appearing as PW-1 has categorically deposed that he made the path *pucca*. There is no material placed on record that the path was made *pucca* by the Municipal Council, from its own funds. There is a detailed procedure, the manner in which the path can become public path under the Municipal Act, 1994. The defendants

have failed to prove that the disputed path is a Municipal path or public street or when it vested in the Municipal Council, Nahan.

13. Section 43 of the H.P. Municipal Act, 1994, reads as under:

> "43. Suits against municipality and its employees.- No suit shall be instituted against a municipality, or against any employee of a municipality, in respect of any act purporting to be done in its or his official capacity, until the expiration of one month next after notice in writing has been, in the case of a municipality, delivered or left at his office, and in the case of an employee, delivered to him or left at his office or place of abode, stating the cause of action and the name and place of abode of the intending plaintiff ; and the plaint must contain a statement that such notice has been so delivered or left :
>
> Provided that nothing in this section shall apply to any suit instituted under section 38 of the Specific Relief Act, 1963 (47 of 1963)."

14. The present suit has been filed for injunction. Thus, the Civil Court had the jurisdiction to decide the lis. The Hon'ble Apex Court in the case of ***Devi Singh vrs. Municipal Corporation, Hyderabad,*** reported in ***AIR 1972 SC 2510,*** have held that where in a suit for injunction against a Municipality restraining it from interfering with plaintiff's peaceful enjoyment and possession of the Bazar in suit, the whole controversy was whether the Bazar was the property of the plaintiff and was in his possession at the time of institution of the suit, no notice of suit under S. 447 was necessary as the suit had nothing to do with any act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. It has been held as follows:

> "12. We may dispose of the legal points. As regards the requirement of a notice under Section 447 of the Corporation Act that section provides that no suit shall be instituted against the Corporation, Commr, Municipal Officer or servant in respect of any act done in or purported to be done pursuance of execution or intended execution of the Act or in respect of any alleged neglect or default in the execution of the Act until the expiration of one month next after a notice had been served on the Corporation or Officer concerned in the manner indicated in the section. This is what the High Court said on the point :
>
> > "It cannot be gain said that the acts complained of by the plaintiff were acts done by the Corporation in pursuance of its powers and duties under the Act. Under Section 59 of the Act the Corporation is empowered to make provision for public parks, gardens play grounds and recreation grounds, while under Section 56 of the Act the Corporation is empowered to remove obstructions upon public places.
>
> The question whether a notice under the aforesaid section was necessary has to be decided on the averments made. It was never the case of the plaintiff that the defendant Corporation was acting or purported to act under the provisions of the Act. The dispute raised related to the ownership of the property as also its possession. We have not been shown any provision in the Corporation Act by which the Corporation or its officers were entitled to either take possession of another person's property or retain its possession or dispossess a person who is already in possession without having recourse to the ordinary remedies under the law. We are wholly unable to understand how Section 56 of the Corporation Act could be of any avail to the

> Corporation in the matter of notice under Section 447 of the Act. The whole controversy between the parties centered on the question whether the Bazaar was the property of the plaintiff and was in his possession at the time of the institution of the suit. That had nothing to do with any act done or purported to be done in pursuance of execution or intended execution of any provision of the Corporation Act. The learned Counsel for the Corporation has not been able to show how the suit as laid and framed attracted the applicability of Section 447 of the Corporation Act. We would, accordingly, hold that under the aforesaid section no notice was necessary any before the institution of the suit."

15. The Division Bench of the Calcutta High Court in the case of ***Gowardhandas Rathi vrs. Corporation of Calcutta and another,*** reported in ***AIR 1970 Calcutta 539,*** have held that where in a suit against the Corporation for declaration and injunction, the relief for permanent injunction restraining the Commissioner from giving effect to his invalid order for demolition of structure is claimed only as an additional relief, the suit is, nevertheless, a suit for permanent injunction within the meaning of Section 54 of the Specific Relief Act. Consequently, such suit would be protected under Section 586(4) and notice under Section 586(1) would not be necessary for the institution of the suit. It has been held as follows:

> "15. Every suit, therefore, for a perpetual injunction must involve a determination or a declaration to the above effect, or, in other words, such a declaration would be necessarily involved or implied in the case of every decree for perpetual injunction.
>
> 16. In the instant case, the invasion of the plaintiff's right or the commission of the act, contemplated above, would, presumably be the passing of the impugned order, which is challenged in the plaint as invalid, illegal and mala fide, and a finding, determination or declaration to that effect would, whether expressly or impliedly, be necessary for the grant of perpetual injunction to the plaintiff. Indeed, in the instant case, there is an express prayer for such a declaration. That however, in our opinion, would not alter the substantive position. That prayer may well be regarded as ancillary to the main relief of perpetual or permanent injunction, --if not unnecessary as a prayer in the prayer portion of the plaint. The necessary allegation in the body of the plaint to enable the Court to come to a determination of the above basic question would be enough for the purpose of supporting the ultimate decree of perpetual injunction. In law, a declaration by implication or in ex-press terms would not make any difference in substance and, regarded from that point of view, it will not affect or alter the nature of the suit and, accordingly, the instant suit may well be regarded, as, in substance, it is, as a suit for perpetual or permanent injunction. In this view, we would hold that the instant suit would satisfy the test of a suit, instituted under Section 54of the old Specific Relief Act, corresponding to Section 38 of the new Act. In that view, the instant case would be covered by the protective provision of Sub-section (4) of Section 586 of the Calcutta Municipal Act and, accordingly, would be outside the mischief of Sub-section (1) of the said section. The absence or want of a notice under the said statutory provision cannot, therefore, be fatal to the instant suit and the learned trial Judge's view to the contrary is not correct and must be set aside.
>
> 17. So far as the question under Section 80 of the Code of Civil Procedure is concerned, it is clear that, for the application of that section and the

requirement of notice under the same, it is necessary that the defendant must be a Public Officer. So far as the present case is concerned, this defence is limited to the case of defendant No. 2, as, obviously, the Corporation of Calcutta would not fulfil the description or definition of a Public Officer. As regards the said defendant No. 2, however, the matter, when judged under the relative statutory provision in Section 2(17) of the Code of Civil Procedure, which defines a "public officer" for purposes of the Code, the same can be attracted, if at all, under Clause (h) of the said section. That clause reads as follows:

> "(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty."

The latter part of this clause would not, obviously, apply in the instant case as the Commissioner of the Corporation of Calcutta is not- remunerated by fees or commissions. The question then shortens itself to this: "Is he an officer in the service or pay of the Government?" For this purpose, it is necessary to consider the effect and implication of some of the provisions of the Calcutta Municipal Act. The Commissioner under the said statute, is appointed by the State Government on the recommendation of the State Public Service Commission and upon such terms and conditions as the State Government may determine and he shall not be a member of the Corporation. This is provided in Section 19(1) of the said Act, Sub-section (3) of the said section provides that "Notwithstanding anything contained in Sub-section (2) [which fixes the normal tenure of the Commissioner to a term of five years subject to renewal in appropriate cases to another term of the same period], the State Government may, at any time, remove the Commissioner from office and shall do so if, at a special meeting of the Corporation, called for purpose, resolution for the removal of the Commissioner, in favour of which more than one-half of the total number of members of the Corporation give their votes, is carried." Power of appointment and removal therefore, so far as the Commissioner is concerned, undoubtedly, rests with the State Government. Sub-section (4) of the above section, again, provides that "The Commissioner shall not undertake any work unconnected with his office without the sanction of the State Government and of the Corporation."

16. The Division Bench of the Gujarat High Court in the case of ***M/S Super Steels, Ahmedabad vrs. Ahmedabad Municipal Corporation, Astodia,*** reported in ***AIR 1981 Gujarat 230,*** while considering the provisions of Bombay Provincial Municipal Corporations Act, 1949 has held that exclusion of jurisdiction of Civil Court is not readily to be inferred unless the finality is attached to the orders of special authorities or tribunals or where there is a bar of jurisdiction of the Court by an express provision or by necessary implications. It has been held as follows:

> "5. We are afraid that the contention urged on behalf of the respondent-Cor1poration is too specious to be adhered to. It is settled position of law which is riot required to be supported by citation of any decisions since it is clear on the matter of principle as well as authorities that if a Tribunal or an officer acting under a statute commits an error of fact which is a Jurisdictional fact, his decision is always liable to be questioned in Civil Court, except where the jurisdiction of the Civil Court is ousted by clear terms of the statute or by necessary implications (Vide: Raza Textile Ltd. v. 1.

T. O. Ranipur, AIR 1973 SC, 1362). This court has, In Municipal Corporation of the City of Ahmedabad v. Patel Prabhudas Dhanjibhai (1960) 1 Guj LR 94, held that S. 260 of the Bombay Provincial Mmicipal Corporations Act was not of retrospective nature but prospective in its operation and any proceeding in respect of a default under the provisions of the Bombay Municipal Boroughs Act, 1925 can only be continued under the provisions of that Act provided that such provisions of the Act fall within the scope of Appendix IV of the Bombay Provincial Municipal Corporations Act of 1949 and are saved under its S. 493 or Appendix IV. The learned single Judge (Shelat J.) further held that a notice issued under S. 260 of the 1949 Act in respect of the constructions made prior to the said Act coming into operation was not a valid and legal notice. In other words, the proceedings which can be initiated by the Corporation under S. 260 for purposes of the demolition of the unauthorised structure are competent only in respect of the structures which have been constructed after the Corporations Act came into force. This will be undoubtedly a jurisdictional fact inasmuch as the notice under S. 260 would be competent provided it is established that the premises are in existence prior to the application of the said Act. If, therefore, the competent Authority purporting to act under S. 260 decides in fact either in favour of the Corporation for initiation and continuation of the proceedings for demolition of unauthorised structures or in favour of citizens for discharge of notice,, the decision of the said authority would invest the authority with the jurisdiction to continue or not to continue the proceedings, and if in course of deciding that jurisdictional fact, the competent -Authority goes wrong, the citizen has always a right to agitate that question by challenging the decision for demolition in Civil Court. The learned City Civil Judge, however, found himself unable to go into this question since he was bound by the decision of this Court in First Appeal No. 828 of 1973 decided on 12th/13th July, 1977. The learned single Judge in that appeal was concerned with a notice dated Oct. 17, 1970 for demolition of unauthorised structure issued by the Deputy Town Planning Officer under S. 260(1)(a) of the said Act and the consequent order of Nov. 14, 1970 passed under S. 260(2) of the said Act. The owner of the premises aggrieved by the said notice and order had filed a suit in the City Civil Court, Ahmedabad, for a declaration 'that the said notice and the said order were bad in law and void and for consequential relief of permanent injunction restraining the Corporation from enforcing the said order. The owner came in appeal being aggrieved with the order of the City Civil Court dismissing the said suit as the learned City Civil Judge was of the opinion that the suit was not tenable. A number of contentions was advanced before the learned single Judge in the course of hearing of the appeal. Contention No. 3 is material for the purposes of this appeal since in the course of discussion of that contention the learned Judge has made some observations which the learned City Civil Judge in the present case found as denying jurisdiction to the Civil Court to try an issue whether the Act applied to the premises in dispute or not. The contention urged before the learned single Judge in the said appeal was that the demolition order was vague and having been passed without application of mind was bad. The learned single Judge, while dealing with this contention, has recorded as under:

> “8. …….All that he had stated was that the three rooms were old and the Act did not apply. Even if we interpret this layman's reply liberally and hold that there was an implicit specific contention

> advanced on behalf of the appellant, there is ample material on the record to show that the authority concerned had, before it the concrete evidence, evidencing otherwise Thus, there was sufficient material before the concerned authority to show that what the appellant was contending before it in the form of his structures being more than 22 years old was a clear hoax. The executive officers assigned with the duty of discharging quasi-judicial functions are not expected to write elaborate judgments as is done by the legally trained persons. All that is required is that there should be reasonable material before the Court subsequently to examine the question of application or non-application of mind to enable the Court to hold that all relevant facets were adverted to by the authority and a decision had been arrived at fairly and reasonably. It was up to the appellant and the appellant alone to convince this Court that the said order had been passed without any application of mind.
>
> As a matter of fact, considerable evidence was led before the learned trial Judge, much of it unnecessarily, about the existence of the structure at the site. It was not within the domain of the learned Judge to decide himself whether the structures were 25 years old or not. All that he had to decide was whether the quasi-judicial authority had applied its mind to that contention of the appellant and whether there was any material of probative value before that authority to arrive at the conclusion it reached ....."

The emphasised part of this observation of the learned single Judge has been read by the learned City Civil Judge in the present suit as exclusion of the Civil Court's jurisdiction. It is no doubt true that the learned Judge has said that the question of existence of the structure at the site was not within the domain of the learned Judge but that observation was made in the context of the contention, whether the authority had applied the mind or not. The learned single Judge was not concerned with the question whether the Civil Court has jurisdiction or not. It cannot be urged as has been sought to be done here before us, by the learned Advocate for the respondent-Corporation that the Civil Court has no jurisdiction whatsoever to go into the question as to whether the said Act was applicable to the structure in dispute since it was constructed before the Corporations Act was made applicable. We are afraid this is too specious a contention to which we should readily agree to, obviously for two reasons: In the first place, exclusion of jurisdiction of Civil Court is not readily to be inferred unless the finality is attached to the orders of special authorities or tribunals or where there is a bar of jurisdiction of the Court by an express provision or by necessary implications. Even such provision as to the finality or exclusion does not exclude the jurisdiction of Civil Court where the provisions of a particular Act have not been complied with or a statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure and where the special remedy does not ensure full and complete relief as available in Civil Court (Vide: Dhulabhai v. State of M. P. AIR 1969 SC 78). Secondly, in any view of the matter, any error committed by the Tribunal or an authority under the statute on a fact which would invest it or him with the jurisdiction is always subject to judicial scrutiny in the ordinary Civil Court. Unless, therefore, the jurisdiction of Civil Court is ousted by express terms or by necessary

implication, it would be wrong on the part of the learned City Civil Judge to read this observation as tantamount to saying that the jurisdiction of the Civil Court is completely barred. We are, therefore, of the opinion that the learned City Civil Court Judge and for that matter the learned ,single Judge of this Court were in error :in dismissing the suit without inquiring into the material question raised at issue No.1 on the ground of want of jurisdicition."

17. In the instant case, the plaintiff, as per the revenue record, is owner-in-possession of land comprised in Khewat/Khatauni No. 148/363, Kh. No. 1107, measuring 12.32 sq. meters, situated at Mohalla Amarpur, Nahan, Distt. Sirmour, H.P. The substantial questions of law are answered accordingly.

18. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

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

Smt. Chiri Devi and another .....Appellants

Versus

Drompti Devi (deceased) through LR's Labh Singh and another .....Respondents

RSA No. 205/2003
Reserved on: 26.11.2015
Decided on: 10.12.2015

Indian Succession Act, 1925- Section 63- 'T' was owner of the suit property- she executed a Will in favour of defendants- plaintiffs assailed the Will pleading that 'T' was not in a sound disposing state of mind- Will was outcome of fraud, misrepresentation and deceit- - Will was got prepared by the husband of the defendant who had prevailed upon 'T' by exercising undue influence and allurement – suit was dismissed by the trial Court- an appeal was preferred which was also dismissed- held, that there was litigation between the husband of plaintiff No. 1 and the deceased – the execution of the Will was duly proved- plaintiff admitted that deceased was an intelligent lady – mere execution of the Will in favour one of his sons excluding all other children itself was not a suspicious circumstance- appeal dismissed. (Para-18 to 20)

Specific Relief Act, 1963- Section 34- Plaintiffs sought declaration and injunction challenging the Will allegedly executed by one 'T' in favour of defendant on the plea that Will was outcome of fraud, mis-representation and that 'T' was not in sound disposing state of mind- defendant supported the Will as a genuine document- trial Court dismissed the suit and the First Appellate Court dismissed the appeal – in second appeal held, that suit property originally belonged to one 'B' from whom it was inherited by 'T'- plea of plaintiffs that property was looked after by the husband of plaintiff No.1 and deceased was also maintained by him stand falsified from the fact that there was litigation between 'T' and the husband of the plaintiff No.1- defendant further proved that 'T' was rather looked after by the defendant –appeal dismissed. (Para-9 to 20)

Case referred:

Ved Mitra Verma v. Dharam Deo Verma, (2014) 15 SCC 578

For the Appellants : Mr. Sanjeev Kuthiala, Advocate.
For the Respondents : Mr. Raman Parashar, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge :

This Regular Second Appeal has been instituted against Judgment and Decree dated 26.4.2003 rendered by learned Additional District Judge, Mandi, District Mandi, HP in Civil Appeal No. 37 of 1997.

2. "Key facts" necessary for the adjudication of the present appeal are that the appellants-plaintiffs (hereinafter referred to as 'plaintiffs' for convenience sake) filed a suit for declaration and injunction against the respondent-defendant (hereinafter referred to as 'defendant' for convenience sake) that Smt. Todari executed a will in favour of the defendant. The suit property was earlier owned by deceased Basakhu. Property was inherited by Todari after the death of Basakhu. It is averred in the plaint that after the death of Basakhu, his entire property was looked after by Shri Khima, husband of plaintiff No.1. Husband of the defendant prevailed upon Todari by undue influence and allurement and got prepared the will dated 8.4.1982 in favour of the defendant. It was outcome of fraud, misrepresentation and deceit. Todari was not in a sound disposing mind.

3. Suit was contested by the defendant. According to the defendant, Todari executed a will in a sound state of mind in favour of the defendant.

4. Issues were framed by the trial Court on 3.2.1993. He dismissed the suit on 1.4.1997. Plaintiffs filed an appeal before the Additional District Judge. He dismissed the same on 26.4.2003. Hence, this Regular Second Appeal.

5. The Regular Second Appeal was admitted on 3.3.2004, on the following substantial questions of law:

> "1. Whether the learned Courts below have misread and mis-appreciated oral and documentary evidence, especially statements of PW2, PW3, DW2 and DW, Exh. DX?
>
> 2. Whether the provision of Sections 68 and 104 of the Indian Succession Act regarding the discharge of burden of proving the onus cast upon the propounder can be dispensed with by the Courts and whether it is not necessary for the propounder to dispel the doubts and suspicious circumstances regarding the execution and attestation of the Will?
>
> 3. Whether the proof and execution and attestation of the Will can be made on the basis of a certified copy without producing the original will and without complying with the provisions of Sections 64 and 67 of the Indian Succession Act and if such method or proof can satisfy the requirement of law as also the conscience of the Court?"

6. Mr. Sanjeev Kuthiala, Advocate, on the basis of substantial questions of law framed, has vehemently argued that the learned Courts below have not correctly appreciated the oral as well as documentary evidence. He contended that the suspicious circumstances have not been explained by the propounder. He lastly contended that the certified copy of the Will could not be taken into consideration by the learned Courts below.

7. Mr. Raman Parashar, Advocate, has supported the judgments and decrees passed by both the learned Courts below.

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

9. Since all the substantial questions of law are interconnected, same were taken up together to avoid repetition of discussion of evidence.

10. According to PW-1 Tonsa, land was being cultivated by Shri Khema and Chiri. After the death of Khema, Nandu and Gorkhu were cultivating the same. Todari was being looked after and maintained by Chiri and Khema. He has also admitted that there was a litigation between Todari and Khema. Todari suffered from high fever 15 days prior to her death. She was an intelligent lady.

11. PW-2 Chiri Devi deposed that the suit land was situate at village Seri. It measured 9 bighas. Basakhu was her father. He died 21 years back. Land was inherited by three sisters and their mother. After the death of Basakhu, Khema used to manage the land. Todari is mother of Drompti. Buhutu is her sister. She and her husband used to cultivate the land after the death of Basakhu. They came to know about the will after one year of death of Todari. Husband of the defendant got will executed in favour of his wife. Todari remained ill. She remained confined to bed. She was unable to walk.

12. PW-3 Shankar deposed that he knew the parties. He has seen the suit land. 10 years prior to death, Todari was not of sound disposing mind. She remained ill. In his cross-examination he has deposed that Chiri has constructed her separate house 25-30 years before. She used to live with Khema. The house in which Todari lived was in a dilapidated condition. She died in that house. Todari was confined to bed before her death.

13. DW-1 Drompti Devi deposed that Todari executed a will in her favour. She and her husband used to look after Todari. Todari was confined to bed 10-12 days prior to her death. Will was scribed by a document writer. She also called for witnesses namely Mohan and Gian Singh. No fraud was committed upon Todari.

14. DW-2 Mohan Singh deposed that the will was scribed by document writer on 8.4.1982. Todari got this will scribed from document writer. Document writer read over and explained contents of the same to Todari. She, after admitting the same to be correct, put her thumb impression on the will. Thereafter, they put their signatures.

15. DW-4 Gian Singh also signed the Will. She was identified by an advocate Yograj. Thereafter they went to Tehsil office. Contents of will were read over and explained to Todari by the Tehsildar. Todari after admitting them to be correct, put thumb impression on it. Thereafter, witnesses put their signatures on it. Will was read over and explained in Hindi by the Document Writer to Todari.

16. DW-3 Yog Raj testified that he identified Todari before Tehsildar.

17. Will was scribed by a document writer. Contents of the will were read over and explained to Todari. She, after admitting the same to be correct, put her thumb impression on it.

18. According to plaintiff No.1, her husband was looking after Todari and also looked after the land. However, fact of the matter is that there was litigation between Khema and Todari. PW-1 Tonsa has deposed that Todari and Khema were involved in litigation. Thus there was no occasion for Khema to cultivate land of Todari. It has also come in the statement of PW-3 Shankar that Todari used to live separately from plaintiffs. She was living in a dilapidated house. She died in the said dilapidated house. Defendants have placed on record statement of Khema Ram, Ext. DY which is on record of execution proceedings,

whereby Khema has undertaken not to interfere in the land of the decree holder. In fact, Todari has filed a civil suit against Khema. She was also constrained to file an execution petition. PW-3 Shankar has deposed that one month prior to death, Todari was confined to bed. PW-1 Tonsa has also admitted that Todari was an intelligent lady. She was ill 20-30 days prior to her death. It has also come on record that Todari has given land to sons of Chiri. Chiri has also admitted that Todari has given 2-3 bighas of land to her sons. Defendants have duly proved the execution of the Will. It was scribed by a document writer. DW-2 Mohan and DW-4 Gian Singh were marginal witnesses. Contents of the Will were read over and explained to Todari. Thereafter, marginal witnesses signed the same. Will was produced before Tehsildar. He also read over the contents of the Will in Hindi to Todari Devi. She thereafter put her signatures. Defendants have moved an application for producing certified copy of the Will. Application was allowed by the trial Court on 26.6.1996. Learned trial Court has passed a speaking order.

19. Mr. Sanjeev Kuthiala, Advocate has also argued that the testatrix could not bequeath entire property to the defendants. This question is no more res integra, in view of the law laid down by their Lordships of the Hon'ble Supreme Court in **Ved Mitra Verma v. Dharam Deo Verma** reported in (2014) 15 SCC 578, whey their lordships have held that execution of will by testator for sole benefit of one of his sons excluding all other children itself was not a suspicious circumstance. Their lordships have held as under:

> "8. The exclusion of the other children of the testator and the execution of the will for the sole benefit of one of the sons i.e. the respondent, by itself, is not a suspicious circumstance. The property being self-acquired, it is the will of the testator that has to prevail."

20. Courts below have correctly appreciated the evidence on record. The substantial questions of law are answered accordingly.

21. Accordingly, there is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

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

Dinesh Kumar .....Petitioner.

Versus

State of H.P and others .....Respondents.

CWP No. 3273 of 2015

Decided on: 10th December, 2015

Constitution of India, 1950- Article 226- Petitioner deals in marketing apple - respondent No. 3 has marketing yards at different places – one such yard was located in Rohru, space is being provided to the traders on their applications – petitioner applied for registration as a commission agent- registration was refused as the petitioner had refused to furnish the security of Rs. 25 lacs- petitioner filed a writ petition seeking the quashing of decision taken by Board in regarding the affixation of registration fees of licence- respondent stated that the provision of furnishing security was made with a view of protect the interest of the farmer and growers- Section 39(2) of Himachal Pradesh Agricultural and Horticultural Produce Marketing (Development and Regulation) Act 2005 provides for obtaining security- the object

of such provision is to protect the interest of the farmers and fruit growers- however, security has to be taken according to the capacity of the buyer – Board of Management had imposed the security of Rs. 25,000/- at flat rate upon all the traders- hence, direction issued to take into consideration to the capacity of the person applying for his registration as traders/commission agent. (Para-4 to 7)

For the petitioner: Mr. Vishal Panwar, Advocate.
For the respondents: Mr. D.S. Nainta and Mr. Virender Verma, Addl. A.Gs with Mr. Pushpinder Jaswal, Dy. A.G for respondent No. 1.
Mr. Dhruv Shaunak, Advocate for respondent No. 2.
Mr. Sanjay Ranta, Advocate for respondent No. 3.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)

Petitioner is a local resident of Tehsil Chirgaon, District Shimla. He deals in the business of marketing apple crop during the apple season. Respondent No. 2-Board is the creation of the Himachal Pradesh Agricultural and Horticultural Produce Marketing (Development and Regulation) Act 2005, (hereinafter referred to as the 'Act') and constituted to approve for marketing the Agricultural/ Horticultural produce, development of effective marketing system, promotion of agricultural/horticultural exports and establishment/ administration of proper markets for the sale of agricultural/horticultural produce in the State. Respondent No.1-State has also formulated the rules known as Himachal Pradesh Agricultural and Horticultural Produce Marketing (General) Rules 2006 (hereinafter referred to as the 'Rules' in short). Respondent No. 3 is the Marketing Committee established for the Districts of Shimla and Kinnaur at Dhalli. Respondent No. 3 is having its marketing yards at different places in Shimla and Kinnaur Districts. It is respondent No. 3 exercise all control over these yards and supervises all marketing activities in accordance with Act and the Rules framed thereunder. One of such yard of respondent No. 3 is situated at Rohru in District Shimla. The space is being provided to the traders on their applications submitted on prescribed performa by respondent No. 2. Section 40 of the Act which provides for the procedure to be followed for making an application by a person desirous to operate in the market area as a trader, commission agent etc. etc. reads as follows:

> 40.(1) Every person who in respect of notified agricultural produce, desires to operate in the market area as a trader, commission agent, weighman, harmal, syrveyor, ware houseman, contract farming sponsor, owner or occupier of the processing factory or any other market functionary, shall apply to the Secretary of the Committee for registration or renewal of registration in such manner and within such period as may be prescribed. The Secretary of the Committee shall be the authority to grant registration certificate with the prior approval of the Committee.
>
> Provided that any person may buy agricultural produce in the market yard/sub-market yard on day to day basis even without getting registered.
>
> Provided further that any person who desires to trade or transact or deal in any notified agricultural produce in more than one market area shall get registered, for respective function from the Managing Director of Board.
>
> (2) No broker, trader, weighman, surveyor, godown keeper or other functionaries shall, unless duly registered, carry on his occupation in a

notified market area in respect of the notified agricultural produce under this Act.

(3) Every application for such registration shall be accompanied with such fee as may be prescribed.

(4) That Committee may register or renew the registration or refuse registration or renewal of the registration or cancel the registration on any of the following grounds:

(i) if the applicant is a minor; or

(ii) if the applicant has been declared defaulter: or

(iii) if the applicant has been found guilty under this Act, the rules and bye-laws made thereunder.

2. The petitioner, who wanted to operate as a commission agent during apple season of this year in the market area Rohru, has applied for his registration as such vide application on prescribed performa, (Annexure P-2) to respondent No. 3. The registration, however, was refused to him as he failed to furnish security to the tune of Rs.25,000,00/- by way of furnishing bank guarantee or in the shape of fixed deposit receipts. As a matter of fact, the application the petitioner has made was processed and vide Annexure R-53 dated 10.07.2015, respondent No. 3 called upon him to furnish security to the tune of Rs.25,000,00/- in the manner as aforesaid. He failed to arrange for security and as such, the registration he sought was declined vide letter, Annexure P-5 to the rejoinder. Hence, this writ petition with the following prayer:

"i. That the decision taken by the BOM dated 23.9.2014 in respect of fixation of registration fee of license for establishing private yard as a commission agent for buying and selling the apple crop at notified market area may kindly be quashed and set aside (i.e. Annexure P-4).

ii. that the respondents may be directed to grant the license in favour of the petitioner for establishing private yard as a commission agent for buying and selling the apple crop at notified market area Rohru District Shimla as per the provisions of Act and Rule:"

3. The complaint is that the decision, Annexure P-4, dated 23.09.2014 taken by the Board of Management of respondent No. 2 qua furnishing of security to the tune of Rs.25,000,00/- in the form of bank guarantee or by way of pledging FDR/property is illegal and violative of Article 14 and 19(1) (g) of the Constitution of India. No such decision could have been taken without making amendment in the Rules. The condition of furnishing security to the tune of Rs.25,000,00/-, according to the petitioner amounts to put unreasonable restriction on the right of a petty commission agent like him to obtain the registration certificate. Also that a commission agent, who establish a private yard in the market committee area for buying and selling the apple crop for a short duration of three months.

4. The petitioner who claims himself to be a petty commission agent had applied for his registration as such to carry on the business in the notified market area to earn his livelihood. However, he has been refused the registration on the ground which is not only arbitrary and harsh but oppressive also. It has been pointed that unreasonable restriction imposed in the matter of carrying out trade and business violates the

fundamental rights of a citizen guaranteed under Article 19 of the Constitution of India, no unreasonable restriction not consistent with the said Article can be imposed.

5. In reply to the writ petition, the stand of respondents No. 2 and 3 is that the source of power of respondent No. 2-Board to impose such restriction flows from the statute i.e. the Act itself and that the provision qua furnishing of security to the tune of Rs.25,000,00/- was made with a view to protect the interest of farmers and growers, as in the recent past, the traders/commission agents fled away leaving the liability of crores of rupees towards the farmers and growers. The respondent-Board could not settle the disputes till date for want of their whereabouts. The farmers and apple growers are now running from pillar to post to recover their hard earned money.

6. On hearing learned counsel representing the parties on both sides and also going through the record, so far as 2nd relief is concerned, the writ petition qua the same has become infructuous because the apple season is now over. So far as the further grouse that the decision taken by the Board of Management of respondent No. 2 to ask for security to the tune of Rs.25,000,00/-, from a person like the petitioner for his registration as a trader/commission agent to carry on the business in the local market area allegedly illegal, arbitrary, harsh and without any authority, the reference can be made to Section 39(2) of the Act, which reads as follows:

> "In order to maintain stability in the market (a) take suitable measures to ensure that traders do not buy agricultural produce beyond their capacity and avoid risk to the sellers in disposing off the produce, and (b) grant license only after obtaining necessary security in cash or bank guarantee according to the capacity of the buyers."

7. It is seen that under the provisions ibid the board in order to maintain stability in the market and also that traders do not buy agricultural produce beyond their capacity and thereby to protect the risk of the sellers in disposing of their produce made provisions to grant license only after obtaining necessary security in cash or bank guarantee as per the buying capacity of the traders/commission agents. The object of such provisions, pure and simple is to protect the interest of the farmers and fruit growers. Therefore, it cannot be said that respondent No. 2 has no authority to make provision of furnishing security. The power so vested with respondent No. 2-Board, however, is controlled by the capacity of a person who applies for his registration as a trader in a particular market area to buy agricultural/horticultural produce. The decision Annexure P-4 (Colly.) of the Board of Management of respondent No. 2 not take care of this aspect of the matter and rather levy the security to the tune of Rs.25,000,00/- at flat rates to all traders, irrespective of their financial capacity to buy the crop. On account of such decision, the person similarly situated to the petitioner seems to have deprived from obtaining the registration to carry on their business in the market yard area at Rohru. Any how, as already said, the season of this year is now over. This Court, however, feels that a direction to respondent No. 2 to take into consideration the capacity of a person applying for his registration as trader/commission agent to carry on business in the market area while fixing the amount of security to be furnished in future, would serve the ends of justice.

8. Therefore, this writ petition is disposed of with a direction to respondent No. 2 to lay down the criteria in the matter of fixing amount of security after taking into consideration the capacity of a person, an applicant to the grant of license to carry on business in any market area in the State in future. Pending application(s), if any, shall also stand disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Kishori Lal ……Appellant.
Versus
State of H.P. …….Respondent.

Cr. Appeal No. 186 of 2015
Reserved on: December 09, 2015.
Decided on: December 10, 2015.

N.D.P.S. Act, 1985- Section 20- Accused was apprehended by the police nakka team and 1.450 kilograms cannabis was recovered from a black coloured bag being carried by him- accused was convicted by trial court- in appeal held that the place of interception of accused was not isolated or secluded - prosecution witnesses have referred that many vehicles were passing from the spot and abadi was also nearby- failure to associate independent/local witnesses by the Investigating Officer creates doubt about the genesis of the incident- PW-2 had admitted that personal search of the accused was also conducted- once personal search was conducted compliance of Section 50 of N.D.P.S. Act was must which was not made by the police- entries in the malkhana register were also not made when the case property was produced in the Court and was taken back- no DDR was also recorded, thus, there is doubt about the fact that case property remained intact with the police- all these facts show that guilt of the accused was not established- appeal accepted. (Para-15 to 19)

Case referred:
State of Rajasthan vrs. Parmanand and another, (2014) 5 SCC 345

For the appellant: Mr. Adarsh Sharma, Advocate.
For the respondent: Mr. Ramesh Thakur, Asstt. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 23.3.2015, rendered by the learned Special Judge (II), Chamba, H.P., in Sessions trial No. 412/2014, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), has been convicted and sentenced to undergo rigorous imprisonment for a period of 10 years and to pay fine of Rs. 1,00,000/- and in default of payment of fine, he was further ordered to undergo simple imprisonment for one year.

2. The case of the prosecution, in a nut shell, is that on 8.6.2014 HC Virender Singh (PW-12) IO SIU Chamba along with Constable Sunil Kumar (PW-1), Constable Yog Raj (PW-2) and Const. Sanjay Kumar (PW-3) proceeded in a private vehicle along with IO bag, electronic scale, camera etc. to lay a Nakka at Gharat Nalla. They reached the spot at about 7:30 AM. In the meanwhile, a person holding a black coloured bag in his right hand came on the road from hill side. On seeing the police, he tried to escape. It raised suspicion. The accused was apprehended. He disclosed his identity. When the bag of the accused was opened a green coloured packet containing black coloured hard substance in the form of

bundles and sticks was recovered. It was found to be cannabis. It weighed 1 kg 450 grams. The codal formalities were completed on the spot. The rukka Ext. PW-12/A was sent to the Police Station through Const. Sunil Kumar (PW-1), on the basis of which, FIR Ext. PW-7/D was registered. ASI Subhash Chand (PW-13) deposited the case property with SHO/Inspector R.R.Thakur for resealing. SHO re-sealed the same. Thereafter, the same was handed over to MHC Prabhat Nahar (PW-7). The contraband was sent to FSL, Junga through HHC Diwan Chand vide RC No. 65/14. The investigation was completed and the challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 13 witnesses. The accused was also examined under Section 313 Cr.P.C. The accused has denied the prosecution case. The learned trial Court convicted the accused, as noticed hereinabove.

4. Mr. Adarsh Sharma, Advocate, appearing on behalf of the accused has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Ramesh Thakur learned Assistant Advocate General for the State has supported the judgment of the learned trial Court dated 23.3.2015.

5. We have heard learned counsel for both the sides and gone through the records of the case carefully.

6. PW-1 Const. Sunil Kumar deposed that on 8.6.2014 at about 7:30 AM they were present at place Gharat Nalla. They saw a person coming from the hill side holding a black coloured bag in his right hand. The person after seeing the police party got perplexed and tried to escape. He was apprehended. On the basis of suspicion, his bag was opened and inside it another carry bag was recovered. On opening the carry bag, charas weighing 1 kg. 450 grams was recovered. It was sealed with 5 seals of impression "K". It was taken into possession vide memo Ext. PW-1/A. The rukka was written. It was handed over to him. He handed over the rukka to MHC Police Station Kihar. FIR was registered. The case property was produced by the learned Public Prosecutor while recording the statement of PW-1 Constable Sunil Kumar before the Court. In his cross-examination, he has admitted that every vehicle which comes from Kihar to Chamba passes through Gharat Nalla. He did not know that between 7:00 AM to 9:00 AM, between Kihar to Gharat Nalla about 5-6 buses and equal number of small vehicles passes through Gharat Nalla. He admitted that hand pump was installed near the *abadi*. He later on admitted that between 7:30 to 9:40 AM, many vehicles passes through Gharat Nalla. He took rukka and proceeded on foot from the spot and thereafter he took a lift from Salooni. At about 11:30 AM, he reached the Police Station. From the Police Station, again he proceeded at about 12:45 and reached Gharat Nalla at about 2:00 PM.

7. PW-2 Const. Yog Raj deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he deposed that they reached at Gharat Nalla at about 7:25 AM. Initially he stated that the accused was searched by the I.O and again stated that bag was searched. He has admitted that at the time of search of the accused, option under Section 50 of the ND & PS Act to the effect that he has legal right to be searched before any Magistrate or Gazetted Officer was not given to him.

8. PW-3 Const. Sanjay Kumar also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. It took about 10 minutes to apprehend and interrogate the accused. First of all, when the

accused was apprehended, the IO asked the name of the accused and thereafter bag of the accused person was opened. The accused person was not personally searched at that time.

9. PW-5 HHC Diwan Chand deposed that on 9.6.2014 MHC, PS Killar HC Prabhat Chand handed over to him one parcel sealed with five seals each of impressions "K" and "A", along with copy of FIR, NCB forms in triplicate, sample seals and docket to be deposited at FSL, Junga vide RC No. 65/14. He deposited the articles at FSL, Junga.

10. PW-6 HHC Satish Kumar deposed that ASI Subhash, Const. Krishan Chand brought the accused in the Police Station along with *pulinda* sealed with five seal impressions of "K", sample of the seal, NCB forms in triplicate and handed over to Inspector/SHO R.R.Thakur. SHO again resealed the same. Thereafter, SHO R.R.Thakur filled in the relevant columns No. 9 to 12 of the NCB forms in triplicate and also put seal "A" on the NCB forms in triplicate. Memo Ext. PW-6/B was prepared in this behalf.

11. PW-7 HC Prabhat Nahar deposed that on 8.6.2014 at around 4:20 PM, Insp. SHO R.R.Thakur deposited with him one pulinda containing five seals each of impressions "K" and "A" containing 1 kg 400 grams charas/cannabis along with NCB forms in triplicate and sample seals. He made necessary entry in the malkhana register at Sr. No. 181. On the next day, i.e. on 9.6.2014, he handed over the case property to HHC Diwan Chand vide RC No. 65/14 to be deposited in FSL Junga.

12. PW-11 SHO R.R.Thakur, deposed that he resealed the case property vide memo Ext. PW-6/B. He also filled up the relevant columns of NCB form. Thereafter, he deposited the same with MHC Prabhat Chand.

13. PW-12 HC Virender Singh deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he admitted that any vehicle which comes from Surgani and Kihar to Chamba passes through Gharat Nalla. He also admitted that between 7:30 AM to 10:00 AM, many buses passes through Gharat Nalla. He searched the bag of the accused person. He had not given any option to the accused as required under Section 50 of the ND & PS Act. He did not try to associate any independent/local witnesses at the time of search. Volunteered that it was an isolated place.

14. PW-13 ASI Subhash Chand prepared the spot map. He recorded the statement of Const. Yog Raj. He deposited the case property at about 4:20 PM before the SHO.

15. What emerges from the statement of PW-1 Const. Sunil Kumar is that the hand pump was situated near the *abadi*. He also admitted that every vehicle which comes from Kihar to Chamba passes though Gharat Nalla. PW-3 Const. Sanjay Kumar has admitted in his cross-examination that vehicles were crossing after 7:30 AM at the spot. PW-12 HC Virender Singh has admitted that between 7:30 AM to 10:00 AM, many buses passes through Gharat Nalla. He also admitted that any vehicle which comes from Surgani and Kihar to Chamba passes through Gharat Nalla. He also admitted that he did not try to associate any independent/local witnesses at the time of search. According to him, it was an isolated place.

16. It is clear from the statements of above mentioned witnesses that the place where the accused was intercepted was neither an isolated place nor it was secluded one. Many vehicles pass through the alleged spot. The prosecution should have associated occupants of the vehicles to inspire confidence in the search, seizure and sealing proceedings on the spot. PW-12 HC Virender Singh has categorically admitted in his cross-

examination that he has not even tried to associate any independent/local witness at the time of search.

17. PW-2 Const. Yog Raj, in his cross-examination, has admitted that accused was searched by the I.O and again stated that bag was searched. He has admitted that at the time of search of the accused, option under Section 50 of the ND & PS Act to the effect that he has legal right to be searched before any Magistrate or Gazetted Officer was not given to him. PW-12 HC Virender Singh deposed that he has searched the bag of the accused person. He has admitted that he has not given any option to the accused as required under Section 50 of the ND & PS Act. It was not necessary for the police to carry out the personal search of the accused since the contraband was recovered from the bag. However, the fact of the matter is that as per record, as per the statement of PW-2 Const. Yog Raj, accused was also searched but he was not apprised of his legal right to be searched either before the Magistrate or the Gazetted Officer.

18. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Parmanand and another,*** reported in ***(2014) 5 SCC 345,*** have held that if merely a bag carried by a person is searched, without there being any search of his person, S. 50 will have no application but if bag carried by him is searched and his person is also searched, S. 50 would be attracted. Their lordships have also held that it was improper for PW-10 SI "Q" to tell respondents that a third alternative was available. It has been held as follows:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.
>
> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

19. The case property was produced by the learned Public Prosecutor while recording the statement of PW-1 Const. Sunil Kumar. The extract of copy of the malkhana register is Ext. PW-7/A. There is entry of sending of the contraband on 9.6.2014 to FSL, Junga through HHC Diwan Chand. There is no entry when the case property was deposited, taken out from the malkhana and produced in the Court. There is no DDR recorded when the case property was produced before the trial Court. Similarly, there is no entry when the case property after production in the trial Court was re-deposited in the malkhana register. It is necessary for the prosecution to prove that the case property was taken out from the malkhana for the production in the Court and also preparing DDR to this effect and the same process is to be undergone when the case property after its production in the Court is taken back and deposited in the malkhana. There has to be entry in the malkhana register when it is re-deposited and DDR is also prepared. The production of the case property in the Court is mandatory. There is doubt whether the case property which was produced in the Court was the same which was recovered from the accused and sent to FSL, Junga in the absence of any corresponding entries made at the time of taking it and re-deposit in the malkhana register or it was case property of some other case. It has caused serious prejudice to the accused. The nabbing of the accused, recovery and sealing proceedings in the instant case are doubtful. When the case property was produced in the Court, there is no reference as to who brought the case property to the Court from malkhana and by whom it was taken back. It is necessary to keep the case property in safe custody from the date of seizure till its production in the Court in ND & PS cases.

20. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 23.3.2015, rendered by the learned Special Judge-II, Chamba, H.P., in Sessions trial No. 412/2014, is set aside. Accused is acquitted of the charges framed against him by giving him benefit of doubt. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

21. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

COPC No.1 of 2015 with
Ex. Petition No.25 of 2014.
Reserved on : 21.11.2015.
Date of decision: December 10th,2015.

1. COPC No.1 of 2015.

M/S Indo Farm Tractors and Motors Ltd. .....Petitioner.

Versus

R.K.Saini and another ..... Respondents.

2. Ex. Petition No.25 of 2014.

M/S Indo Farm Tractors and Motors Ltd. .....Decree-Holder.

Versus

The Rajpura Co-operative Agriculture Service Society Ltd. and others ..... JD/Defendants.

Contempt of Courts Act, 1971- Sections 10 and 12- Parties settled their dispute before the mediator and moved a joint application for passing a decree- consent decree was passed after recording the statements of parties- respondent did not comply with the consent decree on which a contempt petition was filed before the Court- respondents contended that the decree was executable and the contempt petition was not maintainable- held, that a compromise decree is a decree passed on the basis of consent which is approved by the Court- parties giving an undertaking to the Court render themselves liable for violation of the undertaking- respondents had compromised the matter and had not adhered to the undertaking- they had deceived the Court which amounts to contempt of Court- hence, the plea of the respondents that contempt petition is not maintainable cannot be accepted- respondents directed to comply with the undertaking given by them. (Para-6 to 15)

Cases referred:

Chhaganbhai Norsinbhai vs Soni Chandubhai Gordhanbhai and others, AIR 1976 SC 1909
Rosnan Sam Boyce versus B.R. Cotton Mills Ltd. and others, (1990) 2 SCC 636
Mohd. Aslam alias Bhure versus Union of India, AIR 1995 SC 548,
Bank of Baroda versus Sadruddin Hasan Daya and another, AIR 2004 SC 942
Rama Narang versus Ramesh Narang and another (2006) 11 SCC 114

For the Petitioner/ Decree Holder : Mr.C.N.Singh, Advocate, in both the petitions.
For the Respondents/JDs. : Mr.Amrinder Singh Rana, Advocate, for respondent No.1 in COPC No.1 of 2015 and for J.D. No.2 in Ex. Petition No.25 of 2014.
Mr.J.L.Bhardwaj, Advocate, for respondent No.2 in COPC No.1 of 2015 and for J.D. No.3 in Ex. Petition No.25 of 2014.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The petitioner/plaintiff has filed this petition under Sections 10 and 12 of the Contempt of Courts Act (for short 'Act') readwith Section 215 of the Constitution of India for initiation of contempt proceedings against the respondents for violation of the judgment and decree passed by this Court on 11.06.2013 in Civil Suit No.23 of 2010.

2. The undisputed facts are that the parties to the lis settled their dispute before the Mediator and thereafter moved joint application being OMP No. 228 of 2013 for passing a decree in terms of the compromise. On 11.6.2013, this application was taken on record and after recording statement of the respective parties-their representatives, a consent decree came to be passed, the operative portion whereof reads as follows:-

> "4. The parties shall abide by the terms and conditions of compromise Ext.C-1, including the clause with regard to deferment of further proceedings in the complaint under Section 138 of the Negotiable Instruments Act, 1881, filed by the plaintiff-company against defendants No.1 to 3 and pending in the Court of learned Judicial Magistrate 1st Class, Chandigarh (U.T.) by one year from today, that is, 11.6.2013 till 10.6. 2014, failing which consequences as per law shall ensue and the decree shall be enforceable through intervention of this Court.

5. The plaintiff shall be entitled for refund of Court fee as per rules."

3. It is averred by the petitioner that the respondents by their acts and conduct made this Court to believe that an amicable settlement had been arrived at between the parties which led to the passing of the compromise decree, whereas, the respondents have violated and flouted the judgment and decree thereby showing scant regard to the majesty of this Court.

4. Only respondent No.2 has chosen to file reply wherein he has stated that he has not violated any direction/order passed by this Court, but is still tendering unconditional and unqualified apology. It is further averred that in the civil suit, the defendants No.1 and 3 were the original parties, whereas, respondent No.2 was added as one of the party only at the time of signing of the compromise. It is further averred that in case the decree holder/petitioner wants, it could proceed to execute the decree that too against the assets of the society but could not maintain this petition as the compromise decree was not conditional one giving liberty to the petitioner to initiate contempt proceedings in the event of the respondents not paying the decretal amount.

5. Mr.Amrinder Singh Rana, learned counsel for the respondent No.1/defendant No.1 too has taken the stand that the petition is not maintainable as the petitioner was free to execute the judgment and decree. Original defendant No.3 was not made a party as it was averred that he has already paid the decretal amount in terms of the compromise decree.

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

6. Section 2(b) of the Act defines civil contempt as meaning "willful disobedience to any judgment decree, direction, order, writ or other process of a Court or willful breach of an undertaking given to Court".

7. A compromise decree is as much a decree as a decree passed on adjudication. In passing the decree by consent, the Court adds its mandate to the consent. A consent decree is composed of both a command and a contract. A consent decree is a contract with the imprimatur of the Court. 'Imprimatur' means 'authorized' or 'approved'. In other words by passing a decree in terms of a consent order the Court authorizes and approves the course of action consented to.

8. All decrees and orders are executable under the Code of Civil Procedure. Consent decrees or orders are of course also executable. But merely because an order or decree is executable, would not take away the Courts jurisdiction to deal with a matter under the Act provided the Court is satisfied that the violation of the order or decree is such, that if proved, it would warrant punishment under Section 13 of the Act on the ground that the contempt substantially interferes or tends substantially to interfere with the due course of justice.

9. An undertaking entered into or given to the Court by a party or his counsel is equivalent and has the effect of an order of the Court and its infringement may be made the subject of an application to the Court to punish for its breach. In that the contemnor by making a false representation to the Court obtains a benefit for himself and he fails to honour the undertaking, he plays a serious fraud on the Courts itself and thereby obstructs the course of justice and brings into disrepute the judicial institution.

10. An Hon'ble three Judges Bench of the Hon'ble Supreme Court in ***Chhaganbhai Norsinbhai*** *versus* ***Soni Chandubhai Gordhanbhai and others, AIR 1976***

SC 1909, held that a deliberate violation of an undertaking given to the Court has the same effect as that of breach of an injunction and, therefore, amounts to contempt of Court.

11. In ***Rosnan Sam Boyce*** *versus* ***B.R. Cotton Mills Ltd. and others, (1990) 2 SCC 636***, the Hon'ble Supreme Court held that not complying with an undertaking given before the Court amounts to deceiving the Court and the other party. Therefore, such a person is guilty of committing contempt of Court.

12. In ***Mohd. Aslam alias Bhure*** *versus* ***Union of India, AIR 1995 SC 548***, the Hon'ble Supreme Court held that undertaking given to the Court by a party requires compliance, otherwise this violation amounts to contempt of Court and in the event of the party which has given an undertaking failing to satisfy the Court by placing sufficient material as to why the undertaking could not be complied with, he is bound to be punished. The logic behind is that a party after giving an undertaking before the Court cannot be permitted to take a somersault as the undertaking cannot be permitted to be employed to subterfuge the contempt.

13. In ***Bank of Baroda*** *versus* ***Sadruddin Hasan Daya and another, AIR 2004 SC 942,*** the Hon'ble Supreme Court categorically held that in a case of consent decree passed in a money suit, the fact that in case of breach of consent terms the plaintiff has remedy of executing the decree has no bearing on the contempt committed by the defendant.

14. In yet another decision rendered by the Hon'ble three Judges' Bench of the Hon'ble Supreme Court in ***Rama Narang*** *versus* ***Ramesh Narang and another (2006) 11 SCC 114***, it was held that willful disobedience/non-compliance with the consent decree passed under Order 23 Rule 3 CPC amounts to civil contempt and the mere fact that a consent decree is executable like all other decrees or orders executable under CPC would not take away the Court's contempt jurisdiction in case of willful disobedience/non-compliance with it.

15. It is manifest from the records that the respondents had compromised the matter and given an undertaking to pay the amount within a stipulated time. It is more than settled that the undertaking is given to the Court and not to the opposite side and its breach has the same effect as the breach of injunction. The respondents by not adhering to the undertaking have deceived the Court. The respondents are, therefore, held guilty of contempt of Court and are directed to purge the contempt by paying the decretal amount alongwith up-to-date interest to the petitioner within a period of four weeks from today. In case of their failure to do so, the respondents shall remain present before this Court on 08.01.2016 to show cause as to why rule be not made absolute and they be punished for the contempt of Court. List on 08.01.2016.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Purshotam Ram & ors. ...Petitioners

Vs.

Devta Trijugi Narain & ors. ...Respondents

CMPMO No.218 of 2015
Decided on: 10.12.2015

Code of Civil Procedure, 1908- Order 22- Devta Trijugi Narain Ji was owning lands in Kothi Bhallan- father of the defendant was Kardar who had executed a permanent lease in

favour of his sons- devta filed a suit through next friend challenging the lease deed- suit was decreed by the trial Court- an appeal was preferred against the decree- an application was filed in the appeal pleading that next friend had died and the suit had abated in its entirety – application was opposed on the ground that suit was filed by deity and the death of the representative will have no effect- application was dismissed on the ground that deity is a juristic person and the suit will not abate on failure to bring his LRs on record- held, that Devta is treated as a juristic person – suit instituted on behalf of juristic person will not abate on the death of the representative- Court had rightly dismissed the application.

(Para-7 to 15)

Case referred:
Krishan Singh Vs. Mathura Ahir & ors, AIR 1980 SC 707

For the Petitioners : Mr. Onkar Jairath, Advocate.
For the Respondents : Mr. Dibender Ghosh, Advocate for respondents No.2(i) to 2(iii) and 3.

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 passed by the learned District Judge, Kullu on 2.6.2015, whereby he dismissed the application filed by the petitioners for passing appropriate orders.

2. The factual matrix giving rise to this application is that Devta 'Shree Trijugi Naraya Ji', a Hindu deity, having its abode in village Diar of District Kullu, was owning lands in Kothi Bhallan. Chune Ram, the father of defendants-petitioners was Kardar of the deity. He executed a permanent lease on nominal lease money, in favour of his own sons, i.e. defendants-petitioners. The deity filed suit through Sh.Jai Chand, next friend and challenged the lease on the ground that the Kardar acted contrary to the interest of the deity, and it was, therefore, not binding on the deity.

3. The petitioners-defendants contested the suit on the ground that the money was required for the construction of temple, as such, the Kardar, their father, validly executed lease deed to raise money.

4. The suit was decreed by the learned Civil Judge (Senior Division), Manali, camp at Kullu and in appeal the judgment and decree was set aside on the ground that the trial court had no pecuniary jurisdiction to entertain the suit, inasmuch as the valuation of the suit was Rs.80.00 lacs , if not more. The plaint was ordered to be returned to the respondents for filing in the competent court.

5. Matter was taken to this court vide FAO No.446 of 2007 by the respondents and this court held that valuation of the suit for jurisdiction was around Rs.8.00 lacs and since no prejudice was shown to have been caused to the petitioners by entertaining the suit by the Civil Judge, appeal of the respondents was allowed and the matter was remitted to the learned first appellate court to hear the appeal on merits.

6. The order passed by this court was assailed before the Hon'ble Supreme Court, but the SLP was dismissed vide order dated 2.12.2014.

7. Petitioners thereafter filed an application for passing appropriate orders with the averments that the suit was filed by the deity through Jai Chand, his next friend and

since Jai Chand had died when the FAO was pending before this court and no application for bringing on record his L.Rs had been filed, therefore, suit of the plaintiffs stood abated in its entirety before this court and consequently the judgment passed by this court in FAO No. 446 of 2007 itself was nullity and, therefore, suit was not maintainable.

8. The application was contested by the respondents wherein it was averred that Jai Chand was Pujari-worshiper of the deity. The suit was filed by the deity and not by Jai Chand and, therefore, non bringing of his L.Rs on record was inconsequential since interest of the deity was duly protected and represented by Sh. Tikkam Ram and Bhawani Singh, plaintiffs-respondents.

9. The learned court below dismissed the application on the grounds that a Hindu deity is a juristic person, capable of suing and being sued in its own name. It can own properties and since it is a juristic person, it requires a natural person to represent itself in a court of law. It was further held that it was settled law that even worshiper can act as next friend for the deity who merely represents the minor plaintiff in the court. He, in no manner, is the plaintiff, but only represents the deity, so when a next friend dies, there is no necessity of bringing his L.Rs on record and what at most can be done is that any other person can act as next friend for the minor. So there was no question of abatement of the suit on account of non bringing on record the L.Rs of the next friend.

10. It was also held that keeping in view the averments contained in paras 3 and 4 of the plaint, where in it was specifically averred that Sh. Tikkam Ram and Sh.Bhawani Singh are 'Hariyaans' of the deity and have beneficial interest in the management of the property of the deity. Therefore, even on account of death of Jai Chand, deity could be represented by the aforesaid two persons, especially the status of 'Hariyaans' had been admitted.

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

11. Sh.Onkar Jairath, learned counsel for the petitioners has vehemently argued that the impugned order is against law and facts that the court below has committed material illegality, irregularity and impropriety in passing the orders. He further argued that once Jai Chand, who was the next friend of the plaintiffs had died, it was imperative that his L.Rs be brought on record and having failed to do so, the suit abated as a whole.

12. I find no merit in these submissions for the simple reason that the learned counsel has failed to draw a distinction between a party and a representative of a party in a suit. It cannot be disputed that an idol i.e. 'Devta' is treated as a juristic person with a legal personality capable of holding and acquiring property. It, therefore, follows that the suit instituted by a representative for the time being on its behalf is properly constituted and cannot abate under the provisions of order 22 of CPC on the death of the representative representing the idol as the real party to the suit is the idol or Devta. The ownership is in the institution or the idol. From its very nature, an idol can act and assert its right only through human agency.

13. A similar issue came up before the Hon'ble Supreme Court in **Krishan Singh** Vs. **Mathura Ahir & ors, AIR 1980 SC 707** and it was held as under:

> *"84-85. According to the Hindu jurisprudence, a religious institution such as a math is treated as a juristic entity with a legal personality capable of holding and acquiring property. It, therefore, follows that the suit instituted by the mahant for the time being, on its behalf, is property constituted and cannot*

abate under the provisions of O. 22 of the Code of Civil Procedure, on the death of the mahant pending the decision of the suit or appeal, as the real party to the suit is the institution or the idol. From its very nature, math or an idol can act and assert its right only through human agency known as mahant, shebait or dharmakarta or sometimes known as trustee.

86. Jenkins, C.J. in Babajirav V. Luxmandas,(1904) ILR 28 Born 215 at p. 223 defines the true notion of the 'math' in the following terms:

> *'A math, like an idol, is in Hindu Law a judicial person capable of acquiring holding and vindicating legal rights, though of necessity it can only act in relation to those rights through the medium of some human agency". It follows that merely because the mahant for the time being dies and is succeeded by another mahant, the suit does not abate."*

14. In view of the aforesaid exposition of law, it can safely be concluded that upon the death of next friend of the idol, the suit cannot abate as the real party to the suit is the idol who is a juristic person. The ownership vests in the idol and not in the representative of the idol and, therefore, the learned court below committed no error in rejecting the application filed by the petitioner.

15. In view of the aforesaid discussion, I find no merit in the petition and the same is accordingly dismissed leaving the parties to bear the costs. Interim order dated 9.6.2015 is vacated and pending application (s), if any, stand disposed of.

****

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

Ram Prakash and others ……Appellants.

Versus

Jamil Akhtar & ors. …….Respondents.

RSA No. 592 of 2005.
Reserved on: 8.12.2015.
Decided on: 10.12.2015.

Specific Relief Act, 1963- Section 5- Nautor land was granted to 'S'- mutation was attested in her favour- suit land was inherited by plaintiff on her death- plaintiffs claimed that defendants had got themselves recorded non-occupancy tenants, although, they had not paid any rent- defendants claimed that 'S' had admitted them as tenants- in the alternative, they claimed that they had acquired title by virtue of agreement to sell executed by 'S'- defendants also took up the plea of adverse possession - suit was dismissed by the trial Court- an appeal was preferred which was allowed- it was not disputed that nautor was allotted to 'S'- defendants pleaded adverse possession but no evidence was led to prove this fact- DW-2 admitted that Patwari had not visited the spot- defendants did not claim that they were inducted as tenants but pleaded that they were put in possession- the agreement was against the public policy- it was not proved that possession was taken in pursuance of the agreement to sell or that the defendants were ready and willing to perform their part of contract- in these circumstances, Appellate Court had rightly set aside the decree passed by trial court and had allowed the appeal. (Para-15 to 20)

For the appellant(s): Mr. Rajneesh K. Lall, Advocate, vice counsel.
For the respondents: Mr. Rajiv Jiwan and Mr. Pankaj Negi, Advocates.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This regular second appeal is directed against the judgment and decree of the learned District Judge, Bilaspur, H.P. dated 28.9.2005, passed in Civil Appeal No. 15 of 1990.

2. "Key facts" necessary for the adjudication of this regular second appeal are that respondents-plaintiffs (hereinafter referred to as the plaintiffs) have instituted suit for possession against the appellants-defendants (hereinafter referred to as the defendants). According to the averments made by the plaintiffs, one Sakina Bibi (predecessor-in-interest of the plaintiffs) was granted nautor land, as detailed in the plaint, on 16.9.1972 and 28.6.1974, respectively. The mutation was also attested in her name. Smt. Sakina Bibi died on 28.3.1982. The suit land was inherited by her sons, who are the plaintiffs. The grievance of the plaintiffs, in a nut shell, is that the defendants in collusion with revenue staff got themselves incorporated in the revenue record as non-occupancy tenants, though they have not paid any rent. The revenue entries were wrong, illegal and against the provisions of law.

3. The suit was contested by the defendants. According to them, they were in fact inducted as tenants, during the consolidation on yearly rent of Rs. 5/- when Sakina Bibi herself applied for correction of Khasra Girdawari which was decided in their favour. However, in the alternative, they pleaded having acquired title by virtue of agreement of sale which was executed by Sakina Bibi in their favour while she received Rs. 1750/-. She further agreed to execute the sale deed after getting the remainder amount of Rs. 750/- after the expiry of 15 years of period.

4. The replication was filed by the plaintiffs. The learned trial Court framed the issues on 2.1.1989. The suit was dismissed vide judgment dated 5.3.1990. The plaintiffs, feeling aggrieved, preferred an appeal against the judgment and decree dated 5.3.1990. The learned District Judge, Bilaspur, allowed the same on 28.9.2005. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 28.11.2005:

> "1. Whether the findings of the courts below are perverse, based on misreading of oral and documentary evidence, when on the material on record it was established that the appellants were inducted as tenants by Ms. Sakina Bibi and correction of revenue records ordered during consolidation proceedings and when the appellant had also come in possession of the property in part performance of the agreement of sale deed Ext. DW-2/A and hence decree for possession could not be passed in respect of the suit land?
>
> 2. Whether the findings of the court below that agreement Ext. DW-2/A was void and opposed to public policy under Section 23 of the Contract Act is sustainable in law and it was open to the plaintiff to raise the said plea more particularly after the expiry of 15 years of the grant of patta and the agreement Ext. DW-2/A was enforceable in law?

3. Whether on the assumption that agreement Ext. DW-2/A was void, the possession of the appellant had not become adverse and the plea of adverse possession could not be sustained when open, hostile and continuous possession of the plaintiff for more than 12 years before the institution of the suit was made out?

4. Whether on the pleadings of the parties and the material on record, the suit in the civil courts was maintainable and the findings of the court below declaring the revenue record and the ownership conferred on the appellant as contrary to law and are not sustainable in law?"

6. Mr. Rajnish K. Lall, Advocate, on the basis of the substantial questions of law framed, has vehemently argued that the Courts below have not correctly appreciated the oral as well as the documentary evidence on record, more particularly, agreement Ext. DW-2/A. He also contended that the terms and conditions of agreement Ext. DW-2/A were not in terms of Section 23 of the Contract Act. He also contended that his clients have acquired title of the suit land by way of adverse possession. On the other hand, Mr. Rajiv Jiwan, Advocate has supported the judgment and decree passed by the learned first appellate Court.

7. I have heard the learned Advocates on both the sides and have also gone through the judgments and records of the case carefully.

8. PW-1 Sujjad deposed that the name of his mother was Sakina Bibi. She was granted nautor land at Bhrari, measuring 6 bighas 7 biswas. She was put into possession. She died in the year 1982. Thereafter, they came into the possession. The defendants were never inducted as tenants by her mother. No agreement was ever entered into between his mother and defendants for the sale of the land. He has denied the suggestion in his cross-examination that her mother has received wheat towards *Galla Batai*. The land was allotted to his mother in the year 1972 and 1974, respectively.

9. DW-1 Paras Ram deposed that they have purchased the land in the year 1956-57 at village Bhrari. The disputed land was '*charrand*' (pasture). He occupied the same in the year 1957. The suit land abutted his land. He developed the land. However, Sakina Bibi's husband, Hussain Beg got the land allotted in the name of his wife. The consolidation took place in the year 1975 and Sakina Bibi submitted an application for correction in *girdawri* record for a sum of Rs. 5/- as rent for inducting them as tenants. They used to pay Rs. 5/- per annum to Sakina Bibi. She also entered into an agreement to sell the land after 15 years for a consideration of Rs. 2500/-. They were continuing as tenants over the suit land. In case, they are not tenants, in the alternative, they have become owners on the basis of the agreement. They were in possession of the suit land for the last 33 years. In his cross-examination, he admitted that Patwari was not present at the time when they had taken over the possession. However, in the year 1962-63, *tatima* was prepared qua 7 bighas of land. He also admitted that Patwari undertakes *girdawri* after every six months. He did not know as to how many jamabandies were prepared after 1956. Agreement was written by Tulsi Ram in the Court premises. A sum of Rs. 1700/- was paid at the time when the agreement was scribed and Rs. 750/- was to be paid later on at the time of making the correction in the *girdawri*. They became tenants in the year 1976.

10. DW-2 Sukh Dev has testified that he has signed the agreement DW-2/A. It was scribed in his presence by Tulsi Ram at the instance of Sakina Bibi. The contents of the same were read over to Sakina Bibi. She after admitting the contents of the same to be true and correct, put her thumb impression. In the first sentence of his cross-examination, he

admitted that the possession was not given to the defendants. The earnest amount was also not paid in his presence.

11. DW-3 Durga Ram deposed that defendants were in possession of the suit land for the last 30-33 years. In his cross-examination, he admitted that no money was paid in his presence. Sakina Bibi has submitted an application for making necessary entries in the *girdawri*. His statement was recorded by the Patwari. The statement of Sakina Bibi was written by C.O himself. He did not remember as to whether Sakina Bibi has signed it or not.

12. DW-4 Telu Ram has also signed Ext. DW-2/A. It was scribed by Tulsi Ram. The contents of the same were read over and explained to Sakina Bibi, who after admitting the same to be correct put her thumb impression. Thereafter, they signed the same. He also admitted that neither Patwari nor Kanungo had visited the spot to deliver possession.

13. DW-5 Bhagat Ram deposed that he knew Sakina Bibi. Sakina was paid Rs. 10/- as chakota for 2 years from Ram Parkash and others. He scribed receipt dated 17.12.1981 vide Ext. DW-5/A. The contents of the receipt were read over and thereafter, Sakina Bibi put her thumb impression. In his cross-examination, he admitted that the receipt was in torn condition and tape was affixed over the same.

14. DW-6 Sohan Lal has proved register Ext. DW-6/A. Sakina Bibi had submitted an application for making correction in the *girdawri*. It was exhibited. It was deposited in the record room on 27.10.1976 and destroyed on 8.6.1983. He proved (*Talfi*/ *Goshwara* Register) Ext. DW-6/A.

15. The defendants have not disputed the ownership of the suit land. It is also not disputed that Sakina Bibi was the owner of the suit land. According to the jamabdndi for the year 1985-86 Ext. PA, nautor land was allotted to Sakina Bibi. The mutation No. 120 vide Ext. PX and PF were also attested in favour of Sakina Bibi. The mutation was also attested in favour of the plaintiffs after the death of Sakina Bibi vide Ext. G. The very fact that the defendants have taken the plea of adverse possession pre-supposes that they have admitted the ownership of the suit land to be of Sakina Bibi. However, the fact of the matter is that they have not led any evidence to prove the ingredients of adverse possession. The case set up by the defendants is also that Sakina Bibi, mother of the plaintiffs had moved an application before the Consolidation Officer and Khasra *girdawri* was corrected by the Consolidation Officer vide his order dated 27.9.1976 and rent of Rs. 5/- per annum was settled between Smt. Sakina Bibi and the defendants. She also took one quintal of wheat as rent of land. Smt. Sakina Bibi, thereafter entered into agreement to sell the suit land for a consideration of Rs. 2500/-. She had received Rs. 1750/-. She also agreed to execute the sale deed after getting Rs. 750/- after expiry of 15 years, as per Ext. DW-2/A. No witness of the defendants has deposed that the possession of the defendants over the suit land was in denial of the right of the true owner.

16. The defendants, in their written statement, have not pleaded that they were inducted as tenants. Their simple case was that Sh. Paras Ram was in possession of the suit land since 1957 and Sakina Bibi and her husband had promised not to dispossess him from the suit land when the same was allotted to her under the Nautor Rules. PW-1 Sujjad, as noticed hereinabove, has deposed that the suit land was granted to his mother under the nautor scheme and they have inherited the suit property after the death of their mother. He has categorically deposed that his mother has never inducted the defendants as tenants nor received any rent. He also deposed that no agreement was ever executed between Sakina Bibi and defendants.

17. DW-1 Paras Ram has deposed that the consolidation took place in the year 1975-76. Smt. Sakina Bibi had submitted an application for inducting them as tenants. In his cross-examination, he admitted that Patwari had not visited the spot. DW-2 Sukh Dev has deposed that agreement Ext. DW-2/A was scribed by Tulsi Ram. Smt. Sakina Bibi had put her thumb impression over the same. He has also signed the same. He also admitted that the possession was never given to them in his presence. DW-3 Durga has though deposed that Consolidation Officer has himself written the statement of Sakina Bibi, however, the fact of the matter is that neither order dated 27.9.1976 nor the statement of Sakina Bibi has been placed on record. DW-3 Durga did not know whether Sakina Bibi has put her signatures on the document or not.

18. Mr. Rajnish K. Lall, Advocate, for the appellants has vehemently argued that the original order dated 27.9.1976 was lost and DW-6 Sohan Lal has also stated that record was destroyed. He has proved Ext. DW-6/A. In the absence of original order dated 27.9.1976 and the statement of Sakina Bibi on record, the learned first appellate Court was bound to draw adverse inference.

19. The witnesses produced by the defendants have nowhere stated that the defendants were inducted as tenants. They have only made statements with regard to their continuous possession. It would be pertinent to mention here at this stage that the Consolidation Officer has passed the order dated 27.9.1976 after the alleged agreement dated 21.9.1976 Ext. DW-2/A. There could not be any agreement contrary to the terms and conditions of patta within a period of 15 years. The foundation of order dated 27.9.1976 is agreement dated 21.9.1976, which is against the public policy. The same could not be given effect to. The agreement Ext. DW-2/A dated 21.9.1976 was not executable being against the public policy. The entries, thus made on the basis of the order passed by Consolidation Officer dated 27.9.1976 was illegal and incorrect. The tenancy was never created in favour of the defendants. The acts committed by the defendants were forbidden by law. It was for the defendants to prove the manner in which they were inducted as tenants but they have miserably failed to prove the same.

20. Now, as far as receipt Ext. DW-5/A, which is alleged to have been scribed by DW-5 Sh. Bhagat Ram is concerned, the same has rightly been discarded by the learned first Appellate Court. It was also employed to defeat the legal right of the plaintiffs to claim the suit land. Moreover, Ext. DW-5/A was also torn, as admitted by DW-5 Bhagat Ram himself. Even the stamp paper for executing DW-5/A did not bear the signatures or thumb impression of Sakina Bibi in token of purchase from the stamp vendor. Now, as far as plea of part performance is concerned, this defence was never taken by the defendants before the Courts below. The defendants have not pleaded all the ingredients of Section 53 or Section 53A of the Transfer of Property Act, 1882. It was nobody's case that the defendants have taken possession of the suit land for part performance of the contract or they being the transferee have performed or willing to perform their part of the contract. The land was initially owned by the State Government which was granted to Sakina Bibi for agricultural purposes. The plea taken by the defendants was itself self-contradictory. The substantial questions of law are answered accordingly.

21. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sanjay Kalyani son of Shri Naresh Kumar & another ....Petitioners

Versus

State of H.P. and another ....Non-petitioners

Cr.MMO No. 77 of 2015
Order Reserved on 18th November 2015
Date of Order 10th December 2015

Code of Criminal Procedure, 1973- Section 482- Petitioner filed a petition for quashing of FIR under Sections 307, 392, 506, 323, 325 and 34 of Indian Penal Code pleading that parties have entered into a compromise and, matter be settled to keep harmonious relations between the parties - held, that FIR discloses commission of heinous offences- mere settlement between the parties will not be a ground to quash the proceedings- further held, that the jurisdiction under Section 482 of Cr.P.C should not be exercised to stifle a legitimate prosecution. (Para-1 to 8)

Cases referred:

Narinder Singh vs. State of Punjab, JT 2014(4) SC 573

B.S. Joshi and others vs. State of Haryana and another, JT 2003(3) SC 277

Gian Singh vs. State of Punjab and another, JT 2012(9) SC 426

Ravinder Singh @ Laddi and others vs. State of U.P. and another, Latest HLJ 2014 H.P. 1248

Central Bureau of Investigation vs. Ravi Shankar Srivastava, AIR 2006 SC 2872

For the Petitioners: Mr. A.K. Dhiman, Advocate.

For Non-petitioner No.1: Mr. M.L. Chauhan Additional Advocate General with Mr.R.S.Thakur, Additional Advocate General.

For Non-petitioner No.2: Mr. Paresh Sharma, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge

Present petition is filed under Section 482 Cr.P.C. for quashing FIR No. 9 of 2014 dated 16.1.2014 registered with Police Station Shimla District Shimla under Sections 307, 392, 506, 323, 325 and 34 of Indian Penal Code against petitioners on the basis of compromise executed inter se the parties. It is pleaded that false complaint filed against the petitioners and further pleaded that petitioners have joined the investigation and petitioners and complainant are neighbours and in order to keep harmonious relations inter se the parties the parties have amicably settled the matter. Prayer for acceptance of petition sought.

2. Per contra response filed on behalf of the State of H.P. pleaded therein that on 10.1.2014 non-petitioner No.2 namely Babloo has registered a complaint with police station stating therein that petitioners have beaten him and also robbed a sum of Rs.22,000/- (Rupees twenty two thousand only) and also attempted to kill him. It is pleaded that during course of investigation a sum of Rs.11970/- (Rupees eleven thousand nine hundred seventy only) and weapons of offence i.e. two iron rods recovered and after completion of investigation challan filed in the court of learned Sessions Judge (Forest)

Shimla and same is fixed for consideration upon charge. It is pleaded that prima facie criminal case is made out against the petitioners and petitioners have committed heinous offence and further pleaded that it is not in the public interest to quash the FIR on the basis of compromise. Prayer for dismissal of petition sought.

3. Separate response filed on behalf of non-petitioner No. 2 pleaded therein that non-petitioner No. 2 lodged FIR No. 9 of 2014 against the petitioners. It is pleaded that appropriate order be passed by Court in the interest of justice and fair play.

4. Court heard learned counsel appearing for the petitioners and heard learned Additional Advocate General appearing on behalf of non-petitioner No.1 and also heard learned Advocate appearing on behalf of non-petitioner No.2 and also perused the entire record carefully.

5. Following points arise for determination in present case:-

1. Whether petition filed by the petitioner under Section 482 Cr.P.C. is liable to be accepted as mentioned in memorandum of grounds of petition?
2. Final Order.

Findings on Point No.1 with reasons.

6. Allegations against the petitioners are relating to heinous offences under Section 307 IPC i.e. attempt to murder and relating to robbery under Section 392 IPC. It was held by Hon'ble Apex Court of India in ***JT 2014(4) SC 573 titled Narinder Singh vs. State of Punjab*** that mere settlement between the parties would not be a ground to quash the proceedings. It was further held by Hon'ble Apex Court of India in ruling cited supra that in following cases proceedings should not be quashed under Section 482 Cr.P.C. (1) Murder. (2) Rape. (3) Dacoity. (4) Prevention of Corruption Act. (5) 307 IPC. Hon'ble Apex Court of India further held that proceedings should be quashed in following cases. (1) Commercial transaction. (2) Matrimonial relations. (3) Family dispute. ***(Also see JT 2003(3) SC 277 titled B.S. Joshi and others vs. State of Haryana and another. Also See JT 2012(9) SC 426 titled Gian Singh vs. State of Punjab and another. Also see Latest HLJ 2014 H.P. 1248 titled Ravinder Singh @ Laddi and others vs. State of U.P. and another.***

7. It was held in case reported in ***AIR 2006 SC 2872 titled Central Bureau of Investigation vs. Ravi Shankar Srivastava*** that while exercising powers under Section 482 Cr.P.C. the Court does not function as a Court of appeal or revision. It was held that inherent jurisdiction under Section 482 Cr.P.C. should be exercised carefully and with caution. It was also held that inherent power should not be exercised to stifle a legitimate prosecution.

8. In view of rulings given by Hon'ble Apex Court cited supra and in view of fact that FIR is registered under Section 307 IPC it is held that it is not expedient in the ends of justice to allow the petition. Point No. 1 is answered in negative.

Point No. 2 (Final Order)

9. In view of findings on point No. 1 petition filed under Section 482 Cr.P.C. is dismissed. File of learned trial Court be sent back forthwith along with certified copy of this order. Parties are directed to appear before learned trial Court on ***31st December 2015.*** Observations made in this order will not effect the merits of case in any manner and will strictly confine for the disposal of present petition filed under Section 482 of Code of Criminal Procedure 1973. Petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE P.S.RANA, J.

State of H.P. .....Appellant.
Versus
Hitender Kumar .....Respondent.

Cr.M.P.(M) No. 1233 of 2015. And
Cr. Appeal No. 524 of 2015.
Reserved on: 8.12.2015.
Decided on: 10.12.2015.

N.D.P.S. Act, 1985- Section 20- Accused was intercepted by the police while he was coming from footpath with yellow coloured bag – on search, 910 grams of charas was recovered- accused was acquitted by the trial Court- in appeal against the acquittal held, that despite of availability of independent witnesses, none was associated by the Investigating Officer- further, witnesses have given contradictory versions- when two versions are available on record; one that accused was seen coming from the footpath and second that he was travelling in HRTC Bus, accused was rightly acquitted by the trial Court- appeal dismissed. (Para-14 to 16)

For the appellant: Mr. J.S.Guleria, Asstt. AG.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Cr.M.P.(M) No. 1233 of 2015.

Leave to appeal is granted. The application is disposed of. The appeal be registered.

Cr. Appeal No. 524 of 2015.

This appeal has been instituted at the instance of the State against the judgment dated 23.5.2015, rendered by the learned Special Judge-II, Kullu, H.P. in Sessions Trial No. 25 of 2014 (2012), whereby the respondent-accused, who was charged with and tried for offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act) was acquitted.

2. The case of the prosecution, in a nut shell, is that on the evening of 29.8.2012 at around 7:00 PM, the police party headed by PW-6 HC Shesh Raj, I.O. Police Station Banjar and consisting of PW-2 HHC Hira Singh and HHC Amar Chand was on patrolling and Nakabandi duty at Fagu Pul, Banjar, Distt. Kullu. The accused was seen coming from the path (pagdandi) towards the road by carrying yellow colour bag in his right hand. The accused on seeing the police party turned back and tried to flee away. He threw the bag on the road. He was nabbed. PW-6 HC Shesh Raj waited for local witnesses for some time and then associated HHC Amar Chand and PW-2 HHC Hira Singh as witnesses. The bag was searched. It contained charas. It weighed 910 grams. Search, seizure and sealing proceedings were completed on the spot. Rukka Ext. PW-5/A was prepared and sent through PW-2 HHC Hira Singh, on the basis of which FIR Ext. PW-5/B was registered at PS Banjar. The spot map was also prepared. The I.O. produced the case property before PW-5 SI/SHO Shiv Singh, who resealed the parcel containing charas with seal "H". He filled up the relevant columns of NCB-1 form. The case property was handed over to PW-1 MHC

Sunil Kumar for depositing in the Malkhana. He deposited the same and made entry in the relevant register. The abstract of the register is Ext. PW-1/B. On 31.8.2014, MHC Sunil Kumar sent the case property alongwith other documents through PW-2 HHC Hira Singh for depositing at FSL, Junga, vide RC Ext. PW-1/D. The investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 6 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C to which he pleaded not guilty. According to him, he was falsely implicated. The accused has also examined DW-1 Amar Chand, Adda Incharge, DW-2 Const. Vijay Kumar and DW-3 Gagan Kumar in defence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. J.S.Guleria, Asstt. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused.

5. We have gone through the impugned judgment and records of the case carefully.

6. PW-1 HC Sunil Kumar testified that the Station House Officer, PS Banjar handed over to him one sealed parcel stated to be containing 910 grams of charas, sealed with six seals of "T" and resealed with three seals of "H", along with relevant papers. He made entry in the relevant register vide Ext. PW-1/B. The case property was sent through HHC Hira Singh vide RC Ext. PW-1/D to be deposited at FSL, Junga. He deposited the same at FSL, Junga under receipt.

7. PW-2 HHC Hira Singh deposed that on 29.8.2012 the police party headed by HC Shesh Raj was on patrolling duty. The accused was noticed coming from Pagdandi (short cut) carrying a bag of yellow colour in his hand. On seeing the police party, he tried to flee away by throwing the bag on the road. He was nabbed by Const. Shesh Raj at a distance of 10-15 paces. The bag was searched. The place was isolated one and they waited for independent witnesses. The charas was found in the bag. It weighed 910 grams. He further deposed the manner in which charas with polythene was put in a piece of cloth parcel and sealed with seal "T" at six places. Rukka Mark "B" was prepared. It was handed over to MHC Sunil Kumar. In his cross-examination, he deposed that they left the Police Station at 6:30 PM. The accused was spotted at a distance of 30-40 meters from Fagu Pul. He denied the suggestion that *Abadi* was situated near Fagu Pul. He also denied that another village Joul is situated at a distance of 50-100 meters from Fagu Pul. He also deposed that I.O had not sent any police official to call local witnesses before the search of the bag. He denied specifically that accused was taken out from a bus on the relevant day at around 4:30 PM at Larji by CIA staff.

8. PW-3 HC Nirat Singh has proved special report Ext. PW-3/A.

9. PW-5 S.I. Shiv Singh Guleria deposed that he was posted as SHO PS Banjar. Rukka was handed over to him. In sequel to rukka, FIR was registered. HC Shesh Raj produced case property before him and he resealed the parcel with three seals of seal "H". He handed over the case property to MHC for depositing in the malkhana. He has admitted specifically that accused was arrested by the police at around 4:30 PM when he was travelling in HRTC bus driven by driver Babu Ram and Conductor Gagan Kumar.

10. PW-6 HC Shesh Raj deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. According to him also, the accused was spotted with one yellow coloured bag in his right

hand. He has also prepared the spot map. In his cross-examination, he deposed that they left the Police Station at 6:30 PM. Fagu Pul was visible in the photograph Ext. DA. He denied that house is visible in the photograph which is near to Fagu Pul. Self stated that the same was at a distance of 250-300 meters. He deposed that one house is visible from the spot which is in village Joul at a distance of 1½ -2 kms. He denied that village Joul was near to the spot. He categorically deposed that he had not sent any person to call local witnesses from those houses. He admitted that the road was busy one and vehicular traffic remained regular.

11. DW-1 Amar Chand, deposed that he was Incharge of buses. On 29.8.2012 bus No. 5405 was enroute from Kullu to Bathad which left the bus stand in the morning at 7:00 AM. The bus was supposed to come back at around 1:00 PM.

12. DW-2 Const. Vijay Kumar deposed that on 26.8.2012 HHC Hem Raj was posted in S.I.U. Kullu.

13. DW-3 Gagan Kumar deposed that on 29.8.2012 he was conductor in HRTC bus bearing No. HP-34-5405, which was enroute from Kullu to Bathad. The driver of the bus was Babu Ram. Their bus was checked by police at Larji at 4:30 PM and at that time an altercation between police and accused took place. The accused alongwith other passengers were asked to come down from the bus. The police obtained his signatures as well as signatures of driver on some papers at that time. In his cross-examination, he deposed that police obtained his signatures on blank papers.

14. According to PW-2 HHC Hira Singh and PW-6 HC Sheesh Raj the accused was seen coming from Pagdandi. He tried to run away. He was nabbed and he threw bag on the road. However, PW-5 SI Shiv Singh Guleria has categorically admitted in his statement that accused was arrested by the police at around 4:30 PM when he was travelling in HRTC bus being driven by driver Babu Ram. The conductor of the bus was Gagan Kumar. DW-3 Gagan Kumar has also deposed that on 29.8.2012 he was conductor in HRTC bus bearing No. HP-34-5405, which was enroute from Kullu to Bathad. The driver of the bus was Babu Ram. Their bus was checked by police at Larji at 4:30 PM. An altercation took place between police and accused at that time. According to him, the police obtained his signatures as well as signatures of driver on some blank papers at that time. DW-1 Amar Chand, Incharge of buses has also testified that on 29.8.2012 bus No. 5405 was on its way from Kullu to Bathad. The same was driven by Babu Ram driver with conductor Gagan Kumar. These circumstances probablises the defence of the accused that he was not nabbed by the police near Fagu Pul but was taken to Police Station by the police when he was travelling in the HRTC Bus. Thus, there are two versions available on record; one is that the accused was seen coming from Pagdandi (short cut) and the second that he was travelling in HRTC bus bearing No. HP-34-5405, which was enroute from Kullu to Bathad.

15. PW-2 HHC Hira Singh has categorically deposed that I.O had not sent any police official to call local witnesses before the search of the bag. It has come on record that village Joul was nearby. He further deposed that one house was visible from the spot which was in village Joul at a distance of 1½ -2 kms. He also admitted that he has not sent any person to call any person from those houses. PW-6 HC Shesh Raj has admitted that the road was busy one and vehicular traffic remained regular. If that was so, he could have associated the occupants of the vehicles travelling on the road as witnesses to inspire confidence in apprehending, search, seizure and sealing proceedings carried out on the spot. Thus, the prosecution has miserably failed to prove the case against the accused.

16. Accordingly, there is no merit in this appeal and the same is dismissed.

****

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

State of H.P ....Appellant
Versus
Kulbir Singh alias Billa. …Respondent

Cr.A No. : 527 of 2015
Decided on: 10.12.2015

Code of Criminal Procedure, 1973- Section 378- Deceased and two other women were walking on the road, when a Truck loaded with wooden plank arrived at the spot- a wooden plank flew from the truck and fell on the deceased who died during treatment- an FIR was registered against the accused for the commission of offences punishable under sections 279, 337 and 304-A of IPC – on trial accused was acquitted by the Magistrate- in appeal held that, the witnesses have deposed that the wooden plank fell on the deceased accidently and not due to rashness and negligence of the accused- acquittal by the Magistrate proper- appeal dismissed. (Para-11 and 12)

For the appellant: Mr. Parmod Thakur, Addl. A.G. with Mr. P.M. Negi, Dy. A.G.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

This appeal is instituted against the judgment dated 5.3.2015 rendered by the Judicial Magistrate, 1st Class (II), Kangra, District Kangra in Criminal Case No. 1-II/2007, whereby the respondent-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offences punishable under sections 279 and 304-A of the Indian Penal Code, has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 16.12.2005 at about 10.30 A.M. complainant's wife Smt. Roshani Devi alongwith two other women and a young girl was walking on the road at Daulatpur. A truck bearing No. HR-37-B-9827 came from Kangra side. A plank fell from the truck. Smt. Roshani Devi was hit on her stomach by the plank. She fell on the road. She was taken to the hospital. The tempo driver also came to the hospital. She was medically examined. She was discharged in the evening. She was again taken to hospital, Kangra at about 7.30 P.M. She was operated at Zonal Hospital, Dharamshala on 17.12.2005. On 31.12.2005, her condition worsened. She was taken to CMC Hospital, Ludhiana. The complainant informed the police that Smt. Roshani Devi died on 16.1.2006 at CMC Hospital, Ludhiana. Accordingly, on the basis of the complaint, case under sections 279, 337 and 304-A was registered. The police investigated the case and the challan was put up in the Court after completing all the codal formalities.

3. Prosecution examined as many as 9 witnesses to prove its case against the accused. Statement of accused under Section 313 Cr.P.C. was recorded. He denied the incriminating circumstances put to him. The trial court acquitted the accused.

4. Mr. Parmod Thakur, learned Addl. A.G. has vehemently argued that the prosecution has proved its case against the accused.

5. I have heard the learned counsel for the State and have gone through the judgment meticulously.

6. Complainant Chuni Lal has appeared as PW-1. He has reiterated the facts narrated by him in his written complaint filed before S.D.P.O. Kangra. He has given the details the manner in which accident has taken place at about 10.30 A.M. The plank fell from the truck and hit on the belly of his wife. The persons present on the spot shouted and the truck driver was caught. She was taken to Hospital at Kangra in a van. She was operated upon. Thereafter, she was referred to CMC, Ludhiana. She died on 16.1.2006. He has admitted that the accident has not taken place in his presence.

7. PW-2 Kanta Devi has deposed that on 16.12.2005, she alongwith Asha Devi and Meenakshi was going towards forest. A tempo came from Kangra side in a high speed and plank fell down and hit Smt. Roshani Devi. She identified the accused. However, in her cross-examination, she has admitted that tempo was moving on the left side of the road. She has admitted that piece of plank fell from the tempo on its own. The driver had stopped the tempo on the spot. 10-12 persons gathered on the spot. The accused paid Rs. 650/-, which were incurred on treatment at Kangra Hospital. She has also admitted that when the tempo driver did not pay the expenses then the present case was registered.

8. The plank had fallen accidently. It cannot be said that the accused in any manner was responsible for felling of plank accidently which hit Smt. Roshani Devi. The case has been registered when the accused has not paid the expenses for treatment of Smt. Roshani Devi.

9. Similarly, PW-3 Asha Devi has deposed that on 16.12.2005, she alongwith Roshani Devi and Kanta Devi was going towards forest to collect fire wood. A plank fell from the tempo and hit Roshani Devi. Roshani Devi fell down. She was taken to hospital. She had also gone to the hospital. The accused had also gone to the hospital. She has admitted that the tempo was moving on the left side of the road and the plank fell on its own. The accused had stopped the vehicle. She has also admitted that the driver paid the medical expenses.

10. PW-4 Kewal Krishan has deposed that the accident has not taken place in his presence on 16.12.2005. Roshan Devi was taken to hospital in his van. PW-5 Dr. Kush Dev Singh has examined Roshani Devi on 16.12.2005. PW-8 Dr. Sanjeev Kumar has proved the discharge card Ex.PW-8/A.

11. Thus, it is evident from the statements of PW-2 Kanta Devi and PW-3 Asha Devi that the plank had fallen from the truck accidently. The FIR was registered very belatedly. The accident has taken place on 16.12.2005. The complaint was filed on 14.1.2006 before S.D.P.O. Kangra. The S.D.P.O. Kangra had sent the file to S.H.O. Kangra on 24.1.2006. PW-7 Som Raj has admitted that the plank had fallen accidently. Thus, the accused cannot be held guilty of rash and negligent driving.

12. Consequently, in view of analysis and discussion made hereinabove, the prosecution has failed to prove the case against the accused for offences punishable under sections 279 and 304-A of the Indian Penal Code and there is no need to interfere with the well reasoned judgment of the trial court.

13. Accordingly, there is no merit in the appeal and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Vinay Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr. Appeal No. 87/2015
Reserved on: 9.12.2015
Decided on: 10.12.2015

N.D.P.S. Act, 1985- Section 18 and 20- Accused was found in possession of 2.5 kg. of charas and 500 grams of opium- I.O had given an option to the accused to be searched in the presence of Gazetted Officer, Magistrate or the Police- accused consented to be searched by the police- option given by the I.O. to be searched by the police is not in accordance with law- further, no vehicle was stopped to associate any independent person- there was contradiction in the testimonies of the witnesses regarding the police official who had gone to fetch independent person- police official who brought the case property from Malkhana to Court was not examined- no entry was made in the Malkhana register regarding the production of the case property in the Court for the deposit of the same in the Malkhana- hence, case property produced in the Court is not connected to the case property recovered at the spot- held that, in these circumstances, prosecution case is not proved- accused acquitted. (Para-13 to 16)

Case referred:
State of Rajasthan v. Parmanand (2014) 5 SCC 345

For the Appellant: Mr. G.R. Palsra, Advocate.
For the Respondent: Mr. P.M. Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

The instant appeal has been instituted against Judgment dated 28.2.2015 rendered by learned Special Judge, Mandi, District Mandi, Himachal Pradesh in Sessions trial No. 12/2011, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for commission of offence under Sections 18 and 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1.00 Lakh and in default of payment of fine, to further undergo simple imprisonment for six months under Section 20 of the Act. He has also been convicted and sentenced to undergo imprisonment for five years and to pay a fine of Rs.50,000/- in default of payment of fine, to further undergo simple imprisonment for six months, under Section 18 of the Act. Both the sentences shall run concurrently.

2. Case of the prosecution, in a nutshell, is that on 17.2.2011 at about 11.30 am, ASI Sohan Lal PW-8, Constable Tulsi Ram PW-5 and Constable Prem Singh were present at Larji for patrolling duty. Accused was spotted coming from Larji side holding a bag on his left shoulder. On seeing the police party, he turned around and tried to escape. Accused was apprehended. Search of the bag was carried out. One cotton bag containing

two packets was recovered. On opening of the packets, Charas was recovered from one packet and from another packet opium was recovered. Charas weighed 2.5 kgs and opium weighed 500 gms. Charas alongwith polythene packets, cotton bag and bag was put in a parcel which was sealed with seal impression 'B'. Case property was sealed and NCB form was filled in. On the basis of Rukka Ext PW-6/A, FIR Ext PW-6/B was registered. Site map was also prepared. Case property was produced before Inspector Dorje Ram. He resealed the same with 9 seals of impression 'T'. Case property was deposited with PW-7 HC Raj Mal MHC Police station. Necessary entries were made by him in the Malkhana register. Case property was sent to Forensic Science Laboratory through PW-3 Constable Rajneesh Kumar. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 8 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He denied the case of the prosecution. Trial Court convicted and sentenced the accused as noticed herein above. Hence, this appeal.

4. Mr. G.R. Palsra, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. P.M. Negi, Deputy Advocate General, has supported the judgment of conviction dated 28.2.2015.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-3 HC Rajnish Kumar deposed that on 18.2.2011, he was deputed to take case property to FSL Junga. He was given one parcel sealed with 6 impressions of seal 'B' and 9 impressions of seal 'T' alongwith NCB form in triplicate and sample seals 'B' and 'T' vide RC No. 18/10-11. Copy of RC is Ext. PW-3/A. He deposited the case property at FSL Junga.

8. PW-4 HHC Hoshiar Singh deposed that on 22.3.2011, He was deputed by SI/SHO Dorje Ram to bring the case property from FSL Junga. He went to FSL Junga and brought back the case property. The FSL report is Ext. PW-4/A.

9. PW-5 Constable Tulsi Ram deposed that on 17.2.2011, police party headed by ASI Sohan Lal, C. Prem Singh, driver Himmat Ram and him, proceeded from the Police Station at about 11 am in a government vehicle for setting Naka towards Larji Dam Aut. They reached at Larji Dam and set up Naka there and at about 11.30 am, a person was seen coming from Larji Dam side carrying a bag on his right shoulder. Said person became perplexed on seeing the police party and started moving back. He was apprehended by ASI Sohan Lal with the help of other police officials. His name and address were ascertained. On suspicion of having some contraband, ASI Sohan Lal gave his search to the accused vide memo Ext. PW-5/A. Search of the bag of accused was carried out. On search of bag of accused another grey bag containing two polythene packets was recovered. In one polythene bag black substance in the shape of sticks was recovered which was found to be charas. It weighed 2.5 kg. From another polythene packet, grey coloured adhesive substance was recovered which was weighed and found to be 500 gms. It was found to be opium. Search, seizure and sealing process was completed on the spot. Since place of incident was secluded one, no independent witnesses were available. He alongwith Prem Singh were associated as witnesses. He was handed over Rukka mark A. He handed over the same at the Police Station. Case property was produced by the Public Prosecutor while examining PW-5, Constable Tulsi Ram. In his cross-examination, he has admitted that Police Station was

situate at Aut Bazaar. There remained hustle and bustle in the Bazaar. There are many shops and Tehsil office is also at Aut bazaar. Spot was about 4 kms from the Police Station Aut. He admitted that there is office of security branch. Road from Larji Dam leads towards Larji, Bali Chowki and Banjar. It is a motorable road. Vehicles pass on that road in day time. No vehicle passed at that time from the alleged spot. They have reached the spot at about 11.10 am. No vehicle was stopped by them. In his cross-examination, he has admitted that prior to personal search of the accused, IO gave option to be searched in his presence or any Gazetted Officer or Magistrate. Accused consented to be searched by the police party present at the spot. Option memo was written by the IO on the spot in his presence and Constable Prem Singh. Option memo witnessed by him, was not shown to him, in the Court.

10. PW-6 Inspector Dorje Ram deposed that at about 3.30 pm, IO ASI Sohan Lal produced one parcel sealed with impression 'B' at six places alongwith NCB form in triplicate, sample seal and accused. He resealed the parcel with impression 'T' at 9 places. He also filled in column Nos. 9 to 11 of NCB form Ext. PW-6/D.

11. PW-7 HC Raj Mal deposed that SI/SHO Dorje Ram handed over to him one parcel sealed with impression 'B' at six places and 'T' at 9 places alongwith NCB form in triplicate. He entered the same vide entry No. 486 of Malkhana Register. He proved abstract of Malkhana register Ext. PW-7/A.

12. PW-8 ASI Sohan Lal deposed the manner in which accused was apprehended and codal formalities of seizure and sampling were completed at the spot. He, with the help of other police officials apprehended the accused. He, on suspicion that the accused might be carrying some narcotic substance, asked for his search vide memo Ext. PW-5/A. Since place of occurrence was secluded, no independent witnesses were available there. So he associated Prem Singh and Tulsi Ram as witnesses. Search of the bag was carried out in their presence. In his cross-examination, he has admitted that in between 11.15-11.30 am, he has checked 12-15 vehicles at the spot. After 11.30 am, vehicles continuously plied from that place. He had not stopped any vehicle for associating the occupants of the vehicles in the investigation. He had sent Constable Prem Singh to arrange for local witnesses from nearby place but he could not arrange for the same. He has asked the accused to be searched vide memo Ext. PW-5/A. Memo was witnessed by Constable Tulsi Ram and Constable Prem Singh.

13. PW-5 Constable Tulsi Ram has admitted in his cross-examination that the alleged place of occurrence was 4 kms from the Police Station. The Police Station is situate in Aut Bazaar. There are shops and houses at the Bus Stand. Tehsil office is also situate at Aut Bazaar. Vehicles passed on the road. In his cross-examination, he has admitted that before personal search of the accused, IO gave option to be searched in his presence or a Gazetted Officer/Magistrate. But he consented to be searched by the police party on the spot. Option memo was written by the IO on the spot in his presence and Constable Prem Singh. However, alleged option memo witnessed by him was not shown to him. According to the statement of PW-5 Tulsi Ram, personal search of the accused was carried out. He was given option either to be searched by the police or a Gazetted Officer or a Magistrate. There are only two options which are required to be given to the accused either Gazetted officer or a Magistrate. There is no third option which is required to be given to the accused. According to PW-5, option memo was written by the IO on the spot in his presence and Prem Singh. However, fact of the matter is that the memo was not shown to him. PW-8 Sohan Lal has admitted that he asked accused to be searched vide memo and that memo was witnessed by Constable Tulsi Ram and Constable Prem Singh. It is settled law that accused can be apprised of his right orally or in writing. However, in this case, as per statement of PW-5, Constable Tulsi Ram, memo was prepared whether accused wanted to be

searched before a Gazetted Officer or a Magistrate, but the same has not been produced on record. It has also come in the statement of PW-8 ASI Sohan Lal that he has checked 12-15 vehicles at the spot. Vehicles continuously plied from that place after 11.30 am, he did not stop any vehicle to associate occupants of such vehicles in the investigation. Spot, where accused was apprehended was neither isolated nor secluded but despite that prosecution has not associated any independent witnesses. Distance between Police Station and alleged spot is only 4 kms. Aut bazaar is a fairly busy place. Occupants of vehicles who were crossing the alleged spot, could be easily asked to be associated as independent witnesses to inspire confidence in the manner in which accused was apprehended and search, seizure and sampling process was completed at the spot. PW-8 Sohan Lal has stated that he has sent Prem Singh to associate local witnesses from the vicinity but he could not arrange the same. PW-5 Tulsi Ram deposed that IO himself has gone in search of the independent witnesses. Thus, no efforts were made at all by the prosecution to associate independent witnesses. Prem Singh, has not been examined by the prosecution. Since the contraband was recovered from the bag, personal search was not required to be carried out. However, fact of the matter is that as per the statement of PW-5 Constable Tulsi Ram, as discussed herein above, personal search of accused was carried out without following mandate of Section 50 of the Act.

14. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand** reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.
>
> 16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.
>
> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-

10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

15. Case property was produced by the Public Prosecutor during the examination of PW-5 Tulsi Ram. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934. Para 22.70 of the Punjab Police Rules, 1934, as applicable to the State of H.P., reads as under:

"22.70. Register No. XIX- This register shall be maintained in Form 22.70.

With the exception of articles already included in register No. XVI every article placed in the store-room shall be entered in this register and the removal of any such article shall be noted in the appropriate column.

The register may be destroyed three years after the date of the last entry."

The register is to be maintained in Form 22.70. It reads as under.

"FORM NO. 22.70.

POLICE STATION_____ ____DISTRICT

Register No. XIX.-Store-Room Register (Part-I)

Column 1.- Serial No.

2. No. of first information report (if any), from whom taken (if taken from a person), and from what place.

3. Date of deposit and name of depositor.

4. Description of property.

5. Reference to report asking for order regarding disposal of property.

6. How disposed of and date.

7. Signature of recipient (including person by whom dispatched).

8. Remarks.

(To be prepared on a quarter sheet of native paper)."

16. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is redeposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was case property of some other case. The prosecution has failed to prove case against the accused under Sections 18 and 20 of the Act.

17. In view of the discussion and analysis made hereinabove, the present appeal is allowed. Judgment dated 28.2.2015 rendered by learned Special Judge, Mandi, District Mandi, Himachal Pradesh in Sessions trial No. 12/2011 is set aside. Accused is acquitted of the commission of offence under Sections 18 and 20 of the Act. He is ordered to be released forthwith, if not required by the police in any other case. Fine amount, if any paid by the accused, be refunded to him. Registry is directed to prepare the release warrant of the accused and send the same forthwith to the Superintendent of Jail concerned forthwith.

****

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

Bharat Sanchar Nigam Limited and another ...Appellants.

Versus

Sh. Sham Lal and others ...Respondents.

FAO No. 542 of 2009
a/w CO No. 276 of 2010
Decided on: 11.12.2015

Motor Vehicles Act, 1988- Section 166- Appellant challenged the award as being excessive and cross-objector challenged it as being inadequate- held that, the Tribunal has correctly appreciated the evidence including the statement of the medical Officer- the award is neither excessive nor inadequate, hence appeal and cross-objections dismissed.(Para 12)

For the appellants: Mr. Ashok Sharma, Assistant Solicitor General of India, with Mr. Nipun Sharma, Advocate.

For the respondents: Mr. Tek Chand Sharma, Advocate, for respondent No. 1.
Mr. K.R. Thakur, Advocate, for respondent No. 2.
Mr. Ratish Sharma, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

This appeal is directed against the judgment and award, dated 03.09.2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P. (for short

"the Tribunal") in M.A.C. No. 128-S/2 of 2005/04, titled as Sh. Sham lal versus Bharat Sanchar Nigam Limited and others, whereby compensation to the tune of Rs.2,27,000/- 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 appellants were saddled with liability (for short "the impugned award").

2. The appellants have questioned the impugned award on the ground that the amount awarded is excessive.

3. The claimant-injured has called in question the impugned award on the ground that the amount awarded is inadequate.

4. The insurer and the driver of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

5. The only question to be determined in this appeal is - whether the amount awarded is adequate or otherwise?

6. I have gone through the claim petition, record and the impugned award and am of the considered view that the Tribunal has rightly awarded the compensation, cannot be said to be either excessive or inadequate, rather is just and appropriate.

7. It has been pleaded by the claimant-injured that he is an Ex-serviceman, was 45 years of age at the time of the accident and getting pension of Rs.2,275/- per month. Further averred that after retirement, he was employed by Misao Security as a security guard and was getting salary to the tune of Rs.6,500/- per month. He has claimed compensation to the tune of Rs.14,49,350/- on the grounds taken in the memo of claim petition, was resisted by the respondents in the claim petition on the grounds taken in the respective memo of objections.

8. Following issues came to be framed by the Tribunal on 13.03.2008:

"1. Whether the petitioner sustained the injuries because of the rash and negligent driving of the vehicle No. HP-07-4476 by the respondent No. 4 as alleged? OPP

2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled to the compensation as claimed. If so, its quantum and from whom? OP Parties

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

4. Whether the petitioner has suppressed the true and material facts from the Tribunal. If so, its effect? OPR

5. Whether the petitioner has a cause of action? OPP

6. Whether the petition is bad for non joinder and mis joinder of the necessary parties? OPR

7. Whether the respondent No. 4 was driving the vehicle under the influence of liquor. If so, its effect? OPR-5

8. Whether the respondent No. 4 was not holding and possessing a valid and effective driving licence to drive the Swaraj Mazda as alleged. If so, its effect? OPR-5

9. Whether the vehicle was being run without any valid registration cum fitness certificate and route permit. If so, its effect? OPR-5

10. Whether the petitioner was a gratuitous passenger as alleged. If so, its effect? OPR-5

11. Relief."

9. Parties have led evidence. The claimant-injured examined HC Yog Raj as PW-1, Shri Laiq Ram as PW-3, Dr. Lokinder Sharma as PW-4 and has stepped into the witness box as PW-2. The respondents have examined Sh. Joshinder Lal as RW-1, Smt. Shakuntla Sharma as RW-2, Dr. Sunder Chainta as RW-3, HC Roshan Lal as RW-4, Shri R.K. Dhiman as RW-6 and the driver, namely Shri Sant Ram himself appeared in the witness box as RW-5.

10. The Tribunal, after scanning the evidence and the pleadings, has rightly held that the accident was outcome of rash and negligent driving of the offending vehicle by its driver at the time of the accident and decided issues No. 1 and 7 in favour of the claimant-injured, needs no interference. Accordingly, the findings returned by the Tribunal on issues No. 1 and 7 are upheld.

11. The findings returned by the Tribunal on issues No. 3 to 6, 8 and 9 are also upheld for the reason that there is no challenge to the said findings.

12. The challenge revolves around issue No. 2. The Tribunal has discussed issue No. 2 and 10, while holding that they are interlinked, right from para 21 to 30. It appears that the Tribunal has rightly made the discussion while keeping in view the statements of the doctors and the amount awarded cannot be said to be excessive or inadequate in any way, needs no interference.

13. Having said so, the impugned award is upheld and the appeal as well as the cross-objections is dismissed.

14. 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 after proper identification.

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

****

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

Champa Mahajan .....Petitioner.

Versus

Manju Mamik & ors. .....Respondents.

C.R. No. 154 of 2015.
Reserved on: 8.12.2015.
Decided on: 11.12.2015.

Code of Civil Procedure, 1908- Order 6 Rule 17- Defendants filed an application for amending written statement, which was allowed- defendant wanted to place on record the subsequent development which has taken place after the filing of the suit- held that the Court should be liberal in permitting the party to amend the written statement unless a grave injustice or irretrievable prejudice is caused to the other side- Court had exercised the jurisdiction in allowing the amendment considering all principles of law and the material on record. (Para-4 to 9)

Cases referred:
Rajesh Kumar Aggarwal and others vrs. K.K.Modi and others, (2006) 4 SCC 385
Baldev Singh and others vrs. Manohar Singh and another, (2006) 6 SCC 498
Usha Balashaheb Swami and others vrs. Kiran Appaso Swami and others, (2007) 5 SCC 602

For the petitioner: Mr. Anand Sharma, Advocate.
For the respondents: Mr. Atul Jhingan, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order dated 29.6.2015, rendered by the learned Civil Judge (Jr. Divn.), Dalhousie, Distt. Chamba in CMA No. 57/09.

2. "Key facts" necessary for the adjudication of this petition are that the petitioner-plaintiff (hereinafter referred to as the plaintiff), has filed suit for specific performance of contract dated 14.9.1998 and permanent prohibitory injunction against the respondents-defendants (hereinafter referred to as the defendants). During the pendency of Civil Suit, the sole defendant expired on 23.2.2004. The ex-parte decree was passed by the trial Court on 23.7.2005. The plaintiff filed an application for setting aside the abatement and bringing on record the legal representatives of deceased defendant. The defendants challenged the order of setting aside the abatement before this Court by filing Civil Miscellaneous Petition No. 4233 of 2013. The same was dismissed vide order dated 26.8.2014. The defendants moved an application under Order 6 Rule 17 CPC for amendment of the written statement. The reply was filed by the plaintiff. The application was allowed by the learned trial Court on 29.6.2015. Hence, this petition.

3. It is evident from the contents of the application filed under Order 6 Rule 17 CPC vide Annexure P-1 that real sisters and brother of late Sh. Ranjeet Singh filed Civil Suit No. 80 of 2003 against him in the Court of learned Civil Judge (Jr. Divn.), Dalhousie, claiming themselves to be owners in possession of the property comprised in Kh. No. 808, 810, 811, 813 to 819 and 821, as per Will dated 16.4.1992 executed by late Smt. Kuldeep Kaur in favour of late Sh. Ranjeet Singh. The lease deed dated 7.4.1994 executed in favour of late Sh. Ranjeet Singh was also challenged.

4. The suit was contested by the defendants, being legal heirs of late Sh. Ranjeet Singh. Late Sh. Ranjeet Singh died during the pendency of the suit. His legal heirs were brought on record. The suit was contested by them. The suit was dismissed on 31.3.2009 by the learned trial Court. The revenue entries existing in favour of late Sh. Ranjeet Singh as well as lease deed were held to be valid. Two separate appeals No. 7 and 8 of 2009 were filed by the sisters and brother of late Sh. Ranjeet Singh before the Court of learned District Judge, Chamba, H.P. The learned District Judge, Chamba, allowed the same on 16.9.2010, whereby the Will dated 16.4.1992 was held to be the last and valid Will of late Smt. Kuldeep Kaur. The entries in favour of late Sh. Ranjeet Singh regarding lease and ownership were set aside vide judgment and decree dated 16.9.2010.

5. The defendants filed RSA Nos. 460 and 461 of 2010 before this Court assailing the judgment and decree dated 16.9.2010. These appeals were dismissed on 25.4.2013. The Review Petitions bearing Nos. 4001 and 4002 of 2013 were also dismissed by this Court on 17.6.2014. The SLPs preferred against the judgments of this Court were

also dismissed on 13.10.2014. It is, in these circumstances, defendants moved an application under Order 6 Rule 17 CPC to bring on record the factum of the litigation arising out of the Civil Suit No. 80 of 2003, which has culminated in the dismissal of SLPs on 13.10.2014.

6. This Court is of the considered view that the amendment would not alter the nature of the Written Statement rather it would help to adjudicate the matter finally between the parties. It will also avoid further litigation. The endeavour of the defendants is only to place on record the subsequent developments which have taken place after the filing of the suit preferred by the plaintiff. The judgment rendered by the learned District Judge Chamba, in appeals No. 7 and 8 of 2009 decided on 16.9.2010 and the two RSAs decided by this Court bearing Nos. 460 and 461 of 2010 have bearing on the outcome of the present lis between the parties. Moreover, the plaintiff will be given an opportunity to lead evidence. It is settled law that the Courts have to be liberal in allowing the amendments in Written Statement vis-à-vis the plaint.

7. Their lordships of the Hon'ble Supreme Court in the case of ***Rajesh Kumar Aggarwal and others vrs. K.K.Modi and others,*** reported in ***(2006) 4 SCC 385,*** have held that the object of Order 6 Rule 17 CPC is that the Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side. The Court always gives leave to amend the pleadings of a party unless it is satisfied that the party applying was acting mala fide. Their lordships have also held that the Court should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. It has been held as follows:

> " 15. The object of the rule is that Courts should try the merits of the case that come before them and should, consequently, allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other side.
>
> 16. Order VI Rule 17 consist of two parts whereas the first part is discretionary (may) and leaves it to the Court to order amendment of pleading. The second part is imperative (shall) and enjoins the Court to allow all amendments which are necessary for the purpose of determining the real question in controversy between the parties.
>
> 18. As discussed above, the real controversy test is the basic or cardinal test and it is the primary duty of the Court to decide whether such an amendment is necessary to decide the real dispute between the parties. If it is, the amendment will be allowed; if it is not, the amendment will be refused. On the contrary, the learned Judges of the High Court without deciding whether such an amendment is necessary has expressed certain opinion and entered into a discussion on merits of the amendment. In cases like this, the Court should also take notice of subsequent events in order to shorten the litigation, to preserve and safeguard rights of both parties and to sub-serve the ends of justice. It is settled by catena of decisions of this Court that the rule of amendment is essentially a rule of justice, equity and good conscience and the power of amendment should be exercised in the larger interest of doing full and complete justice to the parties before the Court.

19. While considering whether an application for amendment should or should not be allowed, the Court should not go into the correctness or falsity of the case in the amendment. Likewise, it should not record a finding on the merits of the amendment and the merits of the amendment sought to be incorporated by way of amendment are not to be adjudged at the stage of allowing the prayer for amendment. This cardinal principle has not been followed by the High Court in the instant case."

8. Their lordships of the Hon'ble Supreme Court in the case of ***Baldev Singh and others vrs. Manohar Singh and another,*** reported in ***(2006) 6 SCC 498,*** have held that the Courts should be extremely liberal in granting the prayer for of pleadings unless serious injustice or irreparable loss is caused to the other side. Their lordships again reiterated that amendment of plaint and amendment of written statement are not necessarily governed by exactly the same principle. It has been held as follows:

"8. It is well settled by various decisions of this Court as well as the High Courts in India that Courts should be extremely liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side. In this connection, reference can be made to a decision of the Privy Council in Ma Shwe Mya v. Maung Mo Hnaung (AIR 1922 P.C. 249) in which the Privy Council observed:

> "All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit."

15. Let us now take up the last ground on which the application for amendment of the written statement was rejected by the High Court as well as the Trial Court. The rejection was made on the ground that inconsistent plea cannot be allowed to be taken. We are unable to appreciate the ground of rejection made by the High Court as well as the Trial Court. After going through the pleadings and also the statements made in the application for amendment of the written statement, we fail to understand how inconsistent plea could be said to have been taken by the appellants in their application for amendment of the written statement, excepting the plea taken by the appellants in the application for amendment of written statement regarding the joint ownership of the suit property. Accordingly, on facts, we are not satisfied that the application for amendment of the written statement could be rejected also on this ground. That apart, it is now well settled that an amendment of a plaint and amendment of a written statement are not necessarily governed by exactly the same principle. It is true that some general principles are certainly common to both, but the rules that the plaintiff cannot be allowed to amend his pleadings so as to alter materially or substitute his cause of action or the nature of his claim has necessarily no counterpart in the law relating to amendment of the written statement. Adding a new ground of defence or substituting or altering a defence does not raise the same problem as adding, altering or substituting a new cause of action. Accordingly, in the case of amendment of written statement, the courts are inclined to be more liberal in allowing amendment of the written

statement than of plaint and question of prejudice is less likely to operate with same rigour in the former than in the latter case.

16. This being the position, we are therefore of the view that inconsistent pleas can be raised by defendants in the written statement although the same may not be permissible in the case of plaint. In the case of M/s. Modi Spinning and Weaving Mills Co.Ltd. & Anr. Vs. M/s. Ladha Ram & Co. [(1976) 4 SCC 320], this principle has been enunciated by this Court in which it has been clearly laid down that inconsistent or alternative pleas can be made in the written statement. Accordingly, the High Court and the Trial Court had gone wrong in holding that defendants/appellants are not allowed to take inconsistent pleas in their defence."

9. Their lordships of the Hon'ble Supreme Court in the case of ***Usha Balashaheb Swami and others vrs. Kiran Appaso Swami and others,*** reported in ***(2007) 5 SCC 602,*** have held that addition of new ground of defence or substituting or altering a defence or taking inconsistent pleas in written statement can be allowed as long as the amended pleadings do not result in causing grave injustice and irretrievable prejudice to plaintiff or displacing him completely. Their lordships have also reiterated general principles of amendment of pleadings as under:

" 16. Before dealing with the question whether the amendment sought for was rightly rejected by the High Court or not, we may first consider the principles under which amendments of pleadings can be allowed or rejected. The principle allowing or rejecting an amendment of the pleadings has emanated from Order 6 Rule 17 of the Code of Civil Procedure, which runs as under:

> "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 Provided that no application for amendment shall be allowed after the trial has commenced, unless the Court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial"

17. From a bare perusal of Order 6 Rule 17 of the Code of Civil Procedure, it is clear that the court is conferred with power, at any stage of the proceedings, to allow alteration and amendments of the pleadings if it is of the view that such amendments may be necessary for determining the real question in controversy between the parties. The proviso to Order 6 Rule 17 of the Code, however, provides that no application for amendment shall be allowed after the trial has commenced unless the court comes to a conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial. However, proviso to Order 6 Rule 17 of the Code would not be applicable in the present case, as the trial of the suit has not yet commenced.

18. It is now well-settled by various decisions of this Court as well as those by High Courts that the courts should be liberal in granting the prayer for amendment of pleadings unless serious injustice or irreparable loss is caused to the other side or on the ground that the prayer for amendment was not a bonafide one. In this connection, the observation of the Privy

Council in the case of Ma Shwe Mya v. Maung Mo Hnaung [AIR 1922 P.C. 249] may be taken note of. The Privy Council observed:

> "All rules of courts are nothing but provisions intended to secure the proper administration of justice and it is, therefore, essential that they should be made to serve and be subordinate to that purpose, so that full powers of amendment must be enjoyed and should always be liberally exercised, but nonetheless no power has yet been given to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject-matter of the suit."

19. It is equally well settled principle that a prayer for amendment of the plaint and a prayer for amendment of the written statement stand on different footings. The general principle that amendment of pleadings cannot be allowed so as to alter materially or substitute cause of action or the nature of claim applies to amendments to plaint. It has no counterpart in the principles relating to amendment of the written statement. Therefore, addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement would not be objectionable while adding, altering or substituting a new cause of action in the plaint may be objectionable.

20. Such being the settled law, we must hold that in the case of amendment of a written statement, the courts are more liberal in allowing an amendment than that of a plaint as the question of prejudice would be far less in the former than in the latter case [see B.K. Narayana Pillai v. Parameswaran Pillai (2000(1) SCC 712) and Baldev Singh & Ors. v. Manohar Singh (2006 (6) SCC 498)]. Even the decision relied on by the plaintiff in Modi Spinning (supra) clearly recognises that inconsistent pleas can be taken in the pleadings. In this context, we may also refer to the decision of this Court in Basavan Jaggu Dhobi v. Sukhnandan Ramdas Chaudhary (Dead) [1995 Supp (3) SCC 179]. In that case, the defendant had initially taken up the stand that he was a joint tenant along with others. Subsequently, he submitted that he was a licensee for monetary consideration who was deemed to be a tenant as per the provisions of Section 15A of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947. This Court held that the defendant could have validly taken such an inconsistent defence. While allowing the amendment of the written statement, this Court observed in Basavan Jaggu Dhobi's case (supra) as follows :-

> "3. As regards the first contention, we are afraid that the courts below have gone wrong in holding that it is not open to the defendant to amend his statement under Order 6 Rule 17 CPC by taking a contrary stand than was stated originally in the written statement. This is opposed to the settled law open to a defendant to take even contrary stands or contradictory stands, the cause of action is not in any manner affected. That will apply only to a case of the plaint being amended so as to introduce a new cause of action."

21. As we have already noted herein earlier that in allowing the amendment of the written statement a liberal approach is a general view when admittedly in the event of allowing the amendment the other party can be compensated in money. Technicality of law should not be permitted to hamper the Courts in the administration of justice between the parties. In

the case of L.J. Leach and Co. Ltd. v. Jardine Skinner and Co. [AIR 1957 SC 357], this Court observed

> "that the Courts are more generous in allowing amendment of the written statement as the question of prejudice is less likely to operate in that event".

In that case this Court also held

> "that the defendant has right to take alternative plea in defence which, however, is subject to an exception that by the proposed amendment the other side should not be subjected to serious injustice."

22. Keeping these principles in mind, namely, that in a case of amendment of a written statement the Courts would be more liberal in allowing than that of a plaint as the question of prejudice would be far less in the former than in the latter and addition of a new ground of defence or substituting or altering a defence or taking inconsistent pleas in the written statement can also be allowed, we may now proceed to consider whether the High Court was justified in rejecting the application for amendment of the written statement."

10. In the instant case, the trial Court has exercised the jurisdiction in allowing the amendment of Written Statement considering all principles of law and the material on record.

11. Consequently, there is no merit in this petition, the same is dismissed, so also the pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Smt. Kanta Devi W/o late sh. Jagat Ram & another ....Revisionists.

Versus

Smt. Neelam Kashyap W/o late Sh. N.P. Kashyap & others ....Non-revisionists.

Civil Revision No. 29 of 2015
Decided on: 11.12.2015.

Code of Civil Procedure, 1908- Order 23 Rule 1- Parties had entered into a compromise- revision disposed of with the directions that orders of Rent Controller and Appellate Authority shall stand modified in accordance with the compromise entered between the parties.

For the revisionists : Mr Ashok Sood, Advocate.
For non-revisionist No.1. : Mr. S.V. Sharma, Advocate.
For non-revisionist No. 2 to 8.: Mr. Dheepak Thakur, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocates appearing on behalf of the parties submitted that compromise has been executed inter-se the parties Ext. PA placed on record and present

revision petition be disposed of as per terms and conditions of compromise placed on record. In view of the above stated facts present revision petition is disposed of with the direction that order of learned Rent Controller and order of learned first appellate Authority are modified strictly as per terms and conditions of compromise Ext. PA placed on record. Compromise Ext. PA and statements of learned Advocates recorded separately will form part and parcel of this order. Present revision petition is disposed. No order as to costs. File of learned Rent Controller and learned first appellate Authority be sent back forthwith along with certified copy of this order. Pending applications if any also disposed of.

****

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

Kumari Sunita .....Appellant
Versus
The State of H.P. & others ....Respondents

FAO No. 115 of 2009
Decided on : 11.12.2015

Motor Vehicles Act, 1988- Section 166- Deceased was 52 years of age at the time of accident- he was a government employee- his income was Rs.3,000/- per month- 1/3rd of the amount is to be deducted towards his personal expenses- keeping in view his age, multiplier of '13' is applicable – thus, claimant is entitled to Rs.2000 x 12 x 13= Rs.3,12,000/- towards loss of dependency. (Para-5 to 8)

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. H.C. Sharma, Advocate.
For the Respondents: Mr. V.S. Chauhan, Additional Advocate General, for respondents No. 1 & 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 5th November, 2008, made by the Motor Accident Claims Tribunal, Shimla (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 29-S/2 of 2006, titled Kumari Sunita versus The Secretary, H.P.P.W.D. & others, whereby compensation to the tune of Rs.2,60,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant-appellant herein and against the respondents (for short, "the impugned award").

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

3. The claimant has questioned the impugned award on the ground of adequacy of compensation.

4. The only question to be determined in this appeal is-whether the Tribunal has rightly assessed the compensation. The answer is in the negative for the following reasons.

5. Admittedly, the deceased was 52 years of age at the time of accident and was a government employee. The Tribunal has rightly taken his income as Rs.3,000/-, in terms of para-9 of the impugned award and has deducted 1/3rd towards his personal expenses, but has fallen in an error in applying the multiplier of '12'. The multiplier of '13' was applicable in this case, as per 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** 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.**

6. Accordingly, it is held that the claimant is entitled to Rs.2,000/- x 12 = Rs.24,000 x 13 = 3,12,000/- under the head ' loss of dependency'.

7. The Tribunal has rightly awarded Rs.20,000/- under the head 'conventional charges', is maintained.

8. Having said so, it is held that the claimant is entitled to compensation to the tune of Rs.3,12,000/- + Rs.20,000/- total amounting to Rs.3,32,000/- with interest as awarded by the Tribunal, from the date of filing of the claim petition.

9. The amount of compensation is enhanced and the impugned award is modified, as indicated above. The appeal is accordingly disposed of.

10. The respondents-State is directed to deposit the enhanced amount alongwith interest, within a period of six weeks from today before the Registry. On deposit, 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 in the account.

10. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

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

National Insurance Company .....Appellant

Versus

Kuldeep Singh and others ..... Respondents

FAO No.544 of 2009
Date of decision: 11.12.2015

Motor Vehicles Act, 1988- Section 166- Insurer questioned the award on the ground that the compensation awarded by the Tribunal is excessive- held that, careful perusal of the

award shows that the amount awarded, in no way, is excessive or on the higher side, rather the compensation granted appears to be inadequate- appeal dismissed. (Para 6 & 7)

For the appellant: Ms.Seema Sood, Advocate.
For the respondents: Nemo for respondent No.1.
Ms.Seema Guleria, Advocate, for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award, dated 7th August, 2009, passed by the Motor Accident Claims Tribunal(I), Kangra at Dharamshala, (for short, "the Tribunal"), in MAC Petition No.84-D/II-2006, titled Kuldeep Singh vs. Pankaj Sapehia and others, whereby compensation to the tune of Rs.1,68,974/-, with interest at the rate of 9% per annum, came to be awarded in favour of the claimant (respondent No.1 herein) and the insurer was saddled with the liability, (for short the impugned award).

2. The claimant, the driver and the owner/insured have not questioned the impugned award on any ground. Thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has questioned the impugned award on the ground that the compensation awarded by the Tribunal is excessive.

4. Thus, the only question needs to be determined in this appeal is – Whether the amount of compensation awarded by the Tribunal is excessive?

5. Factum of the offending vehicle having been insured with the insurer/appellant is not in dispute. No breach of the insurance policy has been proved by the insurer in order to seek exoneration and for saddling the owner with the liability.

6. As far as amount of compensation is concerned, the Tribunal has made detailed discussion in paragraph 17 of the impugned award while deciding issue No.2. The amount awarded, in no way, can be said to be excessive or on the higher side, rather the compensation granted appears to be inadequate. However, the claimant has not questioned the impugned award and has not preferred any appeal.

7. Having glance of the above discussion, there is no merit in the appeal and the same is dismissed. Consequently, the impugned award is upheld. The Registry is directed to release the amount in favour of the claimant, alongwith interest, after proper identification.

****

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

New India Assurance Co. Ltd. .....Appellant.
Versus
Sh. Rajesh Sharma and others ...Respondents

FAO (MVA) No. 94 of 2009
Date of decision: 11th December, 2015

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the ground of adequacy of compensation- held that, although this ground was not available to the

appellant yet it becomes clear that the tribunal has wrongly applied the multiplier of 15; whereas it should have been 16- further held that, 1/3rd share of the income was to be deducted toward the personal expense of the deceased and Rs.10,000/- each awarded to the claimant under the head loss of love and affection, loss of estate and funeral expenses- award accordingly modified. (Para 7 to 12)

Cases referred:
Munna Lal Jain and another versus Vipin Kumar Sharma and others 2015 AIR SCW 3105
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 appellant: Mr.B.M. Chauhan, Advocate.
For the respondents: Mr.Ashok Tyagi, Advocate, for respondent No.1.
Nemo for other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 28.11.2008, made by the Motor Accident Claims Tribunal –I Sirmaur Disstrict at Nahan, H.P. in MAC Petition No. 125-MAC/2 of 2005, titled *Rajesh Sharma versus Ashwani Infrastructure Pvt Ltd and others*, for short "the Tribunal", whereby compensation to the tune of Rs.11,35,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short.

2. The claimant Rajesh Sharma, being the victim of a vehicular accident, which was caused by respondent No.2-driver, namely, Sharad Kanshi Nath, while driving Truck/Dumper No. MH-12/F-8396 on 26.9.2005 at about 6 P.M. at a place known as Ganesh Vision, Akurdi, Pune due to which deceased, i.e., wife of the claimant sustained the injuries and succumbed to the same. The claimant had filed the claim petition, on the grounds taken in the claim petition.

3. The claim petition was resisted and contested by the respondents and following issues came to be framed by the Tribunal.

(i). Whether Smt. Archana Rajesh Sharma sustained injuries to her person in a vehicular accident involving Damper/Truck NO. MH-12/F-8396, being owned by respondent No. 1 and driven by respondent No. 2 ion a rash or negligent manner at place known as Ganesh Vision Akurdi, Pune (Maharashtra) on dated 26.9.2005 at about 6.30 P.M. by ramming the said Damper/truck against the scooty of the deceased bearing No. MH 09-JF-4610, which injuries proved fatal on the spot, as alleged? OPP.

(ii) If issue No. 1 is prove ion affirmative, whether the petitioner being legal representative of the deceased is entitled to compensation, if so, to what amount and from whom? OPP.

(iii) Whether the Tribunal has no jurisdiction to entertain and adjudicate the petition, as alleged? OPR-3.

(iv) Whether the driver of the offending vehicle was not in possession of valid and effective driving licence, as alleged? OPR-3.

(v) Relief.

4. The claimant has led the evidence. Respondents have not led any evidence. Thus, the evidence led by the claimant has remained un-rebutted.

5. The Tribunal, after scanning the evidence, held that the claimant has proved all the issues and granted the compensation, details of which have been given in para 39 of the impugned award.

6. Owner, driver, insured and claimants have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

7. The insurer has questioned the impugned award on the ground of adequacy of compensation though this ground is not available to the insurer but while going through para 39 of the impugned award, it appears that the Tribunal has fallen in an error in awarding the compensation under the head "loss of gratuitous services rendered by deceased to the petitioner". At the same time, the Tribunal has fallen in an error in applying the multiplier of "15". The multiplier of "16" was applicable while keeping in view the age of the deceased who was 26 years of age at the time of accident. She was working as Executive Officer with M/s Karvy Stock Broking Ltd. Akurdi and her salary slip is on the record, which do disclose that her salary was Rs.7694/- per month, roughly Rs.7700/- per month.

8. I deem it proper to assess the compensation herein. 1/3rd was to be deducted from the income of the deceased towards her personal expenses and claimant has lost source of income to the tune of Rs.5200/- per month. Keeping in view the age of the deceased read with ***Munna Lal Jain and another*** versus ***Vipin Kumar Sharma and others*** reported in ***2015 AIR SCW 3105***, the multiplier is to be applied according to the age of the deceased. The multiplier of "16' was applicable, keeping in view ***Sarla Verma and others versus Delhi Transport Corporation and 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***, and is accordingly applied in this case.

9. The claimant is held entitled under the head "Loss of income" to the tune of Rs.5200x12x16= Rs.9,98,400/-.

10. I hold that the claimant is also entitled to compensation under the following heads as under:

(i)	Loss of love and affection:		Rs.10,000/-
(ii)	Loss of estate	:	Rs.10,000/-
(iii)	Funeral expenses	:	Rs.10,000/-
			Total Rs.30,000/-

Rs.5000/ - under the head "Medical expenses" and Rs.20,000/- under the head Loss of foetus is maintained.

11. Accordingly, the total amount of compensation is awarded in favour of the claimant to the tune of Rs.9,98,400+Rs.30,000 under the four heads +Rs.5000/- and Rs.20,000/- under the heads "medical expenses and loss of foetus" respectively".

12. Thus, in all, the claimant is held entitled to Rs.10,53,400/-. The rate of interest awarded by the Tribunal is upheld.

13. Having said so, the impugned award is modified as indicated hereinabove. The insurer is directed to deposit the amount, if not already deposited, in this Registry within six weeks from today. The Registry, on deposit of the amount, is directed to release the same in favour of the claimant, strictly in terms of the conditions contained in the impugned award, and excess amount, if any, be refunded to the insurance company, through payees cheque account.

14. The appeal stands disposed of accordingly.

15. Send down the record forthwith, after placing a copy of this judgment.

****

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

Padam Dass and another ...Appellants.
Versus
Man Kumari and others ...Respondents.

FAO No. 411 of 2009
Decided on: 11.12.2015

Motor Vehicles Act, 1988- Section 166- The owner/insured and the driver of the offending vehicle have challenged the award on the plea that owner-insured has wrongfully been saddled with the liability-held that, the averments made by the owner/insured in reply that the tractor was being driven by the deceased by taking the key fraudulently not established being contrary to the contents of the FIR; not challenged by the appellant- further held that even if the owner-insured pleads that the person, who was driving the vehicle without having a valid and effective driving licence at the relevant point of time, had taken the keys fraudulently, is breach on the part of the owner-insured- the order of the Tribunal is well reasoned; hence appeal dismissed. (Para 16 to 21)

Case referred:
Kesari Devi versus Anil Kumar Mastana & others, I L R 2014 (VI) HP 1142

For the appellants: Mr. Y.P. Sood, Advocate.
For the respondents: Mr. D.S. Nainta, Advocate, for respondents no. 1 and 2.
Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award dated 10.07.2009, made by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, Camp at Rohru (for short "the Tribunal") in M.A.C. No. 42-R/2 of 2008/2006, titled as Smt. Man Kumari and another versus Sh. Padam Dass and others, whereby compensation to the tune of Rs.2,03,000/- with interest @ 9% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the owner-insured was saddled with liability (for short "the impugned award").

2. The claimants and the insurer 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 appellants, i.e. the owner-insured and the driver of the offending vehicle, have questioned the impugned award on the ground that the Tribunal has fallen in an error in saddling appellant No. 1, i.e. the owner-insured, with liability, on the grounds taken in the memo of appeal.

4. The claimants invoked the jurisdiction of the Tribunal in terms of Section 166 of the Motor Vehicles Act, 1988 (for short "the MV Act") for grant of compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition.

5. The respondents in the claim petition contested the same by the medium of replies.

6. Following issues came to be framed by the Tribunal on 05.08.2008:

> *"1. Whether Sh. Megh Raj died due to the rash and negligent driving of the tractor No. HP-10-0748 by the respondent driver Sh. Gur Dev as alleged? OPP*
>
> *2. If issue No. 1 i proved in affirmative, whether the petitioners are entitled to the compensation as claimed. If so, its quantum and from whom? OP Parties.*
>
> *3. Whether Sh. Gur Dev was not holding and possessing a valid and effective driving licence to drive the tractor as alleged. If so, its effect? OPR-3*
>
> *4. Whether the vehicle was being driven in violation of the terms and conditions of the insurance policy. If so, its effect? OPR-3*
>
> *5. Whether the tractor was being run without valid registration cum fitness certificate and route permit etc. as alleged? OPR-3*
>
> *6. Whether the petition is collusive as alleged? OPR-3*
>
> *7. Relief."*

7. The claimants examined Rukam Chand as PW-1 and one of the claimants, namely Shri Thumb Bhadur, appeared in the witness box as PW-2. The respondents have not led any evidence, but the owner-insured and the driver of the offending vehicle, namely Shri Padam Dass and Shri Gur Dev, appeared in the witness box as RW-1 and RW-2, respectively.

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the accident was outcome of rash and negligent driving of the tractor, bearing registration No. HP-10-0748, by its driver, namely Gur Dev, on 26.01.2006, at place Gushali and accordingly decided issue No. 1 in favour of the claimants.

9. The Tribunal has assessed the compensation, the quantum of which is not in dispute, and saddled the owner-insured of the offending vehicle with liability on the ground that Shri Dhani Ram was not competent to drive the same and the owner-insured has committed breach, which is subject matter of this appeal.

10. The question is - whether the owner-insured has committed any willful breach?

11. It appears that the FIR has been lodged by appellant No. 2, who is said to be the driver of the offending vehicle and son of the owner-insured, which stands proved as Ext.PW-1/A. Nobody has questioned the genuineness of the said FIR. It has specifically been recorded in the said FIR that Dhani Ram was engaged by the appellants as a helper with the offending vehicle and he was on the wheel of the offending vehicle at the relevant point of time.

12. The appellants, i.e. the owner-insured and the driver, in para 24 of the reply to the claim petition, have stated that it was the deceased, who had taken the keys of the

offending vehicle fraudulently and was driving the same at the time of the accident. It is apt to reproduce para 24 of the reply filed by the appellants herein:

> *"24. That the contents of para 24 of the petition are wrong and denied emphatically. The deceased was not traveling in the tractor. Nor he was employ. The respondent No. 2 is driver having perfect legal license to drive the vehicle. But on the alleged date the tractor was parked and the deceased by procuring key fraudulently drove the tractor himself and caused the alleged accident hence the petitioner are rather liable to pay damages to the respondents. Rest of the averments of para 24 of the petition are denied emphatically. If at all the petitioner are found entitled then the replying respondents are indemnified by the insurance company."*

13. It was for the appellants to prove that the offending vehicle was being driven by the deceased unauthorizedly. Neither such FIR has been lodged before any agency or the police nor evidence has been led to prove that the deceased was driving the offending vehicle. If at all the deceased was driving the offending vehicle unauthorizedly at the time of the accident, why the owner-insured has not taken any action.

14. In the FIR, Ext. PW-1/A, appellant No. 2, i.e. the driver of the offending vehicle, has himself stated that it was Dhani Ram, who was the in charge of the offending vehicle at the relevant point of time.

15. In view of the above, FIR (Ext. PW-1/A) and para 24 of the reply (supra) are at variance.

16. The Tribunal, after discussing the pleadings and the evidence, rightly came to the conclusion that Dhani Ram was driving the offending vehicle at the time of the accident, who was not having any valid and effective driving licence to drive the same.

17. After making the discussion in paras 21 and 21A of the impugned award how the owner-insured has committed breach, the Tribunal has rightly discussed the statement of Gur Dev (RW-2), who has lodged the FIR and has virtually admitted in the said FIR that Dhani Ram was on the wheel of the offending vehicle at the time of the accident.

18. Having said so, the Tribunal has rightly held that Dhani Ram was driving the offending vehicle at the relevant point of time, who was not having a valid and effective driving licence to drive the same and the owner-insured has committed breach.

19. Learned counsel for the appellants argued that Dhani Ram was not authorized by the owner-insured or the driver of the offending vehicle to drive the same, if, at all, the accident had taken place due to the rash and negligent driving of Dhani Ram.

20. The argument of the learned counsel for the appellants is not tenable for the reason that in case the keys of the offending vehicle were with appellant No. 2 at the relevant point of time, as alleged, then how Dhani Ram or any other person including the deceased drove the same and caused the accident. Thus, adverse inference is to be drawn.

21. This Court in a batch of two appeals, **FAO No. 10 of 2012,** titled as **Nirmala Devi & another versus Sh. Ravinder Kumar & others,** being the lead case, decided on 01.08.2014, and another batch of two appeals, **FAO No. 347 of 2007, titled as Kesari Devi versus Anil Kumar Mastana & others,** being the lead case, decided on 19.12.2014, has held that even if the owner-insured pleads that the person, who was driving the vehicle

without having a valid and effective driving licence at the relevant point of time, had taken the keys fraudulently, is breach on the part of the owner-insured.

22. Having said so, the impugned award is well reasoned, speaking one and the Tribunal has rightly saddled the owner-insured with liability, needs no interference.

23. Viewed thus, the impugned award is upheld and the appeal is dismissed.

24. 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 after proper identification.

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

****

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

Sh. Rattan Chand alias Ratto and another ...Appellants.

Versus

Smt. Neelam Devi and others ...Respondents.

FAO No. 572 of 2008
Reserved on: 04.12.2015
Decided on: 11.12.2015

Motor Vehicles Act, 1988- Section 166- In an accident all passengers including the driver died-claim petition by the claimants, who lost their son dismissed by the Tribunal holding that the rashness and negligence of the offending driver not established-held that, Granting of compensation is a welfare legislation and the hyper technicalities, mystic maybes, procedural wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions and the social purpose of granting compensation-FIR u/s 279 & 304-A lodged against the offending driver has been proved on the record-apart from it, specific allegations qua rashness and negligence leveled against the offending driver have not been denied-evidence led fully establishes the rash and negligent driving being the cause of the accident- the income of the deceased assessed to be Rs.5000/-; 50% deducted toward personal expenses of the deceased and claimants held entitled to Rs.4,80,000/- as compensation- appeal allowed. (Para 10 to 36)

Cases referred:

N.K.V. Bros. (P.) Ltd. vs M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. vs Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627,
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646
Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298
National Insurance Co. Ltd. vs Swaran Singh and others, AIR 2004 Supreme Court 1531
Pepsu Road Transport Corporation vs National Insurance Company, (2013) 10 Supreme Court Cases 217
Sarla Verma 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 and another versus Vipin Kumar Sharma and others, 2015 AIR SCW 3105

For the appellants:	Mr. S.D. Gill, Advocate.
For the respondents:	Nemo for respondents No. 1 to 3.
	Ms. Shilpa Sood, Advocate, for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to the judgment and award, dated 28.03.2008, made by the Motor Accident Claims Tribunal, Chamba Division Chamba (HP) (for short "the Tribunal") in M.A.C. Petition No. 48 of 2005, titled as Shri Rattan Chand alias Ratto and another versus Smt. Neelam Devi and another, whereby the claim petition filed by the appellants-claimants came to be dismissed (for short "the impugned award").

2. In order to determine this appeal, I deem it proper to give a flashback of the case, the womb of which has given birth to the appeal in hand.

3. The appellants-claimants, being the parents of the deceased-Joginder Singh, 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.

4. It is pleaded in the claim petition that the appellant-claimants became the victim of the motor vehicular accident, which was caused by the driver of the offending vehicle, i.e. Balero Camper, bearing registration No. HP-46-0267, on 14.12.2004, at about 11 P.M. on the way from Bharmour to Pansei, while driving the same rashly and negligently, lost control over the vehicle, which fell down in a *nallah* and the driver and all the occupants of the vehicle including Joginder Singh sustained injuries and succumbed to the injuries on the spot. Further pleaded that deceased-Joginder Singh was 25 years of age at the time of the accident and was earning Rs.8,000/- per month being a skilled carpenter and the parents lost their sole bread earner, which has made their lives miserable.

5. The respondents in the claim petition resisted the claim petition on the grounds taken in the respective memo of replies.

6. Following issues came to be framed by the Tribunal on 17.11.2006:

> *"1. Whether on 14.12.2004 Shri Joginder Singh died in a vehicular mishap due to rash and negligent driving of vehicle No. HP-46-0267 Bolero Camper by its driver 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 petition is not maintainable in the present form as alleged? OPR-1*
>
> *4. Whether the petitioners have no cause of action and locus standi to file the petition as alleged? OPR 1 and 2*
>
> *5. Whether the driver of the offending vehicle was not holding valid and effective driving licence at the time of accident as alleged? OPR-2*
>
> *6. Whether the offending vehicle was being plied in contravention of the conditions of Insurance policy, hence the insurance company is not liable? OPR-2*

7. Whether deceased was a gratuitous passenger hence respondent No. 2 is not liable? OPR-2

8. Relief."

7. The claimants have examined MHC Tilak Raj as PW-1, Shri Jagdish Chand as PW-2 and one of the claimants, namely Smt. Rukko Devi herself appeared in the witness box as PW-3. Respondent No. 1-Neelam Devi appeared in the witness box and the insurer examined Shri Gian Chand as RW-2.

8. After examining the pleadings and the evidence, oral as well as documentary, the Tribunal held that the appellants-claimants have failed to prove that the accident was outcome of rash and negligent driving of the offending vehicle by its driver and thereafter has not returned findings on all other issues.

9. I have perused the record and am of the considered view that the Tribunal has fallen in an error in deciding issue No. 1 for the following reasons:

10. It is pleaded by the claimants that the driver of the offending vehicle had driven the same rashly and negligently at the time of the accident, who too died in the said accident. The factum of accident has not been denied. Even, there is no rebuttal to the same. PW-1, MHC Tilak Raj, has proved the contents of FIR No. 65/2004, Ext. PW-1/A, which was lodged under Sections 279 and 304-A of the Indian Penal Code (for short "IPC"). PW-2, Shri Jagdish Chand, has proved the Pariwar Register, Ext. PW-2/A. PW-3, Smt. Rukko Devi, has also deposed that the accident had occurred.

11. It appears that the Tribunal, while determined the issue, was dealing with a criminal case, not a claim petition. Perhaps, it has lost sight of the standard of proof required in the claim petitions.

12. It is beaten law of land that the Tribunal has to conduct the trial of the claim petitions and determine the same by adopting summary procedure. All the provisions of Civil Procedure Code, 1908 (for short "CPC") and the Indian Evidence Act, 1872 (for short "Evidence Act") are not applicable in terms of Section 169 of the Motor Vehicles Act, 1988 (for short "MV Act"). Section 169 of the MV Act and Rule 232 of the Himachal Pradesh Motor Vehicles Rules, 1999 (for short "the Rules") provide which provisions of CPC are applicable before the Claims Tribunal.

13. Granting of compensation is a welfare legislation and the hypertechnicalities, mystic maybes, procedural wrangles and tangles have no role to play and cannot be made ground to defeat the claim petitions and to defeat the social purpose of granting compensation.

14. My this view is fortified by the judgment of the Apex Court in the case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354.** It is apt to reproduce relevant portion of para 3 of the judgment herein:

"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in

> *plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard." (Emphasis Added)*

15. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

16. It would also be profitable to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

> *"12. .....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting*

compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

17. The Apex Court in a case titled **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646** has laid down the same principle and held that strict proof and strict links are not required.

18. The same principle has been laid down by this Court in a series of cases.

19. A Single Judge of this Court in FAO No. 127 of 1999, titled as Bimla Devi and others versus Himachal Road Transport Corporation and others, decided on 22.08.2005, held that the claimants have to prove the case by leading cogent evidence and applied the mandate of CPC read with the Evidence Act, was questioned before the Apex Court by the medium of Civil Appeal No. 2538 of 2009, titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and the Apex Court set aside the said judgment and held that strict proof is not required. It is apt to reproduce paras 2 and 12 to 15 of the judgment herein:

"2. This appeal is directed against a judgment and order dated 22.8.2005 passed by the High Court of Himachal Pradesh, Shimla in FAO No. 127 of 1999 whereby and whereunder an appeal preferred against a judgment and award dated 28.10.1998 passed by the Motor Accident Claims Tribunal-II [MACT (I), Nahan] in MAC Petition No. 21-NL/2 of 1997, was set aside.

xxx xxx xxx

12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimants predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem report vis-a-vis the averments made in a claim petition.

13. The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

> *14. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos. 2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant s witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos. 2 and 3.*
>
> *15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."*

20. The claimants have *prima facie* proved that the driver of the offending vehicle had driven the same rashly and negligently at the relevant point of time, had lost control over the same, which fell down in a *nallah* and all the occupants of the vehicle alongwith the driver sustained injuries and succumbed to the injuries. Accordingly, it is held that the claimants have proved issue No. 1 and the same is decided in favour of the claimants and against the respondents.

21. Before I deal with issue No. 2, I deem it proper to determine issues No. 3 to 7.

Issue No. 3:

22. It was for respondent No. 1 to prove that the claim petition was not maintainable, has not led any evidence to prove the same. It is an admitted case that the accident has taken place and FIR has been lodged.

23. The MV Act has gone through a sea change in the year 1994 by amendment in terms of Act 54 of 1994. Amendment was made in Sections 158 and 166 of the MV Act, which mandates that even the report of the police officer can be treated as a claim petition.

24. Viewed thus, issue No. 3 is decided against respondent No. 1 and in favour of the claimants.

Issue No. 4:

25. It was for both the respondents to discharge the onus, have not led any evidence, thus, have failed to prove that claimants have no locus. The appellants-claimants have lost their budding son, who was their only source of income, hope and help in their old age. Thus, they have every cause and locus to invoke the jurisdiction of the Tribunal in

terms of Section 166 of the MV Act. Accordingly, issue No. 4 is decided against the respondents and in favour of the claimants.

Issue No. 5:

26. It was for the insurer-respondent No. 2 to prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same. RW-2, Shri Gian Chand, Branch Manager, Oriental Insurance Company Limited Chamba, though, has deposed that the driver of the offending vehicle was not having a valid and effective driving licence because his licence was valid for 'non transport vehicle' only, however, the driving licence of the driver of the offending vehicle is on the record as Ext. RW-2/B, the perusal of which does disclose that the driver of the offending vehicle was having a licence to drive 'LMV'.

27. The Apex Court and this Court in a series of cases have held that a vehicle, the gross vehicle weight of which does not exceed 7500 kilograms, falls within the definition of 'LMV'. In terms of the insurance policy, Ext. RW-2/A, the gross vehicle weight of the offending vehicle does not exceed 7500 kilograms, thus, is a light motor vehicle.

28. Having said so, it can safely be said and held that the driver of the offending vehicle was having a valid and effective driving licence to drive the same. Accordingly, issue No. 5 is decided against the insurer-respondent No. 2 and in favour of the claimants and respondent No. 1.

Issue No. 6:

29. It was for the insurer to plead and prove that the owner-insured of the offending vehicle has committed willful breach and the vehicle was being driven in contravention of the terms and conditions contained in the insurance policy. The insurance policy is on the record as Ext. RW-2/A. The factum of insurance is not in dispute.

30. The Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** has laid down the principles, how can insurer 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."

31. 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."

32. Having said so, issue No. 6 is also decided against the insurer-respondent No. 2 and in favour of the claimants and respondent No. 1.

Issue No. 7:

33. It was for the insurer-respondent No. 2 to lead evidence to prove that the deceased was a gratuitous passenger, has not led any evidence to this effect, thus, has failed to prove the same. Accordingly, issue No. 7 is decided against the insurer-respondent No. 2 and in favour of the claimants and respondent No. 1.

Issue No. 2:

34. Admittedly, the age of the deceased was 25 years at the time of the accident. It is pleaded that he was earning Rs.8,000/- per month as a skilled carpenter and there is evidence to this effect also. Even otherwise, the income of the labourer would not have been less than Rs.5,000/- per month at that point of time. Thus, it can be safely said that the deceased was earning not less than Rs.5,000/- per month at the time of the accident. He

was a bachelor. In view of the ratio laid down by the Apex Court in the case titled 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 the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120,** 50% is to be deducted towards his personal expenses. Accordingly, it is held that the appellants-claimants have suffered loss of income/dependency to the tune of Rs.2500/- per month.

35. The Apex Court in a latest judgment rendered in the case titled as **Munna Lal Jain and another versus Vipin Kumar Sharma and others,** reported in **2015 AIR SCW 3105,** has held that the application of the multiplier depends on the age of the deceased alone. Viewed thus, the multiplier of '15' is just and appropriate in view of the judgments (supra) read with the Second Schedule appended with the MV Act.

36. Accordingly, the appellants-claimants are held entitled to compensation to the tune of Rs.2500/- x 12 x 15 =Rs.4,50,000/- under the head 'loss of income/dependency'. The appellants-claimants are also held entitled to compensation to the tune of Rs.10,000/- under the head 'loss of love and affection', Rs.10,000/- under the head 'loss of estate' and Rs.10,000/- under the

head 'funeral expenses'.

37. In view of the discussions made hereinabove read with the fact that the factum of insurance is not in dispute, the insurer is saddled with liability.

38. Having said so, the appellants-claimants are held entitled to total compensation to the tune of Rs.4,50,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- = Rs.4,80,000/- with interest @ 7.5% per annum from the date of the impugned award, i.e. with effect from 28.03.2008 till its finalization.

39. The insurer is directed to deposit the awarded amount before this Registry within eight weeks. On deposition of the amount, the same be released in favour of the appellants-claimants in equal shares after proper identification.

40. Having glance of the above discussions, the impugned award is set aside and the appeal is allowed.

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

****

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

Rattan Lal ..... Petitioner

Versus

R.K. Seth .....Respondent

CMPMO No. 266/2015
Reserved on: 10.12.2015
Decided on: 11.12.2015

Payment of Wages Act, 1936- Section 15- Petitioner alleged that respondent had engaged him for completion of the work awarded to him by I & PH Department- petitioner employed 40 labourers - he was paid only Rs. 2,63,859/- out of Rs. 3,46,880/- by respondent,

whereas, remaining amount of Rs.83,021/- was never paid- respondent denied the award of contract to him and the fact that petitioner was engaged by him to complete the assignment- Trial Court directed respondent to pay Rs.83,021/- with interest- Appellate court accepted the appeal and set aside the decision of trial court - held, that Appellate Court had failed to appreciate the fact that respondent had admitted in reply to the notice served upon him by the petitioner that the work was awarded to him- the denial of this fact by respondent in reply to the petition and in evidence is, thus, inconsequential- further held, that Appellate court had not read the statement of AW-3 Jiwan Chand in totality and had further wrongly disbelieved the witnesses examined by the petitioner to support his case- the appellate court had also failed to notice the fact that respondent had not even appeared in the witness box to support his case nor had he examined any witnesses- claim of the petitioner is duly proved- appeal allowed and judgment of trial Court restored. (Para-7 to 10)

For the petitioner : Mr. Neeraj Gupta, Advocate.
For the respondent : Mr. H.S. Rangra, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This petition has been instituted against Judgment dated 9.4.2015 rendered by learned District Judge, Mandi, District Mandi, Himachal Pradesh in Civil Appeal No. 21 of 2014.

2. “Key facts" necessary for the adjudication of the present petition are that the petitioner filed an application stating therein that the respondent being a contractor of Irrigation & Public Health Department was awarded work of construction of sewerage tanks at Naina Devi, District Bilaspur. Respondent has engaged petitioner as sole in-charge and head of labourers’ team for completion of said work. He employed 40 labourers. Work commenced on 26.1.1997 and came to an end in October, 1997. Respondent paid only a sum of Rs.2,63,859 out of entire amount of Rs.3,46,880/- and remaining amount of Rs.83,021/- was to be paid by the respondent to the petitioner.

3. Application was contested by the respondent. He denied altogether that he was awarded work of construction of sewerage tanks at Naina Devi by the Irrigation & Public Health Department and he engaged petitioner as sole incharge and head of labourers’ team. Rejoinder was filed by the petitioner.

4. Issues were framed by the learned Civil Judge (Senior Division) Mandi on 14.10.2013. He awarded Rs.83,021/- alongwith interest at the rate of 9% per annum from the date of filing application till the realization of the entire amount vide Award dated 20.6.2014. Respondent feeling aggrieved by Award dated 20.6.2014, preferred an appeal before the District Judge, Mandi. He allowed the appeal on 9.4.2015. Hence, this petition.

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

6. AW-1 Puran Parkash deposed that a notice received by the respondent. He sent reply to the same vide Ext. CE on the instructions of the respondent.

7. Petitioner has appeared as PW-2. He has led his evidence by filing affidavit Ext. PA. .It is stated in the affidavit that the respondent was awarded work by the Irrigation & Public Health of construction of sewerage tanks at Naina Devi. He was engaged by the

respondent as sole in charge and head of labourers' team. He deployed 40 labourers. Work commenced on 26.1.1997 and continued upto October, 1997. Respondent has only paid Rs.2,63,859/- out of total of Rs.3,46,880/- and remaining amount of Rs.83,021/- has not been paid. He issued a legal notice on 23.12.1997. He has placed on record copy of legal notice as Ext. PA and copies of bills which were paid by him to the truck owner of truck No. 5252 at Bilaspur vide Ext. PB, PC, PD, PF, PG and PH. Reply was filed by the respondent to the legal notice dated 23.12.1997.

8. AW-3 Diwan Chand deposed that they have undertaken construction of sewerage tanks. Work was awarded to the respondent by the Irrigation & Public Health Department. Work was completed in October, 1997. Petitioner was in charge of the labourers' team. The number of labourers deployed by him was 40. Contractor has paid Rs.2,63,859/- out of Rs.3,46,880/-, remaining amount of Rs.83,021/- was payable by the respondent. Petitioner used to pay charges to the labourers. Money for carriage of sand and gravel was also paid by the petitioner. He signed the receipts in his presence. Amount payable was due to labour charges.

9. Mr. Neeraj Gupta, Advocate has drawn attention to Ext. PA, legal notice dated 23.12.1997. It is specifically averred in the notice that the respondent has undertaken work of construction of sewerage tanks at Naina Devi. He engaged petitioner as head of labourers' team for completion of work. 40 labourers were engaged by the petitioner. Work started on 26.1.1997. A sum of Rs.83,021/- was not paid to the petitioner. Respondent in reply to the legal notice in para -1 has admitted categorically that the work was allotted to him by the Irrigation & Public Health Department. According to the reply, labourers were engaged by the petitioner at his own level and they have nothing to do with his client. Respondent has not appeared in the witness box nor led any evidence. In reply to the application, he has even denied that he was awarded work by the Irrigation & Public Health. But in the reply to notice, Ext. PA, he has admitted that the work was allotted to him. It is duly established from the statements of AW-1 and AW-3 that respondent was awarded work of construction of sewerage tanks at Naina Devi. Petitioner was Supervisor. He has engaged 40 labourers. A sum of Rs.2,63,859 was paid only and remaining amount of Rs.83,021/- was not paid. Learned trial Court has correctly awarded a sum of Rs.83,021/- to the petitioner towards wages. However, surprisingly, the first appellate Court without taking into consideration that the respondent has neither appeared in the Court nor led any evidence, got swayed by the fact that petitioner has placed on record Exts. PA to PH. What the petitioner wanted to prove by placing these documents on record in fact was that work was allotted to the respondent and petitioner has engaged labourers. First appellate Court has also mis-construed statement of AW-3 Diwan Chand. Statement is required to be read in its totality. Petitioner has duly proved that the amount claimed by him was towards wages of the labourers.

10. Accordingly, the petition is allowed. Judgment dated 9.4.2015 rendered by learned District Judge, Mandi, District Mandi, Himachal Pradesh in Civil Appeal No. 21 of 2014 is set aside. Award passed by learned Civil Judge (Senior Division), Mandi, District Mandi, HP in Civil Suit No. 16/98/13 dated 20.6.2014 is restored. Pending applications, if any, are disposed of.

****

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

FAO No., 644, 645 and 646 of 2008.
Decided on : 11.12.2015

1.	**FAO No.644 of 2008**	
	Satya Narayan	.....Appellant
	Versus	
	Gauri Dutt and others	.....Respondents
2.	**FAO No.645 of 2008**	
	Satya Narayan and others	.....Appellants
	Versus	
	Gauri Dutt and others	.....Respondents
3.	**FAO No.646 of 2008**	
	Satya Narayan and others	.....Appellants
	Versus	
	Gauri Dutt and others	.....Respondents

Motor Vehicles Act, 1988- Section 166- Deceased aged about 6 years died in a bus accident- the claimants, who are father and sisters of the deceased challenged the award on the ground of adequacy of the compensation-held that, the Tribunal has rightly awarded Rs. 2,40,000/- as compensation under various heads, which, by no stretch of imagination, can be said to be inadequate. Appeal dismissed. (Para 10 & 11)

Motor Vehicles Act, 1988- Section 166- Deceased died in a bus accident-the Tribunal committed an error in holding that the claimants had lost source of dependency of Rs.1500/- per month- deceased was a house wife and can be presumed to be earning not less than Rs. 3000/- per month-after deducting 1/3rd amount toward the personal expenses the loss of source of dependency comes to Rs.2,000/- per month- applying the multiplier of 16, total compensation computed comes to Rs. 4,24000/- (Rs. 2000x12x16) appeal allowed. (Para 13 to 16)

Motor Vehicles Act, 1988- Section 166- The claimant, who had sustained the injuries in the accident challenged the award on the ground of adequacy of the compensation-held that, the amount awarded under the heads 'pain and suffering and loss of amenities of life', is too meager and in view of settled law amount is enhanced to 50,000/- above the already awarded amount- appeal allowed. (Para 8 & 9)

Cases referred:

R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755
Sarla Verma 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

For the appellant(s):	Mr.Vivek Sharma, Advocate.
For the respondent(s):	Mr.Ramakant Sharma, Senior Advocate, with Ms.Soma Thakur, Advocate, for respondent No.1. Mr.Deepak Bhasin, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

All these appeals are the outcome of one vehicular accident, which was allegedly caused by Shri Jai Kishan, while driving Bus No.HP-14-4149 rashly and negligently, on 1st November, 2007, at Kandaghat, District Solan. Qua the accident, FIR

Ext.PW-1/A was registered at Police Station, Kandaghat. In the accident, the claimant Satya Narain sustained injuries, wife and son of Satya Narain, namely, Sunita and Pankaj, respectively, sustained injuries and succumbed to the same lateron.

2. The claimant Satya Narain filed claim Petition No.3FTC/2 of 2008, titled Satya Narain vs. Gauri Dutt and others, for compensation to the tune of Rs.6.00 lacs, on account of the injuries sustained by him. Claimants i.e. Satya Narain and two minor daughters filed Claim Petition No.4FTC/2 of 2008, titled Satya Narain and others vs. Gauri Dutt and others, for grant of compensation to the tune of Rs.6.00 lacs on account of death of son of claimant No.1 and brother of claimants No.2 and 3, while Claim Petition No.2FTC/2 of 2008, titled Satya Narain and others vs. Gauri Dutt and others, was filed by the claimants, being the husband and minor daughters of deceased Sunita, claiming compensation to the tune of Rs.12.00 lacs.

3. All the three claim petitions came to be determined by the Tribunal by three different awards, dated 14th August, 2008, and Compensation to the tune of Rs.99,344/-, Rs.2,40,000/- and Rs.3,18,000/- came to be awarded in Claim Petitions No.3FTC/2 of 2008, (subject matter of FAO No.644 of 2008), No.4FTC/2 of 2008, (subject matter of FAO No.645 of 2008) and No.2FTC/2 of 2008, (subject matter of FAO No.646 of 2008), respectively, with interest at the rate of 7% per annum from the date of filing of the Claim Petition, till realization, and the insurer was saddled with the liability, (for short, the impugned awards).

4. Owner/insured, driver and the insurer have not questioned the impugned awards on any count, thus, the same have attained finality so far as these relate to them. The claimants have questioned the impugned awards on the ground of adequacy of compensation.

5. Thus, the only question to be determined in all the three appeals is – Whether the amount of compensation awarded is meager or otherwise.

FAO No.644 of 2008:

6. Learned counsel for the appellant argued that the amount awarded by the Tribunal is meager and merits to be enhanced.

7. On a bare perusal of the impugned award one comes to an inescapable conclusion that the compensation amount, under the heads 'loss of earnings, medical charges, attendant charges, special diet, transportation charges and removal of ankle plate', has been rightly assessed by the Tribunal. However, the amount awarded under the heads 'pain and suffering and loss of amenities of life', is too meager.

8. Accordingly, in view of the law laid down by the Apex Court in **R.D. Hattangadi versus M/s Pest Control (India) Pvt. Ltd. & others, AIR 1995 SC 755** and 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,** the amount awarded under the heads 'pain and suffering, and loss of amenities' is enhanced by Rs.50,000/-, in addition to the amount already awarded under these heads by the Tribunal.

9. Having glance of the above discussion, the appeal is allowed, the impugned award is modified and the claimant is held entitled to Rs.1,49,344/-, with interest as awarded by the Tribunal. The insurer is directed to deposit the enhanced amount within a period of six weeks and on deposit, the Registry is directed release the amount in favour of the claimants strictly in terms of the impugned award.

FAO No.645 of 2008:

10. By the medium of instant appeal, the claimants, being the father and sisters of deceased Pankaj, aged 6 years at the time of accident, have sought enhancement of compensation.

11. I have gone through the impugned award. The Tribunal has rightly awarded Rs.2,40,000/- as compensation under various heads, which, by no stretch of imagination, can be said to be inadequate.

12. Accordingly, there is no merit in the appeal and the same is dismissed. The Registry is directed to release the amount in favour of the claimants, strictly in terms of the impugned award.

FAO No.646 of 2008:

13. In the instant appeal, the learned counsel for the appellants argued that the Tribunal has fallen in error in assessing the income of the deceased Sunita Devi and also has wrongly applied the multiplier of 16.

14. The Tribunal has fallen in error in holding that the claimants lost source of dependency to the tune of Rs.1500/- per month. Admittedly, the deceased was a housewife. The income of the deceased, by no stretch of imagination, can be said to be less than Rs.3,000/- per month. After deducting 1/3rd, the loss of source of dependency can be said to be Rs.2,000/- per month.

15. Coming to the multiplier, in view of the law expounded by the Apex Court in Sarla Verma's case (supra), the Tribunal has rightly applied the multiplier of 16. Accordingly, the claimants are awarded a sum of Rs.2,000 x 12 x 16 = Rs.3,84,000/- under the head 'loss of source of dependency'. In addition, a sum of Rs.40,000/- i.e. Rs.10,000/- each is also awarded under the heads 'loss of love and affection', 'loss of estate', 'loss of consortium' and 'funeral expenses'.

16. In view of the above discussion, the appeal is allowed, the impugned awarded is modified and the claimants are awarded compensation to the tune of Rs.3,84,000/- + Rs.40,000/- = Rs.4,24,000/-, with interest as awarded by the Tribunal. The insurer is directed to deposit the enhanced amount within a period of six weeks from today and on deposit, the Registry is directed to release the amount strictly in terms of the impugned award.

17. All the appeals stand disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE P.S.RANA, J.

Shah Jahan Ali son of Mohammad Sanaula. ...Appellant.

Vs.

State of H.P. ....Respondent.

Cr. Appeal No.4089 of 2013.
Judgment reserved on:10.12.2015
Date of Decision: December 11, 2015.

Indian Penal Code, 1860- Section 320, 376 read with Sec.511- Accused attempted to commit rape upon the prosecutrix and thereafter murdered her- he was convicted by the trial Court for the commission of offences punishable under Sections 302, 376 read with Section 511 of IPC- PW-1 had categorically stated that prosecutrix was lying dead and her body was half naked- he had identified the accused- PW-2 stated that accused had dragged the prosecutrix and thereafter had run away- she had also seen the prosecutrix half naked- merely because, they are relatives of the deceased is no reason to disbelieve their testimonies- accused had made a disclosure statement leading to the recovery of blood stained stone- 18 ante mortem injuries were found on the person of the deceased- minor contradictions in the testimonies of the witnesses when they were deposing after a gap of considerable time is not sufficient to discard their testimonies- testimonies of the prosecution witnesses are duly corroborated by the documentary evidence- DNA profile of pant and T-shirt of accused and stone matched completely with DNA profile obtained from the blood sample of the deceased, which also corroborates the prosecution version- chemical analyst report showed that struggle marks were observed upon the shirt of the deceased and drag marks were observed upon the salwar of the deceased- held, that in these circumstances, prosecution case was duly proved beyond reasonable doubt- accused was rightly convicted. (Para-11 to 23)

Cases referred:

Mst. Dalbir Kaur and others Vs. State of Punjab, AIR 1977 SC 472
Molu and others Vs. State of Haryana, AIR 1976 SC 2499
Sarwan Singh and others Vs. State of Punjab, AIR 1975 SC 2304
C.Muniappan and others Vs. State of Tamil Nadu, 2010 (9) SCC 567
Sohrab and another Vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of UP Vs. M.K.Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan Vs. Om Parkash, AIR 2007 SC 2257
Prithu Chand and another Vs. State of HP, 2009 (11) SCC 588
State of UP Vs. Santosh Kumar and others, 2009 (9) SCC 626
State Vs. Saravanan and another, AIR 2009 SC 151
Appabhai and another Vs. State of Gujarat, AIR 1988 SC 696
Rammi Vs. State of M.P., AIR 1999 SC 3544
State of H.P. Vs. Lekh Raj and another,2000(1) SCC 247
Laxman Vs. Poonam Singh and others, 2004 (10) SCC 94
Dashrath Singh Vs. State of UP, 2004 (7) SCC 408
Kuriya and another Vs. State of Rajasthan, 2012 (10) SCC 433
Bhe Ram Vs. State of Haryana, AIR 1980 SC 957
Rai Singh Vs.State of Haryana, AIR 1971 SC 2505
Vadivelu Thevar Vs. The State of Madras, AIR 1957 SC 614
Masalti and others Vs. State of Uttar Pradesh, 1965 SC 202

For the Appellant: Mr. R.K.Bawa, Sr. Advocate with Mr. Jeevesh Sharma, Advocate.
For the respondent: Mr.V.S.Chauhan, Addl. Advocate General with Mr.J.S.Guleria Assistant Advocate General.

The following judgment of the Court was delivered:

P.S. Rana Judge

Present appeal is filed against judgment and sentence passed by learned Sessions Judge Kinnaur Sessions Division at Rampur Bushahr HP in Sessions trial No. 19 of 2011 titled State of HP Vs. Shah Jahan Ali decided on 26.7.2013.

BRIEF FACTS OF PROSECUTION CASE:

2. It is alleged by prosecution that on dated 11.7.2011 at about 5.30 PM at place Shikari rivulet accused attempted to commit rape upon prosecutrix and thereafter committed murder of deceased Kim Dassi intentionally. It is further alleged by prosecution that incident was witnessed by PW2 Jakmali, PW1 Shyam Lal and PW10 Jiya Lal. It is further alleged by prosecution that salwar of prosecutrix was opened and was rested on her knees and her left eye was damaged and blood was oozing from the head of deceased Kim Dassi. It is further alleged by prosecution that PW10 Jiya Lal identified accused in Court. It is further alleged by prosecution that thereafter information was given to police by PW10 Jiya Lal. It is further alleged by prosecution that PW8 constable Gopal Singh recorded rapat No.12 Ext PW8/E. It is further alleged by prosecution that PW18 ASI Dharmesh Dutt police post Sarahan recorded statement of PW10 Jiya Lal Ext PW10/A. It is further alleged by prosecution that thereafter FIR Ext PW15/F was registered at police station Jhakri by PW15 HC Bhaskra Nand. It is further alleged by prosecution that PW18 ASI Dharmesh Dutt took twenty two photographs of spot which are Ext PX1 to Ext PX22 and negatives are Ext PX23 to Ext PX29. It is further alleged by prosecution that spot map Ext PW18/A was prepared. It is further alleged by prosecution that dead body of deceased Kim Dassi took into possession vide memo Ext PW11/E. It is further alleged by prosecution that PW18 Dharmesh Dutt took into possession leaves of 'Ban' tree stained with blood vide memo Ext PW11/D and sealed them in a parcel with seal impression 'P'. It is further alleged by prosecution that PW18 Dharmesh Dutt took into possession hair which was found in the hands of deceased Kim Dassi vide memo Ext PW11/B. It is further alleged by prosecution that sandal Ext P9 took into possession vide seizure memo and sealed in a parcel. It is further alleged by prosecution that PW18 Dharmesh Dutt prepared inquest reports Ext PW18/C and Ext PW18/D and sent dead body of deceased Kim Dassi to MGMSC Khaneri for post mortem along with Ext PW18/E. It is further alleged by prosecution that dead body was referred for post mortem examination to IGMC Shimla. It is further alleged by prosecution that accused was interrogated and arrested. It is further alleged by prosecution that for medical examination of accused investigating officer moved application Ext PW9/A. It is further alleged by prosecution that accused was medically examined at MGMSC Khaneri. It is further alleged by prosecution that pubic hair, pant, T-shirt and under wear of accused also took into possession. It is further alleged by prosecution that MLC Ext PW9/B was issued by medical officer. It is further alleged by prosecution that final opinion is Ext PW9/C. It is further alleged by prosecution that disclosure statement of accused Ext PW11/F recorded in the presence of witnesses PW11 Diwan Singh and PW17 Devinder Singh. It is further alleged by prosecution that spot map Ext PW18/F was prepared. It is further alleged by prosecution that post mortem of deceased Kim Dassi was conducted in IGMC Shimla on dated 13.7.2011 vide post mortem report Ext PW16/A. It is further alleged by prosecution that on dated 10.7.2011 accused remained present on duty and thereafter on dated 11.7.2011 accused was found absent from duty. It is further alleged by prosecution that copy of jamabandi Ext PW3/A, copy of tatima Ext PW3/B and copy of khasra girdawari Ext PW3/C obtained from Patwari Patwar Circle Sarahan. It is further alleged by prosecution that sickle Ext P2 and rope Ext P1 were took into possession vide seizure memo Ext PW4/A. It is further alleged by prosecution that rope Ext P1 and sickle Ext P2 were found by PW4 Sheela Devi lying in the

orchard where her mother-in-law prosecutrix had gone for cutting grass. It is further alleged by prosecution that copy of malkhana register Ext PW6/A, FSL report Ext PW19/F, Ext PW19/G, Ext PW19/H and Ext PW19/J obtained. It is further alleged by prosecution that case property was deposited in malkhana and thereafter case property was sent to FSL Junga through PW5 constable Rakesh Kumar vide RC No.102/2011. Charge framed against accused by learned Sessions Judge Kinnaur Sessions Division at Rampur Bushahr HP on dated 30.11.2011 under section 302 IPC and under Section 376 IPC read with section 511 IPC. Accused did not plead guilty and claimed trial.

3. Prosecution examined twenty oral witnesses in support of its case and also produced documentaries evidence.

4. Statement of accused under Section 313 Cr.PC was also recorded and accused has stated that false case has been filed against him. Accused did not lead any defence evidence.

5. Learned trial Court convicted appellant under Sections 302 and 376 IPC read with Section 511 of Indian Penal Code and sentenced accused Shah Jahan Ali under Section 302 IPC to rigorous imprisonment for life and to pay fine of Rs.50000/- (Fifty thousand). Learned trial Court further directed that in default of payment of fine convict would undergo simple imprisonment for a period of one year. Learned trial Court also sentenced appellant under Section 376 IPC read with Section 511 IPC to rigorous imprisonment for five years and to pay fine of Rs.25000/- (Twenty five thousand). Learned trial Court further directed that all sentences shall run concurrently and period undergone by convict during investigation and trial would be set off as provided under Section 428 Cr.PC.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court appellant filed present appeal.

7. We have heard learned Advocate appearing on behalf of appellant and learned Additional Advocate General appearing on behalf of State and also perused entire record carefully.

8. Points for determination in present appeal are whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court committed miscarriage of justice by way of convicting appellant Shah Jahan Ali.

Reasons for findings.

9.Oral evidence adduced by prosecution.

9.1. PW1 Shyam Lal has stated that he is agriculturist by profession. He has stated that on dated 11.7.2011 he was grazing his sheep by the side of Shikari rivulet. He has stated that at about 5.30 PM Jakmali told him that some person caught hold of one lady. He has stated that thereafter he went to the house of Jiya Lal. He has stated that thereafter he along with Jiya Lal followed accused upto distance of 1 Km. He has stated that despite efforts accused could not be caught. He has stated that thereafter he along with Jiya Lal returned back and found Kim Dassi was lying dead. He has stated that thereafter he went to his house along with his goat. He has stated that thereafter about ½ hour when he came back many persons gathered nearby the dead body. He has stated that dead body was rested on the ground by back and it was half naked as the Salwar was upto the knee of deceased Kim Dassi. He has stated that nearby the dead body of Kim Dassi there were blood stained spots. He has stated that accused present in Court was seen by him earlier in the house of Aklu Ram. He has stated that his house is at a distance of about 25/30 feet from

the house of deceased Kim Dassi. He has stated that his house is at a distance of about 10/15 feet from the house of Jiya Lal. He has stated that rivulet where deceased Kim Dassi was grazing sheep is situated at a distance of about 10/15 feet from the house of Jakmali. He has denied suggestion that he falsely implicated accused. He has denied suggestion that he deposed incorrectly at the instance of police officials.

9.2. PW2 Smt.Jakmali has stated that she is housewife as well as agriculturist. She has stated that on dated 11.7.2011 she was cutting grass nearby Dogri of one Diwan. She has stated that at about 5.30 PM she heard cries of deceased Kim Dassi coming from the side of her orchard. She has stated that deceased was dragged by accused present in Court. She has stated that thereafter accused laid upon deceased Kim Dassi on the ground. She has stated that she called her father in law Shyam Lal. She has stated that thereafter Shyam Lal came and in the meanwhile accused ran away. She has stated that thereafter Shyam Lal and Jiya Lal chased accused. She has stated that in the meanwhile villagers gathered at the spot. She has stated that salwar of deceased Kim Dassi was opened and it was rested on her knees and her left eye was damaged. She has stated that blood was oozing out from the head of deceased. She has stated that police officials reached at the spot. She has stated that accused was known to her earlier because accused was residing in the house of one Aklu Ram. She has denied suggestion that she did not see accused on dated 11.7.2011 at the spot. She has denied suggestion that she deposed falsely at the instance of family members of deceased and investigating officer.

9.3. PW3 Ms Anu Verma has stated that in the year 2011 she was posted as Patwari Patwar Circle Sarahan and she was having additional charge of Jeori. She has stated that as per request of police officials she supplied copy of jamabandi Ext PW3/A, copy of tatima Ext PW3/B and copy of khasra gardawari Ext PW3/C.

9.4. PW4 Smt. Sheela Devi has stated that she was employed in government primary school Humtu as part time worker. She has stated that at about 5 PM when she was taking out cow dung from cowshed in the meantime her mother in law deceased Kim Dassi went to orchard for cutting grass. She has stated that her father in law Shyam Lal was grazing sheep. She has stated that her father in law told that one person wearing T-shirt red in colour and green pant killed deceased Kim Dassi. She has stated that on the next day she went to orchard where she found a sickle and plastic rope of her mother in law Kim Dassi which she took for cutting grass. She has stated that sickle and plastic rope were took into possession vide seizure memo Ext PW4/A which bears her signature. She has stated that rope is Ext P1 and sickle is Ext P2.

9.5. PW5 Rakesh Kumar has stated that he was posted as constable in police station Jhakri. He has stated that on dated 18.7.2011 MHC Bhaskra Nand handed over to him case property from serial No. 1 to 17 vide RC No. 102 with direction to deposit the same in the office of FSL Junga. He has stated that he deposited articles in the office of FSL Junga on the same day. He has stated that thereafter he handed over receipt to MHC. He has stated that case property remained intact in his custody and was not tampered.

9.6 PW6 Suresh Kumar has stated that he was posted as constable in police station Jhakri. He has stated that one sickle and plastic rope was handed over to him and he recorded entry in register No. 19. He has stated that copy of malkhana register is Ext PW6/A which is correct as per original record.

9.7. PW7 Diwan Chand has stated that he was posted as constable in police station Jhakri since 2010. He has stated that on dated 22.8.2011 he along with Lalsain and Sheela Devi remained associated in investigation of case. He has stated that Sheela Devi

produced one sickle and one plastic rope at Shikari rivulet which was took into possession vide seizure memo Ext PW4/A. He has stated that length of sickle was one feet and 1.5 inches and rope was 20 feet.

9.8 PW8 constable Gopal Singh has stated that in the year 2011 he was posted as MC police post Sarahan. He has stated that on dated 11.7.2011 he recorded rapat No.12 Ext PW8/A. He has stated that Ext PW8/A is the true and correct copy of roznamcha brought by him in Court.

9.9. PW9 Sh B.D.Negi has stated that he was posted as medical officer in MGMSC Khaneri since 2003. He has stated that he medically examined accused Shah Jahan Ali. He has stated that at the time of examination accused was well oriented person. He has stated that he was not under influence of any drug or alcohol. He has stated that on examination he observed as follows. He has stated that external genitalia organs were well developed and pubic hair well grown. He has stated that he did not observe any scratch mark, any visible blood clot or seminal fluid with naked eye. He has stated that pubic hair was preserved. He has stated that clothes of accused i.e. pant, T-shirt underwear and vest were preserved. He has stated that blood sample was preserved for chemical examination. He has stated that after receipt of report of FSL Junga he had given his final opinion that blood resembled with that of human being found on the pant and T-shirt of accused. He has stated that accused was not incapable of performing sexual intercourse. He has stated that he issued MLC Ext PW9/B. He has stated that final opinion Ext PW9/C bears his signature. He has denied suggestion that he did not examine accused clinically. He has stated that tear marks were present on T-shirt and pant of accused.

9.10 PW10 Jiya Lal has stated that he has three brothers and all are residing separately. He has stated that his deceased mother Kim Dass used to reside with his elder brother Bir Singh. He has stated that on dated 11.7.2011 at about 5.30 PM Shyam Lal came to him and said that one person was dragging a woman on the path. He has stated that when he reached at the spot he saw that his mother was resting on the ground by backside and her left eye was protruded and her salwar was lowered down up to knee. He has stated that accused fled away from the spot the moment he saw persons came at the spot. He has stated that he chased accused upto a distance of 2 Kms. but accused escaped. He has stated that villagers came at the spot and in the meantime his mother had died. He has stated that person who ran away from the spot was Bihari. He has stated that he could identify the accused. He has stated that he informed police officials through telephone and police came at the spot. He has stated that his statement Ext PW10/A was recorded under Section 154 Cr.PC which bears his signature. He has stated that photographs of spot obtained by investigating officer. He has stated that a pair of sandal was found lying near the dead body which was identified by his brother Bir Singh. He has stated that parcels were sealed and took into possession vide seizure memo Ext PW10/B which bears his signature. He has stated that recovered black hair placed in a plastic envelope and thereafter sealed in a parcel. He has stated that blood was found on the leaves of oak tree near right side of dead body. He has stated that dead body of his mother took into possession vide seizure memo. He has stated that hair Ext P10 took into possession by police officials. He has stated that blood stained oak leaves Ext P11 are the same which took into possession by police officials from the spot. He has stated that on dated 15.7.2011 police brought accused at the spot and he identified accused. He has stated that accused is the same person who resided in the house of Alku Ram. He has denied suggestion that accused was not present at the spot. He has denied suggestion that accused has been falsely implicated in present case. He has denied suggestion that he along with his brother and villagers went to the site of L&T Company and assaulted labourers and accused Shah Jahan Ali.

9.11. PW11 Diwan Singh has stated that on dated 11.7.2011 he along with Bir Singh and Jiya Lal remained associated in investigation. He has stated that on identification of Jiya Lal police took photographs of spot and prepared site plan. He has stated that police officials recovered pair of sandal and placed in a parcel of cloth. He has stated that specimen of seal impression took on a piece of cloth. He has stated that seal after use was handed over to Bir Singh. He has stated that parcel of sandal took into possession vide seizure memo Ext PW10/B in his presence and in the presence of Jiya Lal. He has stated that black coloured hair was recovered from the spot which was placed in a plastic envelope and plastic envelope was wrapped in a cloth parcel with eight seals impression 'A'. He has stated that seal after use was handed over to Bir Singh and parcel took into possession vide seizure memo Ext PW11/B which bears his signature and that of Bir Singh. He has stated that blood stained was found upon oak leaves near the dead body of deceased Kim Dassi. He has stated that blood stained oak leaves were collected from the spot and placed in a plastic envelope vide seizure memo Ext PW11/D. He has stated that police officials took into possession dead body of deceased Kim Dassi vide seizure memo Ext PW11/E. He has stated that accused had given disclosure statement that he had concealed blood stained stone behind grass and could get the same recovered from the spot. He has stated that disclosure statement of accused Ext PW11/F was recorded. He has stated that sample of oak leaves was obtained upon a piece of cloth Ext PW11/H. He has stated that police officials obtained photographs of spot and stones. He has stated that police officials took into possession oak leaves in his presence. He has stated that sandal of deceased Kim Dassi were lying near the dead body of deceased at a distance of about 3/ 4 feet. He has stated that dead body remained intact till arrival of police officials. He has denied suggestion that police officials have prepared seizure memo in police station and not at the spot. He has denied suggestion that no disclosure statement of accused under Section 27 of Indian Evidence Act was recorded in his presence. He has denied suggestion that no recovery was effected by police officials at the instance of accused.

9.12. PW12 Aklu Ram has stated that he is agriculturist by profession. He has stated that his house is situated near Shikari rivulet. He has stated that accused was his tenant. He has stated that accused stayed in his house only for eight days. He has stated that accused used to work in L&T Company. He has stated that villagers came to his house and told that accused had killed a lady. He has stated that name of deceased woman was Kim Dassi. He has stated that accused did not return to his rented house on the day of incident. He has denied suggestion that accused did not reside in his house. He has denied suggestion that he falsely implicated accused at the instance of investigating officer. He has denied suggestion that he falsely claimed that accused was tenant in his house just to extort money from L&T Company.

9.13 PW13 constable Jiya Lal has stated that he was posted as constable on general duty at police post Sarahan. He has stated that he brought following articles from IGMC Shimla to police station Jhakri. (1) One jar plastic which contained stomach intestines of deceased. (2) Two jars plastic containing liver, spleen, kidney of deceased. (3) Clothes of deceased along with sample seal and one C.D and 5 parcels sealed with seal impression DKG which contained jewellery. (4) One more parcel containing pubic hair, another parcel containing preservative, one sample containing blood, another envelope containing vaginal swab. He has stated that aforesaid articles were sealed with seal impression 'DKG'. He has stated that parcel remained intact in his possession and he did not tamper case property.

9.14 PW14 Hira Singh has stated that he was posted as HHC in police station Jhakri since 2010. He has stated that on dated 12.7.2011 he collected following articles from MGMSC Khaneri to police station Jhakri and handed over the same to MHC police

station Jhakri. (1) Air dried blood sample, pubic hair, sample hair along with sample seal MGH/RB, one parcel sealed with seal impression MGH/RB containing clothes of accused Shah Jahan Ali along with sample seal, one envelope sealed with seal of MGH/RB addressed to chemical examiner FSL Junga. He has stated that case property remained intact in his possession and was not tampered. He has denied suggestion that he did not collect and deposit parcel.

9.15 PW15 HC Bhaskar Nand has stated that he remained posted as MHC police station Jhakri w.e.f. 2008 to July 2012. He has stated that on dated 12.7.2011 ASI Dharmesh Dutt deposited with him one parcel sealed with seal impression 'A'. He has stated that articles were entered in relevant register and sent case property vide RC No.102/2011 dated 18.7.2011 through constable Rakesh Kumar to FSL Junga. He has stated that case property remained intact in his custody.

9.16. PW16 Dr. Sangeet Dhillon has stated that she was posted as Assistant Professor in department of forensic medicines in IGMC Shimla. She has stated that she conducted post mortem of deceased Kim Dassi aged about 62 years. She has stated that dead body was brought by police officials and wrapped in a white sheet. She has stated that rigor mortis of deceased disappeared from all joints of body. She has stated that she observed following ante mortem external injuries.

1. Red contusion 3x.7 cm present on the anterior aspect of the forehead. Central portion is 3 cm. above the nasion.

2. Red contusion on the right upper eyelid, right lower eyelid, extending from inner canthus to the outer canthus of the eye. Periorbital haemotoma on the upper, lower aspect of eyelids. Clotted blood present on the upper aspect of right side of forehead. Conjunctival hemorrhage present throughout the right eye, corneal portion seen as a black area. The periorbital haemotoma was extending to eyebrow superiorly and 2.4 x.9 cm. inferiorly.

3. Red contusion of the left eye involving the upper eyelid, lower eyelid extending from inner canthus to outer canthus of left eye. Periorbital haemotoma 3x.8 cm. at the upper eyelid and 1.2 x.4 cm at the lower eyelid. Clotted blood present on the nose, upper aspect of forehead. Conjunctival hemorrhage present at the periphery with corneal portion as black area. The left eye had fallen towards the lateral side due to ligamental detachment at the posterior aspect, irregularly underlying orbital cavity has clotted blood.

4. Red contusion 2x7 cm. on the bridge of nose 1.5 cm. below nasion and other red contusion 5 cm. inferior to the earlier one measuring 2.1x .9 cm. fracture of the underlying bone present.

5. Red contusion 1x2x.5 cm. near left side of nose.

6. Red contusion 2.2x1 cm. extending from left alae of nose towards the left side.

7. Multiple red contusions on the lower aspect of left cheek in an area 6x5 cm.

8. Multiple red contusions on the lower aspect of right cheek in an area 7x5 cm.

9. Horizontal red contusion on the chin 3.2x.8 cm. another red contusion 1 cm. lateral left side of face .9x1 cm. and another red contusion .9 cm. lateral to previous contusion measuring .8x1.2 cm.

10. Horizontal red contusion on the inner aspect of lower lip 3.2x.8 cm. The teeth and gums were normal.

11. Red contusion on the right upper aspect of the neck 5 cm. interior to lower end of right ear 7x4 cm. at maximum width ranging 2,3 cm. at places extending towards mid of neck.

12. Red contusion on the middle anterior aspect of neck 1.2x3 cm. inferior to the chin.

13. Red contusion on the left lateral aspect of upper area of neck 1.5 cm. below the inferior aspect of left ear.

14. Red contusion on the dorsal aspect of right hand second finger 1.2x5 cm.

15. Red contusion on the dorsal aspect of left hand, 1.7cm inferior to wrist 9.1.2 cm.

16. Red contusion on the lateral aspect of left wrist dorsum, 1.3x9 cm.

17. Red contusion on the lateral aspect of right thigh 21 cm. below the interior superior iliac spine 8x9 cm another red contusion medical to earlier contusion 4cm. medially 3x6 another contusion 1.7 cm. inferior to first contusion 7x5 cm.

18. Red contusion 2.2x1.8 cm. on the lateral aspect right side of chest 2.3 cm. below mid of right clavicle.

She has stated that deceased had died due to ante mortem injuries and hemorrhage to brain. She has stated that probable time that elapsed between injuries and death was immediate and time between death and post mortem was around two days. She has stated that 35 photographs obtained during autopsy on a CD. She has stated that viscera was sent for examination along with blood, pubic hair, vaginal swab and clothes along with sample seal and preserved it. She has stated that deceased had died as a result of ante mortem injuries to eyes and hemorrhage to brain. She has stated that shirt had struggle marks and salwar had graze marks. She has stated that she issued post mortem report Ext PW16/A. She has stated that final opinion is Ext PW16/B. She has denied suggestion that she did not receive request from police officials for conducting post mortem. She has denied suggestion that she has conducted post mortem only on the request of police officials.

9.17. PW17 Devinder Kumar has stated that he was Vice President Gram Panchayat Badhal. He has stated that on dated 15.7.2011 he along with Diwan Singh and accused who was in custody of police joined investigation of case. He has stated that accused made a disclosure statement before him that stone which was stained with blood was concealed by accused in bushes. He has stated that statement under Section 27 of Evidence Act was recorded by police officials. He has stated that thereafter he along with other witnesses and accused went to spot where stone was recovered at the instance of accused and the same was took into possession vide seizure memo Ext PW11/G. He has denied suggestion that he did not join investigation. He has denied suggestion that accused did not make any disclosure statement in his presence. He has denied suggestion that no recovery of stone was effected in his presence.

9.18 PW18 ASI Dharmesh Dutt has stated that he was posted as ASI in police post Sarahan. He has stated that on dated 11.7.2011 he received telephonic message from police station Jhakri that mother of Jiya Lal was raped and he should visit at the spot. He has stated that after receiving information he visited spot and also seen dead body of deceased Kim Dassi. He has stated that he also recorded statement of Jiya Lal under Section 154 Cr.PC Ext. PW10/A and same was sent to police station Jhakri for registration of FIR.

He has stated that FIR Ext PW15/F was recorded at police station Jhakri. He has stated that he also obtained twenty two photographs at the spot Ext PX1 to Ext PX 22 and also obtained seven negatives Ext PX23 to Ext PX29. He has stated that he prepared spot map Ext PW18/A. He has stated that thereafter dead body of Kim Dassi was took into possession vide seizure memo Ext PW11/E. He has stated that he took into possession leaves of Ban tree on which blood stains were present vide memo Ext PW11/D. He has stated that hair of deceased Kim Dassi was also took into possession vide memo Ext PW11/B. He has stated that hair is Ext P10 which was sealed with seal impression 'A'. He has stated that he took into possession sandal Ext P9 vide seizure memo Ext PW10/B. He has stated that he also recorded supplementary statement of complainant and also recorded statements of other witnesses as per their versions. He has stated that he filled up inquest forms Ext PW18/C and Ext PW18/D and thereafter sent dead body of deceased Kim Dassi for post mortem to IGMC Shimla. He has stated that he filed application for medical examination of accused. He has stated that parcels were deposited in malkhana. He has stated that accused had given disclosure statement Ext PW11/F. He has stated that as per disclosure statement stone Ext P13 was recovered from bushes. He has stated that he prepared spot map Ext PW18/F. He has stated that salwar of deceased was rested upto knee and clothes were torn. He has stated that dead body was directly sent to MGMSC Khaneri from the spot with letter addressed to conduct post mortem. He has denied suggestion that villagers gathered in the office of L&T site and started beatings labourers and when accused objected then villagers caught accused and handed over to police. He has denied suggestion that accused did not make any disclosure statement. He has denied suggestion that accused was forced to sign blank papers. He has denied suggestion that stone Ext P13 was not recovered at the instance of accused. He has denied suggestion that he fabricated false evidence. He has denied suggestion that accused did not commit any offence. He has denied suggestion that accused was falsely implicated in present case.

9.19 PW19 SI Bhagat Ram has stated that he remained posted as SHO police station Jhakri. He has stated that he had partly investigated present case. He has stated that he took demarcation of the spot from Patwari and obtained tatima Ext PW3/B, jamabandi Ext PW3/A and khasra girdawari Ext PW3/C. He has stated that Sheela Devi had produced one sickle Ext P2 and rope Ext P1 which were took into possession vide memo Ext PW4/A. He has stated that sickle and rope were handed over by him to MHC and same were deposited in malkhana. He has stated that he took into possession attendance card Ext PW19/A, appointment card Ext PW19/B, wages sheets Ext PW19/C and attested copies of muster rolls for the months of June and July 2011 Ext PW19/D and Ext PW19/E. He has stated that he took into possession certified copy of malkhana register. He has stated that he recorded statements of witnesses as per their versions and after completion of investigation he prepared challan. He has denied suggestion that he prepared attendance card, muster rolls and other documents of accused as per his own convenience. He has denied suggestion that accused was present at his working place on 11.7.2011. He has denied suggestion that he filed false case against accused.

9.20. PW20 Naval Kishore Sharma has stated that since 2011 he was posted in L&T Company as Administrative Incharge Jeori. He has stated that he had given documents relating to employment of accused Shah Jahan Ali. He has stated that accused present in Court was posted as fitter on daily wages in L&T Company Jeori. He has stated that accused was on duty upto 10.7.2011. He has stated that thereafter he was found absent from his duty. He has stated that total amount of wages which were due to him was Rs.4200/-(Four thousand two hundred). He has stated that he had given attendance cards, wages sheet, employment card and muster roll. He has denied suggestion that accused was on his duty

on 11.7.2011. He has denied suggestion that he submitted false documents regarding duty of accused.

10. Prosecution also tendered following documentaries evidence. (1) Ext.PW3/A copy of jamabandi for the year 1996-97 (2) Ext.PW3/B field map (3) Ext.PW3/C copy of khasra girdawari for April 2010 (4) Ext.PW4/A seizure memo of sickle & plastic rope (5) Mark DX statement of Jakmali Devi (6) Ext.PW6/A extract of malkhana register (7) Ext.PW8/A rapat No.12 dated 11.7.2011 (8) Ext.PW9/A application for conducting medical examination of accused. (10) Ext.PW9/B MLC of accused (11) Ext.PW10/A statement under section 154 Cr.PC of Jiya Lal (12) Ext.PW10/B seizure memo of sandal (13) Ext.PW11/A seal impression upon cloth (13) Ext.PW11/B recovery memo of hair found in the hand of deceased (14) Ext.PW11/C seal impression upon cloth (15) Ext.PW11/D seizure memo of blood clotted dead body of deceased (16) Ext.PW11/E seizure memo of dead body of deceased aged 65 years (17) Ext.PW11/F disclosure statement of accused under section 27 of Evidence Act (18) Ext.PW11/G recovery memo of blood clotted stone (19) Ext.PW11/H seal impression upon cloth (20) Ext.PW15/A to Ext.PW15/D extract of malkhana register (21) Ext.PW15/E copy of road certificate (22) Ext.PW15/F copy of FIR No. 97 dated 12.7.2011 (23) Ext.PW16/A post-mortem report (24) Ext.PW16/B final opinion of medical officer relating to cause of death (25) Ext.PW18/A site plan (26) Ext.PW18/B seal impression upon cloth (27) Ext.PW18/C & Ext.PW18/D inquest reports (28) Ext.PW18/E application for conduction of post-mortem of deceased (29) Ext.PW18/F site plan (30) Ext.PW18/G sapurdari memo (31) Ext.PX1 to PX22 photographs of dead body of deceased (32) Ext.PX23 to PX29 negatives of photographs (33) Ext.PW19/A copy of attendance card of accused issued by Larsen & Toubro Limited (34) Ext.PW19/B copy of employment card issued by Larsen & Toubro Limited relating to accused (35) Ext.PW19/C copy of muster-roll relating to accused issued by Larsen & Toubro Limited (36) Ext.PW19/C-1 copy of muster-roll of accused issued by Larsen & Toubro Limited (37) Ext.PW19/F to Ext.PW19/H & Ext.PW19/J FSL reports.

11. Submission of learned Advocate appearing on behalf of appellant that learned trial Court has illegally relied upon testimony of PW1 Shyam Lal is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimony of PW1 Shyam Lal. PW1 Shyam Lal has specifically stated that he along with Jiya Lal followed accused up to the distance of 1 Km. PW1 Shyam Lal has stated in positive manner that deceased Kim Dassi was lying dead and dead body of deceased was half naked and salwar was up to knees. PW1 Shyam Lal has specifically stated in positive manner that nearby the dead body of Kim Dassi there was blood stained spots. There is no evidence on record in order to prove that PW1 Shyam Lal had hostile animus against accused. PW1 had identified accused before learned trial court during proceedings of case. There is no reason to disbelieve the testimony of PW1 Shyam Lal. Testimony of PW1 Shyam Lal is trust worthy, reliable and inspires confidence of Court.

12. Submission of learned Advocate appearing on behalf of appellant that learned trial Court has illegally relied upon the testimony of PW2 Jakmali is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimony of PW2 Jakmali placed on record. PW2 Jakmali has specifically stated in positive manner before learned trial Court that she heard cries of deceased Kim Dassi from orchard side. PW2 Jakmali has stated in positive manner that accused dragged deceased Kim Dassi. PW2 Jakmali has stated in positive manner that accused laid deceased on the ground and thereafter accused ran away by making the body of deceased dead. PW2 has specifically stated in positive manner that Salwar of deceased was opened and was rested upon her knees. PW2 Jakmali has stated in positive manner that left eye of deceased was damaged

and blood was oozing out from the head of deceased. PW2 has stated in positive manner that accused was known to her as accused was residing in the house of Alku Ram. There is no evidence on record that PW2 Jakmali had hostile animus against accused at any point of time. Testimony of PW2 Jakmali is trust worthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW2 Jakmali.

13. Submission of learned Advocate appearing on behalf of appellant that learned trial Court has illegally relied upon testimony of PW10 Jiya Lal is also rejected being devoid of any force for the reasons hereinafter mentioned. PW10 Jiya Lal has specifically stated in positive manner that blood was found nearby the dead body and PW10 Jiya Lal had identified accused in Court. PW10 Jiya Lal has specifically stated that accused was employed in L&T Company and was residing in the house of Alku Ram. There is no evidence on record that PW10 Jiya Lal had hostile animus against accused at any point of time. There is no reason to disbelieve the testimony of PW10 Jiya Lal. Testimony of PW10 Jiya Lal is trust worthy, reliable and inspires confidence of Court.

14. Submission of learned Advocate appearing on behalf of appellant that PW1 Shyam Lal is the brother-in-law of deceased, PW2 Jakmali is daughter-in-law of deceased and PW10 Jiya Lal is the son of deceased Kim Dassi and above stated witnesses are close relatives of deceased Kim Dassi and their testimonies were illegally relied by learned trial Court is rejected being devoid of any force for the reasons hereinafter mentioned. There is no evidence on record that there was previous enmity between accused and relative witnesses of deceased. It was held by Hon'ble Apex Court of India in case reported in AIR 1977 SC 472 titled Mst. Dalbir Kaur and others Vs. State of Punjab that close relative who on the circumstances of case is very natural witness is not an interested witness of deceased. It was held by Hon'ble Apex Court of India in case reported in AIR 1976 SC 2499 titled Molu and others Vs. State of Haryana that mere fact that witnesses were close relatives of deceased is not sufficient to discard them. Also see AIR 1975 SC 2304 titled Sarwan Singh and others Vs. State of Punjab. It is held that PW1 Shyam Lal, PW2 Jakmali and PW10 Jiya Lal are natural witnesses and their testimonies cannot be disbelieved simply on the ground that PW1 Shyam Lal, PW2 Jakmali and PW10 Jiya Lal are close relatives of deceased Kim Dassi.

15. Submission of learned Advocate appearing on behalf of appellant that learned trial Court has illegally relied upon disclosure statements of PW11 Diwan Singh, PW17 Devinder kumar and PW18 Dharmesh Dutt is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the testimony of PW11 Diwan Singh, PW17 Devinder Kumar and PW18 Dharmesh Dutt. PW11 Diwan Singh has specifically stated in positive manner that disclosure statement of accused was recorded in his presence. He has stated that blood stained stone was recovered as per disclosure statement given by accused. PW17 Devinder Kumar has specifically stated in positive manner when he appeared in witness box that stone was concealed in bushes and same fact was disclosed by accused in his disclosure statement. PW18 Dharmesh Dutt has specifically stated that stone Ext P13 was recovered from bushes as per disclosure statement given by accused. He has stated that hairs of deceased also took into possession. Testimonies of PW11 Diwan Singh, PW17 Devinder Kumar and PW18 Dharmesh Dutt are trust worthy, reliable and inspire confidence of Court. There is no reason to disbelieve the testimony of PW11 Diwan Singh, PW17 Devinder Kumar and PW18 Dharmesh Dutt. There is no evidence on record that PW11, PW17 and PW18 have hostile animus against accused prior to incident at any point of time.

16. Submission of learned Advocate appearing on behalf of appellant that learned trial Court has illegally held that death of deceased Kim Dassi was homicidal in

nature is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimony of PW16 Dr. Sangeet Dhillon who conducted post mortem of deceased Kim Dassi. PW16 Dr. Sangeet Dhillon has specifically stated in positive manner that deceased Kim Dassi died as a result of ante mortem injuries to eyes and hemorrhage to brain. PW16 medical officer has stated in positive manner that shirt of deceased had struggle marks and salwar of deceased had graze marks. PW16 medical officer has observed following 18 (eighteen) ante mortem external injuries upon the body of deceased Kim Dassi. As per final opinion of medical officer Ext PW16/B placed on record deceased died as a result of ante mortem injuries to eyes and hemorrhage to brain. As per final opinion of medical officer shirt of deceased had struggle marks and salwar of deceased had graze/drag marks. Hence it is held that deceased had died due to homicidal death due to ante mortem injuries sustained by deceased. It is held that injuries were caused by accused because only accused was present nearby deceased Kim Dassi as per testimonies of PW1 Shyam Lal and PW2 Jakmali who identified accused in court. Possibility of commission of death by third person is ruled out in present case keeping in view oral as well as documentary evidence placed on record.

17. Submission of learned Advocate appearing on behalf of appellant that motive to kill deceased is not proved on record and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. PW12 Alku Ram has specifically stated in positive manner that accused was his tenant. PW12 Alku Ram has specifically stated that accused was working in L&T company. PW12 has specifically stated that accused did not come to rented house on the day of incident. Even PW20 Naval Kishore Sharma Administrative Incharge of L&T Company has stated in positive manner that accused was posted as fitter on daily wage in L&T Company Jeori. PW20 has stated in positive manner that accused was on duty upto 10.7.2011 and thereafter he was absent from duty. Testimony of PW20 Naval Kishore Sharma is also corroborated with duty chart documents placed on record. Even PW9 Sh. B.D.Negi who medically examined accused has stated that tear marks were present upon T-shirt and pant of accused. Motive to kill deceased was reason because deceased resisted sexual assault upon her by accused. As per Section 8 of Indian Evidence Act 1872 previous and subsequent conduct of accused is relevant fact. It is held that connection of accused for the commission of criminal offence as alleged by prosecution is proved beyond reasonable doubt in present case as per oral as well as documentary evidence placed on record beyond reasonable doubt.

18. Submission of learned Advocate appearing on behalf of appellant that statement of accused under Section 313 Cr.PC was not recorded by learned trial Court in accordance with law is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused statement of accused recorded by learned trial Court under Section 313 Cr.PC. Learned trial Court had put all material incriminatory questions to accused when statement of accused was recorded under Section 313 Cr.PC. It is held that no miscarriage of justice has been caused to appellant while recording statement of accused under Section 313 Cr.PC by learned trial Court.

19. Submission of learned Advocate appearing on behalf of appellant that there is material contradictions and improvements in the testimonies of prosecution witnesses and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused entire testimonies of oral witnesses produced by prosecution. There is no material contradiction and improvement in the testimonies of prosecution witnesses which goes to the root of case. It is well settled law that minor contradictions are bound to come in criminal case when statement of prosecution witnesses recorded after a gap of sufficient time. In the present case incident

took place on dated 11.7.2011 at about 5.30 PM at place Shikari rivulet and statement of prosecution witnesses recorded on dated 9.5.2012, 10.5.2012, 11.5.2012, 8.8.2012, 9.8.2012, 28.9.2012, 29.9.2012, 24.11.2012, 19.12.2012 and 17.1.2013 after a gap of sufficient time. It is well settled law that minor contradictions in criminal case should be ignored when testimony of prosecution witnesses is recorded after a gap of sufficient time. See 2010 (9) SCC 567 titled C.Muniappan and others Vs. State of Tamil Nadu. See AIR 1972 SC 2020 titled Sohrab and another Vs. The State of Madhya Pradesh, see AIR 1985 SC 48 titled State of UP Vs. M.K.Anthony, see AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, see AIR 2007 SC 2257 titled State of Rajasthan Vs. Om Parkash, see 2009 (11) SCC 588 titled Prithu Chand and another Vs. State of HP, see 2009 (9) SCC 626 titled State of UP Vs. Santosh Kumar and others, see AIR 2009 SC 151 titled State Vs. Saravanan and another, see AIR 1988 SC 696 titled Appabhai and another Vs. State of Gujarat, see AIR 1999 SC 3544 titled Rammi Vs. State of M.P, see 2000(1) SCC 247 titled State of H.P. Vs. Lekh Raj and another, see 2004 (10) SCC 94 titled Laxman Vs. Poonam Singh and others also See 2004 (7) SCC 408 titled Dashrath Singh Vs. State of UP. See 2012 (10) SCC 433 titled Kuriya and another Vs. State of Rajasthan. It is well settled law that concept falsus in uno falsus in omnibus is not applicable in criminal case. See AIR 1980 SC 957 titled Bhe Ram Vs. State of Haryana. Also See AIR 1971 SC 2505 titled Rai Singh Vs.State of Haryana.

20. Submission of learned Advocate appearing on behalf of appellant that testimony of prosecution witnesses is not sufficient for conviction is also rejected being devoid of any force for the reasons hereinafter mentioned. It was held in case reported in AIR 1973 SC 944 titled Jose Vs. State of Kerala that conviction can be based on the sole testimony of a single witness if testimony is trustworthy, reliable and inspire confidence of Court. See AIR 1957 SC 614 titled Vadivelu Thevar Vs. The State of Madras and also see 1965 SC 202 titled Masalti and others Vs. State of Uttar Pradesh.

21. Testimony of oral witnesses adduced by prosecution witnesses is corroborated by documentary evidence i.e. seizure memo Ext PW4/A, Ext PW10/B, Ext PW11/B, Ext PW11/D, Ext PW11/E, disclosure statement Ext PW11/F, Ext PW11/G, post mortem report Ext PW16/A, final opinion given by medical officer Ext PW16/B, site plan Ext PW18/A, inquest reports Ext PW18/C and Ext PW18/D, photographs Ext PX1 to Ext PX22 along with negatives, chemical analyst report Ext PW19/F placed on record. Even as per chemical examination report Ext PW19/F placed on record DNA profile of pant and T-shirt of accused Shah Jahan Ali and stone matched completely with DNA profile of deceased Kim Dassi. Even as per chemical report Ext PW19/H there was struggle marks upon the shirt of deceased and there was drag marks upon the salwar of deceased.

22. As per chemical analyst report Ext PW19/F placed on record DNA profile obtained from pant, T-shirt of accused and from stone matches completely with DNA profile obtained from blood sample of deceased Kim Dassi.

23. Even as per chemical analyst report Ext PW19/H placed on record struggle marks were observed upon shirt of deceased and drag marks were observed upon salwar of deceased. Even as per chemical analyst report Ext PW19/J placed on record human blood was detected upon the blood stained leaves lifted from the spot, human blood was detected on pant and T-shirt of accused and blood was also detected upon shirt of deceased Kim Dassi and jacket of Kim Dassi. Blood was also detected upon salwar of deceased Kim Dassi.

24. In view of the above stated facts and case law cited supra appeal filed by appellant is dismissed and the judgment and sentence passed by learned trial Court are affirmed. It is held that learned trial Court has properly appreciated oral as well as

documentary evidence placed on record. It is held that no miscarriage of justice is caused to appellant. File of learned trial Court along with certify copy of judgment be sent back forthwith and file of this Court be consigned to record room. Appeal is disposed of. Pending application(s) if any also disposed of.

****

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

State of Himachal Pradesh ..... Appellant
Versus
Bagga Ram and others .....Respondents

Cr. Appeal No. 364/2006
Reserved on: 10.12.2015
Decided on: 11.12.2015

Indian Forest Act, 1927- Sections 41 and 42- Accused was intercepted while transporting 105 logs of Khair Tree in a truck without permit – accused was acquitted by the trial Court- in appeal against acquittal held, that since police team was holding nakka, when the truck was allegedly intercepted, independent witnesses should have been associated at the time of search and seizure- further held, that logs produced in the Court did not find any identification marks therefore, identity of case property was not established- official witnesses have not remained consistent – trial Court has rightly acquitted the accused- appeal dismissed. (Para-16 to 19)

For the appellant : Mr. Parmod Thakur, Additional Advocate General with Mr. Neeraj K. Sharma, Deputy Advocate General.
For the respondents : Mr. Vivek Singh Thakur, Advocate.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal is instituted by the State against Judgment dated 1.6.2006, rendered by learned Judicial Magistrate 1st Class, Bilaspur, Himachal Pradesh in Case No. 90/3 of 2000/98, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Sections 41 and 42 of Indian Forest Act and Sections 3, 4 and 16 of Land Preservation Act, have been acquitted by the learned trial Court.

2. Case of the prosecution, in a nutshell, is that on 3.5.1998 Inspector/SHO Kashmiru Ram alongwith HC Prakash Chand and Constable Amar Nath was present at Excise & Taxation Barrier Naina Devi Chowk, Ghawandal. At about 1.35 am, one truck came from Bhakra side towards Ghawandal. It was stopped. Driver disclosed his name as Lajpat Singh. Truck No. HP-24-2555 was searched. It was carrying 105 hard wood logs of Khair trees. Export permit and other documents were not shown by the driver, on which excise barrier inspector Ram Dass Premi and Rakesh Singh, watchman were called on the spot and logs were counted. Bagga Ram told that he had cut the logs from his own land. No permit of 105 logs was produced. Case was registered against the accused. During the course of investigation, police visited the spot and prepared spot map. One hard wood log was recovered from the house of Bagga Ram. He had cut 17 trees from his own land with

the help of labourers Gurbachan Singh and Gurcharan Singh and also unbarked by them. Spot, from where trees were cut, was inspected by the Forest Department. Demarcation was conducted by the Revenue Department. Investigation was completed and challan was put up after completion of all codal formalities.

3. Prosecution examined 13 witnesses. Accused were also examined under Section 313 of the Criminal Procedure Code. They pleaded innocence. Accused were acquitted. Hence, this appeal.

4. Mr. Parmod Thakur, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Vivek Singh Thakur, Advocate has supported judgment dated 1.6.2006.

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

7. PW-1 Ram Dass deposed that in the year 1998, he was posted as Excise & Taxation Inspector at Naina Devi Ji. On 3.5.1998 at about 1.35 am, he alongwith Rakesh Kumar was posted at Barrier. One truck came from the side of Bhakra bearing registration No. HP-24-2555. Police searched the truck. They were also summoned. Truck was carrying 105 logs of Khair hard wood. Owner of the truck was Lajpat Singh and Driver was Bagga. Truck alongwith wood was taken into possession vide Ext. PW-1/A. Truck was unloaded and logs were counted. He did not know who unloaded the truck. Nothing has happened in his presence. Thereafter, truck was taken to Police Station Kot. In his cross-examination, he has admitted that he did not know who was driving the truck at the relevant time. He had only seen the truck. He did not know who was the author of Ext. PW-1/A. He has not seen any mark on the log.

8. PW-2 Gurbachan Singh deposed that he was an agriculturist by profession. He had cut trees from the land of Bagga Ram. There were 17 trees. He used to get `60 per day. He has worked for 7 days. Police has come on the spot alongwith Forest Guard. Trees and logs were counted. They have not placed any log in the room of Bagga Ram. He was declared hostile and cross-examined by the learned APP. In his cross-examination by the learned APP, he has disowned portion 'A to A' of his statement Mark X. In his cross-examination, he has admitted that he has cut trees at the instance of Ranjit Singh Contractor. He also admitted that he did not know who was owner of the land, from where he has cut the trees.

9. PW-3 Sardeep Singh deposed that on 11.5.1998, truck bearing registration No. HP-24-2555 was unloaded. Volunteered, that logs were weighed with the help of a weighing machine.

10. PW-4 Bishan Dass deposed that the accused has not given demarcation of land in the presence of the police. He was declared hostile. He reiterated in his cross-examination by the learned APP that neither before him nor before Jagat Ram, demarcation was carried out.

11. PW-5 Jaimal Chand deposed that he was working as a Patwari in the year 1998. He alongwith Office Kanungo and Naib Tehsildar has carried out demarcation of the spot where Bagga Ram has cut trees. It was carried out at the instance of the police. This land was found to be owned and possessed by Bagga Ram. Report is Ext. PW-5/A. In his cross-examination, he has admitted that that the family of Bagga Ram for the last 6-7 years has shifted near Anandpur Sahib and they were not residing in their ancestral village. Their land was being cultivated by other persons.

12. PW-6 Ranjit Singh deposed that documents of the truck were taken into possession by the police on 4.6.1998 from the owner of the truck Shri Lajpat Singh.

13. PW-7 Mahender Lal deposed that he has gone to the Police Station Kot. Police weighed logs. Ext. PW3/A was prepared. He has signed the same. He did not know the name of wood. He has not seen the truck on the spot. He was declared hostile and cross-examined by the learned APP. He did not know that there were 105 logs of Khair wood. He did not know the exact weight of the wood. He did not know accused Bagga. He disowned the portion 'A' to 'A' of his statement mark 'X'.

14. PW-8 Brij Lal deposed that he visited the spot with the police on 4.6.1998. Gurbachan and Gurcharan Singh have shown the spot from where 17 trees were cut. He has measured the stumps. Accused has not obtained any export permit.

15. PW-9 deposed that the demarcation of the spot was carried out while she was posted as Naib Tehsildar at Swarghat. Trees were cut from the private land. She prepared report Ext. PW-5/A.

16. PW-10 ASI Prakash Chand deposed that in the year 1998, he was posted at Kot Kehloor. He was present at Excise Barrier Ghawandal. A Truck came at 1.35 am from Bhakra side. It was signalled to stop. Driver disclosed his name as Lajpat. Truck was carrying 105 logs. Accused Bagga Ram and Sukh Dev were also sitting in the truck. Excise & Taxation Inspector and Peon of Excise & Taxation Department were called. Accused could not produce document. There was no hammer mark on the logs. In his cross-examination, he admitted that one Jagat Ram and another person had come on the spot.

17. PW-12 Inspector Kashmiru Ram deposed that he was present at Excise Barrier at 1.35 am. Truck bearing registration No. HP-24-2555 came from Bhakra side. Truck was carrying 105 logs of hard wood. Truck was being driven by Lajpat. Logs were taken into possession. FIR was registered against the accused. In his cross-examination, he could not disclose at what time they left the Police Station on 3.5.1998. He did not remember whether they have gone in vehicle or on foot. He did not know at what time, they came back to the Police Station on 3.5.1998. He did not remember whether they came back to the Police Station in vehicle or on foot. He did not remember at what time truck left the spot and reached the Police Station. Accused was arrested at 12.30 pm on 3.5.1998. He did not remember whether the accused were released on bail at Ghawandal or at any other place. He has not prepared the arrest memo of the accused. He has admitted categorically that he has not arrested the accused from 1.35 am to 12.30 pm. He did not know in which direction truck was heading for. He has also admitted that he has put only one sample mark on the log wood on 11.5.1998. He has also admitted that he has not put any sample mark before 11.5.1998. He has admitted that sample of log was not shown to him in the examination-in-chief. PW-12 Kashmiru Ram was re-examined for identification of logs Ext. P1 and Ext. P2. In his cross-examination by the learned Advocate for the accused, he has admitted that on Ext. P1 and Ext. P2 mark 'X' was not present.

18. PW-1 Ram Dass has categorically stated that he has not seen any mark on the logs. Only logs were counted before him. PW-2 Gurbachan Singh has not supported the case of the prosecution. He was declared hostile. He has disowned portion 'A' to 'A' of his statement. He did not know who was owner of the land from which trees were cut. In his examination-in-chief, he has stated that they have not put any logs in the room of accused Bagga Ram. PW-4 Bishan Dass has also not supported the case of the prosecution. He has denied that in his presence, demarcation was got conducted by the accused in the presence of police officials. PW-5 Jaimal Chand, in his cross-examination has admitted categorically

that Bagga Ram and his family members were residing now near Anandpur Sahib and no one was residing in the ancestral village. PW-7 Mahender Lal has also not supported the case of the prosecution. Though he has admitted his signatures on Ext. PW-3/A. He did not know what was the species of wood. He has not seen the truck on the spot. PW-10 Prakash Chand admitted that one Jagat Ram and another person came on the spot. However, fact of the matter is that prosecution has not examined any independent witness though available on the spot at the time of search and seizure of the truck including logs. He deposed that he alongwith SHO had come to the Police Station on Motorcycle. However, PW-12 Kashmiru Ram did not know how they came to the spot and went back to the Police Station. According to him, three of them have come together to the spot and went back to the Police Station. PW-1 Ram Dass deposed that Bagga was driver however PW-10 Prakash Chand and PW-12 Kashmiru Ram deposed that Lajpat was the driver of the truck. It is surprising that SHO did not know how he came on the spot and left the spot. Truck was stopped at 1.35 am but arrest was made at 12.30 pm. PW-12 Kashmiru Ram did not know whether accused were granted bail at Ghawandal or at another place. He has not even prepared arrest memo of accused. He did not even know when the truck left the spot and reached the Police Station. Other vehicles were also plying on the road. The very fact that a barrier and Naka was put, presupposes that vehicles were plying at that point of time but occupants of such vehicles were not associated as independent witnesses. Case property was produced while examining PW-12 Kashmiru Ram. There was no mark on Ext. P1 and Ext. P2. Thus, the identification of the property was also not established by the prosecution.

19. There is no occasion for this Court to interfere with the well reasoned judgment passed by the learned trial Court.

20. In view of discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending applications, if any, are also disposed of.

****

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

United India Insurance Co. Ltd. .....Appellant.

Versus

Sh. Daulat Ram and others ...Respondents

FAO (MVA) No. 82 of 2009

Date of decision: 11th December, 2015

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the ground that owner had committed willful breach of the policy- held that, no evidence was led by the insurer to prove this plea - appeal dismissed. (Para 12 to 14)

For the appellant: Mr. Lalit K. Sharma, proxy Advocate for Mr. Anand Sharma, Advocate..

For the respondents: Mr.S.V. Sharma, Advocate, for respondent No.1.

Mr. S.D. Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 22.11.2008, made by the Motor Accident Claims Tribunal Shimla, H.P. in MAC case No. 30-S/2 of 2007, titled *Shri. Daulat Ram Sharma versus Shri Shyam Singh Jaswal and others*, for short "the Tribunal", whereby compensation to the tune of Rs.1,83,000/- alongwith interest @ 9% per annum was awarded in favour of the claimant, hereinafter referred to as "the impugned award", for short.

2. Owner, driver, insured and claimants have not questioned the impugned award on any ground, thus it 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. The claimant had claimed compensation to the tune of Rs.5,00,000/-, as per the break-ups given in the claim petition.

5. The claim petition was resisted and contested by the respondents and following issues came to be framed by the Tribunal.

(i). Whether the petitioner suffered injuries due to rash and negligent driving of bus No. HP-51-0579 and Santro Car No. HP-16-5580 by respondents No. 2 and 3, respectively, as alleged? OPP

(ii) If issue No. 1 is proved, to what amount of compensation the petitioner is entitled and from which of the respondents? OPP.

(iii) Whether the respondent No. 3 is not liable to pay any compensation to the claimant, as alleged? OPR-3.

(iv) Whether the petition is not maintainable, in the present form, as alleged? OPR-4.

(v) Whether the petition is bad for non-joinder of necessary parties? OPR-4.

(vi) Whether the vehicle in question was being driven at the time of accident in violation of terms and conditions of the insurance policy, if so, it seffect?OPR-4.

(vii) Relief.

6. Parties have led evidence.

7. The Tribunal, after scanning the evidence, held that the claimant has proved while leading cogent evidence that the driver of Santro Car No. HP-16-5580 has driven the said vehicle rashly and negligently and decided the issue No. 1 in favour of the claimant and against the respondents. The said findings are not in dispute, are accordingly upheld.

8. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 5 at the first instance.

9. **Issue No.3**. It was for the insurer to discharge the onus, has not led any evidence. In view of the findings returned on issue No.1, this issue is to be decided accordingly. Viewed thus, findings returned on this issue are upheld.

10. **Issue No.4.** It was for respondent No. 4 to prove that how the claim petition is not maintainable. Keeping in view the facts of the claim petition, the findings came to be rightly recorded by the Tribunal, are upheld.

11. **Issue No.5**. It was for the insurer to prove this issue, has not led any evidence. Accordingly, the findings returned on issue No. 5 are upheld.

12. **Issue No.6**. It was for the insurer to plead and prove by leading cogent evidence that the owner has committed willful breach, has not led any evidence. While going through the impugned award, one comes to an inescapable conclusion that the owner has not committed any willful breach. Thus, the findings returned by the Tribunal on this issue are upheld.

13. **Issue No.2**. I have gone through the assessment made by the Tribunal. The Tribunal has rightly recorded the findings in para 6. The amount awarded cannot be said to be excessive, in any way, rather it is meager. Unfortunately the claimant has not questioned the same, reluctantly, it is upheld. The factum of insurance is not in dispute. Thus, the Tribunal has rightly saddled the insurer with the liability.

14. Having said so, the appeal is dismissed and the impugned award is upheld.

15. The Registry is directed to release the amount in favour of the claimant, strictly, in terms of the conditions contained in the impugned award.

16. Send down the record, forthwith, after placing a copy of this judgment.

****

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

Oriental Insurance Company Ltd. .....Appellant
Versus
Sh. Lachman Singh & others ....Respondents

FAO No. 112 of 2009
Decided on : 11.12.2015

Motor Vehicles Act, 1988- Section 166- Claimants are the parents of the deceased and the legal representatives of the deceased- thus, they are entitled to file the petition- further, Motor Accident Claims Tribunal can treat the repot of the accident forwarded as an application for compensation- therefore, the plea that petition is bad for non-joinder of necessary parties cannot be accepted. (Para-11 to 13)

For the Appellant : Mr. Lalit K. Sharma, Advocate.
For the Respondents: Mr. Rakesh Thakur, Advocate, for respondents No. 1 & 2.
Mr. Virbahadur Verma, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 11th November, 2008, made by the Motor Accidents Claims Tribunal-II, Shimla, H.P. (hereinafter referred to as "the

Tribunal") in M.A.C. Petition No. 28-NL/2 of 2005, titled **Sh. Lachman Singh & another versus Parminder Kumar Bansal & others**, whereby compensation to the tune of Rs.2,99,000/- with interest @ 12% per annum and cost quantified at Rs.1,000/- was awarded in favour of the claimants-respondents No. 1 & 2 herein and the insurer-appellant herein came to be saddled with liability (for short, "the impugned award").

2. The claimants, insured-owner and driver have not questioned the impugned award, on any count. Thus, it 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.

Brief Facts:

4. The claimants being victims of the motor vehicular accident, had invoked the jurisdiction of the Tribunal, in terms of the mandate of Section 166 of the Motor Vehicles Act, 1988, for short "the Act", for grant of compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition.

5. The respondents contested the claim petition on the grounds taken in their memo of objections.

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

"1. *Whether the accident and consequent death of Kulwinder Singh was due to the rash and negligent driving of the offending vehicle i.e. Tipper bearing No. HR-37A-1708 by respondent No. 2 Ranjeet Singh on 1.7.205 at about 3 PM at Village Mallpur as alleged. If so, its effect? …OPP*

2. If issue No. 1 is proved in affirmative whether the petitioners are entitled to compensation, if so to what extent and from whom?….OPP

3. Whether the petition is bad for non joinder of necessary party?…OPR

4. Whether the petition is not maintainable in the present form as alleged? ….OPR

5. Whether the respondent No. 2 Ranjeet Singh was not having valid and effective driving licence on the date of accident to drive the offending vehicle, if so, its effect?….OPR-3

6. Relief."

7. The claimants have examined Sh. Vashir Mohammad (PW-1) and Shri Krishan Gopal (PW-3) and Shri Gurmel Singh (PW-4). One of the claimants, i.e. Lachman Singh also appeared in the witness box as PW-2. The respondents have examined Shri Mahinder Lal Sharma (RW-1), Shri R.S. Sharma (RW-2) and Shri Sita Ram (RW-4). Owner Parminder Singh also appeared in the witness box as RW-3.

8. The Tribunal after scanning the evidence, oral as well as documentary, held that driver, namely, Parinder Singh has driven the offending vehicle, i.e. Tipper bearing registration No. HR-37A-1708, rashly and negligently, on 01.07.2005, at about 3.00 p.m., at Village Mallpur on Nalagarh-Pinjore road, in which deceased Kulwinder Singh sustained injuries and succumbed to the same.

Issue No. 1.

9. The claimants have proved issue No. 1. The findings returned by the Tribunal on this issue are not in dispute. Accordingly, the same are upheld.

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

Issue No. 3.

11. It was for the respondents to prove that the claim petition was bad for non-joinder of necessary party, have not led any evidence. Even otherwise, the claimants are the parents of the deceased and are the legal representatives of the deceased, thus are within their rights to maintain the same.

12. The Act has gone a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 of the Act have been added, whereby the Claims Tribunal can treat report of accident forwarded to it under Section 158 (6) of the Act as an application for compensation. Thus, it does not lie in the mouth of the respondents to plead that the claim petition was bad for non-joinder of necessary parties.

13. Having said so, the Tribunal has rightly decided issue No.3 and accordingly, the findings returned by the Tribunal on this issue are upheld.

Issue No. 4.

14. It was for the respondents to prove this issue, have not led any evidence. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 5.

15. Respondent No. 3-insurer has examined Shri R.S. Sharma as RW-2. The Tribunal has discussed issue No. 5 in para-16 of the impugned award. It is apt to record the aforesaid para herein:-

> "*It has been submitted that the respondent No. 2 Ranjeet Singh was not holding valid driving licence and the Tipper was being plied in rash and negligent manner by the respondent No. 2. Thereby, in case any compensation is ordered to be paid that would have to be paid by the respondent No. 1 and 2 and not by the respondent No. 3. In this respect, driving licence of the respondent No. 2 has been produced on the file as Ex. R.1. The perusal of the driving licene goes to show that it was issued in the name of Ranjit Singh, the respondent No. 2 firstly on 31.5.1984 and thereafter from time to time it had been renewed. The last date on its renewal was 30.10.2006. The respondent No. 3 to establish that it was not issued by Licensing Authority which is alleged to have been examined one Sita Ram as R3-W-1 who has deposed that he has brought the record qua the licence No. 123/ODL/1990 stating that it was never issued by R.L.A. Alwar. It has also been stated that there is no other Licensing Authority at Alwar issuing licence. In his cross-examination he has deposed that he had brought the record w.e.f. 28.6.1984 to 3.7.1984. The record produced by the witness w.e.f. 28.6.1984 to 3.7.1984 and no licence bearing No. 123/ODL/1990 was issued by R.L.A. Alwar during this period. However, he has not deposed qua 31.5.1984 on which date the licence in question is endorsed to have been issued. The perusal of Ex R-1 would go to show that for the first time the licence in the name of respondent No. 2 was issued on 31.5.1984. No record having been brought qua this fact by the respondent No. 3 that the licence bearing date of 31.5.1984 was never issued. The only conclusion which could be drawn is that a valid driving licence was issued in the name of the respondent No. 2 on 31.5.1984 by the Licensing Authority, Alwar. Thereby, it can safely be held that the respondent No. 2 was holding valid driving licence at the time of the accident which had been renewed from time to time. There is no other*

evidence from the side of the respondents that the vehicle was being plied in violation of the terms and conditions of the insurance policy. Thereby to establish the averments made by the respondent No. 3, no evidence having been led. This issue is decided by holding that the respondent No. 2 at the time of accident was holding a valid driving licence and no terms and conditions of the insurance policy have been violated."

16. The Tribunal has rightly made the discussion, *supra.* Accordingly, the findings returned by the Tribunal on Issue No. 5 are upheld.

Issue No. 2

17. The amount awarded by the Tribunal cannot be said to be excessive while keeping in view the age of the deceased and the age of the parents of the deceased. Rather, meager amount has been awarded in favour of the claimants/parents of the deceased, who have lost their budding son, who was the only source of their income, have not questioned the same. Accordingly, the findings returned by the Tribunal on issue No. 2 are upheld.

18. Viewed thus, no interference is required. The impugned award is upheld and the appeal is dismissed.

19. The Registry is directed to release the compensation amount in favour of the claimants, strictly as per the terms and conditions, contained in the impugned award.

20. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

United India Insurance Co. Ltd. .....Appellant.

Versus

Managing Director, HRTC and others .....Respondents

FAO (MVA) No. 31 of 2009

Date of decision: 11th December, 2015

Motor Vehicles Act, 1988- Section 166- Insurance company challenged the award on the ground that excessive amount was awarded by the tribunal- held that, the owner has led cogent and convincing evidence to show that a damage of Rs.1,02000/- was caused to his bus in the accident by the rash and negligent driving of the respondent No.2- award is based upon proper appreciation of evidence- appeal dismissed. (Para 4 to 6)

For the appellant: Mr. Lalit K. Sharma, Advocate.

For the respondents: Mr.Narinder Kumar, proxy, Advocate, for respondents No. 1 and 2.
Nemo for respondent No.3.
Mr. K.B. Khajuria, 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 30.9.2008, made by the Motor Accident Claims Tribunal, Presiding Officer Fast Track Court, Mandi,

H.P. in Claim Petition No. 27/01,46/2005, titled *Managing Director HRTC and another versus Ram Dass and others*, for short "the Tribunal", whereby compensation to the tune of Rs.1,02,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Owner, driver, insured and claimants have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the ground that the amount awarded is excessive and liability of the insurer was only to the extent of Rs.6000/.

4. I have gone through the insurance policy and discussions made by the Tribunal in the impugned award. It is apt to reproduce paras 14 to 16 of the impugned award herein.

> *"14.In order to rebut the evidence of the petitioners, no rebuttal evidence has been led by the respondent No.3 on issue No.1 and the respondent No. 3 has only tendered in evidence the documentary evidence i.e. Insurance Policy Ext. R3/A, Terms and Conditions Ex. R-3-A1, Verification report of Route permit Ex. R3/B, verification of R/C Ex. R3/C, verification of report of D/L Ex. R3/D on issue No.2.*
>
> *15. From the unrebtuted evidence of the petitioners it is proved on the file that the petitioner's bus NO. HP-37-0447 was damaged due to the rash and negligent driving of Bus No. HP-23-3264 by the respondent No.2 when the bus of petitioner was stationary on its side at village Bhager near Ghumarwin Distt. Bilaspur, H.P and FIR to this effect was also registered in the Police Station, Ghumarwin on 19.7.1999 and the copy of FIR is Ex.PW1/A and the petitioners have to spent amount on the repair of the bus bearing registration No. HP-37-0447 as mentioned ion the Job Sheets Ex. PA and Ex. PB and the petitioner's bus could not ply and remained in the workshop from 24.7.1999 to 15.8.1999 and thus, the petitioners in total had suffered damages to the tune of Rs.1,02,000/- and he petitioners are entitled to the sum of Rs.1,02,000/- from the respondents.*
>
> *16. Since, the respondent No. 1 has insured his bus bearing registration No. HP-23-3264 with the respondent No.3 and thus, the respondent No.3 has to indemnify the respondents No. 1 and 2 for the amount claimed by the petitioners. Accordingly, it is held that the petitioners had suffered damages on account of the negligent act of the respondent No. 2 ion driving the vehicle bearing registration No. HP-23-3264 and thus, the petitioners are entitled for compensation in the sum of Rs.1,02,000/- from the respondent No. 1 and 2 which shall be paid by the respondent No.3. Accordingly, both these issues are decided in favour of the petitioners and against the respondents."*

5. I have gone through the record. I am of the considered view that the Tribunal has rightly recorded the findings that the claimants have suffered damages on account of the rash and negligent act of respondent No.2 in driving the vehicle bearing registration No. HP-23-3264. The Tribunal has rightly made the discussion on issue No. 1 and returned the findings.

6. I have gone through the insurance policy. In terms of the amendment to the Act read with the fact that the insurer has resisted the claim petition on flimsy grounds and

deprived the claimants to reap the fruits/benefits of social legislation, the amount awarded is too meager and cannot be said to be excessive, in any way.

7. Having said so, no interference is called for. The appeal is accordingly 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.

9. Accordingly, the appeal is disposed of, alongwith pending applications, if any.

10. Send down the record, forthwith, after placing a copy of this judgment.

****

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

United India Insurance Company Ltd. .....Appellant
Versus
Sh. Naveen Gupta & others ...Respondents

FAO No. 95 of 2009
Decided on : 11.12.2015

Motor Vehicles Act, 1988- Section 166- Claimant had filed a claim petition pleading that accident was outcome of rash and negligent driving of the driver of Tata Indica- insurer pleaded that accident was result of negligence of the claimant himself- pillion rider had also deposed that accident had taken place due to the negligence of the driver of Tata Indica- strict proof is not required in the proceedings before Motor Accident Claims Tribunal- claimant has to prove prima facie case- in the present case, claimant has prima facie proved that driver of Tata Indica had driven the vehicle in a rash and negligent manner due to which claimant had sustained injuries- appeal dismissed. (Para-10 to 19)

Cases referred:
N.K.V. Bros. (P.) Ltd. vs M. Karumai Ammal and others etc., AIR 1980 Supreme Court 1354
Oriental Insurance Co. vs Mst. Zarifa and others, AIR 1995 Jammu and Kashmir 81
Sohan Lal Passi versus P. Sesh Reddy and others, AIR 1996 Supreme Court 2627
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646
Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

For the Appellant : Mr. Lalit K. Sharma, Advocate.
For the Respondents: Mr. Rakesh Thakur, Advocate, for respondent No. 1.
Respondents No. 2 & 3 already ex-parte.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 29th November, 2008, made by the Motor Accident Claims Tribunal-II, Kangra at Dharamshala, H.P. (hereinafter referred

to as "the Tribunal") in M.A.C. Petition No. 29-K/2005 titled **Naveen Gupta versus Shri Sikander Singh & others,** whereby compensation to the tune of Rs.2,60,789/- with interest @ 7½ % per annum and cost quantified at Rs.7,000/- was awarded in favour of the claimant-respondent No. 1 herein and the insurer-appellant herein came to be saddled with liability (for short, "the impugned award").

2. The claimant, insured-owner and driver have not questioned the impugned award, on any count. Thus, it 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 argued that the accident was not the outcome of the rash and negligent driving of driver, namely, Sikander Singh, but the same was caused by the claimant himself, while driving his motor cycle and prayed that the appellant be exonerated from liability. The argument is misconceived for the following reasons.

5. The claimant, being victim of the motor vehicular accident, had filed the claim petition under Section 166 of the Motor Vehicles Act, for short 'the Act', before the Tribunal, for grant of compensation to the tune of Rs.2,00,000/- as per the break-ups given in the same.

6. In the claim petition, the claimant has specifically averred that the accident was outcome of rash and negligent driving of driver, namely, Sikander Singh.

7. The respondents contested the claim petition on the grounds taken in their memo of objections.

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

"1. *Whether the respondent No. 1 was driving vehicle PB-46A-9433 owned by respondent No. 2 in a rash and negligent manner and had struck it against the motor cycle of the petitioner causing grievous injury to him? …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 the respondent No. 1 was not holding valid and effective driving licence at the time of accident, if so its effect? ….OPR-3

4. Whether the vehicle was being driven by the respondent No. 1 in violation of documents and rule, If so, its effect? …OPR-3.

5. Whether the petition is not maintainable against the respondent No. 3 as alleged? ….OPR

6. Relief."

9. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that driver, namely, Sikander Singh, has driven the offending vehicle, i.e. Tata Indica bearing registration No. PB-46A-9433, rashly and negligently, on 03.12.2004, at about 9.00-9.05 a.m, at Dharamshala Road, Birta, District Kangra and caused the accident, in which claimant sustained injuries.

Issue No. 1

10. I have gone through the impugned award. The Tribunal has made discussion in paras 8 to 13 relating to rash and negligent driving, scanned the evidence and

rightly came to the conclusion that the accident was outcome of the rash and negligent driving of driver, namely, Sikander Singh. There is nothing on the file, on the basis of which, it can be held that the accident was outcome of the rash and negligent driving of the claimant himself or the outcome of contributory negligence.

11. It is apt to record herein that Shri Ashneel Singh Gill, who was Pillion Rider on the motor cycle, appeared in the witness box as PW-4 on behalf of the claimant. He has given details how the accident has taken place, which is recorded in para-13 of the impugned award.

12. It is a beaten law of the land that strict proof is not required, but the claimant has *prima-facie* to prove, that the accident is outcome of rash and negligent driving of the driver.

13. My this view is fortified by the judgment of the Apex Court in the case titled as **N.K.V. Bros. (P.) Ltd. versus M. Karumai Ammal and others etc.,** reported in **AIR 1980 Supreme Court 1354.** It is apt to reproduce relevant portion of para 3 of the judgment herein:

> *"3. Road accidents are one of the top killers in our country, specifically when truck and bus drivers operate nocturnally. This proverbial recklessness often persuades the courts, as has been observed by us earlier in other cases, to draw an initial presumption in several cases based on the doctrine of res ipsa loquitur. Accident Tribunals must take special care to see that innocent victims do not suffer and drivers and owners do not escape liability merely because of some doubt here or some obscurity there. Save in plain cases, culpability must be inferred from the circumstances where it is fairly reasonable. The court should not succumb to niceties, technicalities and mystic maybes. We are emphasising this aspect because we are often distressed by transport operators getting away with it thanks to judicial laxity, despite the fact that they do not exercise sufficient disciplinary control over the drivers in the matter of careful driving. The heavy economic impact of culpable driving of public transport must bring owner and driver to their responsibility to their "neighbour". Indeed, the State must seriously consider no-fault liability by legislation. A second aspect which pains us is the inadequacy of the compensation or undue parcimony practised by tribunals. We must remember that judicial tribunals are State organs and Art. 41 of the Constitution lays the jurisprudential foundation for state relief against accidental disablement of citizens. There is no justification for niggardliness in compensation. A third factor which is harrowing is the enormous delay in disposal of accident cases resulting in compensation, even if awarded, being postponed by several years. The States must appoint sufficient number of tribunals and the High Court should insist upon quick disposals so that the trauma and tragedy already sustained may not be magnified by the injustice of delayed justice. Many States are unjustly indifferent in this regard." (Emphasis Added)*

14. The Jammu and Kashmir High Court in the case titled as **Oriental Insurance Co. versus Mst. Zarifa and others,** reported in **AIR 1995 Jammu and Kashmir 81,** held that the MV Act is Social Welfare Legislation and the procedural

technicalities cannot be allowed to defeat the purpose of the Act. It is profitable to reproduce para 20 of the judgment herein:

> *"20. Before concluding, it is also observed that it is a social welfare legislation under which the compensation is provided by way of Award to the people who sustain bodily injuries or get killed in the vehicular accident. These people who sustain injuries or whose kith and kins are killed, are necessarily to be provided such relief in a short span of time and the procedural technicalities cannot be allowed to defeat the just purpose of the Act, under which such compensation is to be paid to such claimants."*

15. It would also be profitable to reproduce relevant portion of para 12 of the judgment of the Apex Court in the case titled as **Sohan Lal Passi versus P. Sesh Reddy and others,** reported in **AIR 1996 Supreme Court 2627,** herein:

> *"12. .....While interpreting the contract of insurance, the Tribunals and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment-debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."*

16. The Apex Court in a case titled **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another**, reported in (**2013) 10 Supreme Court Cases 646** has laid down the same principle and held that strict proof and strict links are not required.

17. The same principle has been laid down by this Court in a series of cases.

18. A Single Judge of this Court in FAO No. 127 of 1999, titled as Bimla Devi and others versus Himachal Road Transport Corporation and others, decided on 22.08.2005, held that the claimants have to prove the case by leading cogent evidence and applied the mandate of CPC read with the Evidence Act, was questioned before the Apex Court by the medium of Civil Appeal No. 2538 of 2009, titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and the Apex Court set aside the said judgment and held that strict proof is not required. It is apt to reproduce paras 2 and 12 to 15 of the judgment herein:

> *"2. This appeal is directed against a judgment and order dated 22.8.2005 passed by the High Court of Himachal Pradesh, Shimla in FAO No. 127 of 1999 whereby and whereunder an appeal preferred against a judgment and award dated 28.10.1998 passed by the Motor Accident Claims Tribunal-II [MACT (I), Nahan] in MAC Petition No. 21-NL/2 of 1997, was set aside.*

xxx xxx xxx

12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimants predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem report vis-a-vis the averments made in a claim petition.

13. The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

14. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos. 2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant s witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos. 2 and 3.

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

19. The claimant has *prima facie* proved that the driver of the offending vehicle had driven the same, rashly and negligently, at the relevant point of time and had caused the accident, in which the claimant sustained injuries. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

Issues No. 3 to 5.

20. It was for the respondents to prove issues No. 3 to 4, have not led any evidence, thus have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on Issues No. 3 to 5 are upheld.

Issue No. 2

21. The Tribunal has made assessment, the details of which are given in paras-14 to 16 of the impugned award. The assessment made by the Tribunal is reasonable. The award amount is just and appropriate, cannot be said to be excessive, in any way.

22. Having said so, it is held that there is no merit in the appeal. Accordingly, the impugned award is upheld and the appeal is dismissed.

23. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' account cheque.

24. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Kamaljeet @ Kamal ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr. Appeal No. 236/2015
Reserved on: 11.12.2015
Decided on: 14.12.2015

N.D.P.S. Act, 1985- Section 20 and 55- Accused was apprehended while travelling on a motorcycle with a bag carrying 1.980 kgs. charas by the police team during nakka- accused convicted by the trial Court- in appeal held, that compliance of Section 55 of N.D.P.S. Act was not made as SHO concerned had not re-sealed the case property deposited with him- further held, that although, compliance of section 55 of the Act is directory yet, the same is required to be followed scrupulously taking into account the stringent sentence under the Act – omission on the part of SHO creates doubt regarding the genuineness of the case property- further police official who had brought the case property from malkhana to Court and back, was not examined and entry in malkhana register with respect to taking of case property to the Court was not proved- the alleged independent witnesses (PW-7) not supported the prosecution case and admitted in cross examination to be a witness in number of similar cases- failure to associate independent witness by Investigating Officer also creates doubt in the prosecution story- acquittal of accused not established- appeal accepted. (Para- 14 to 16)

For the Appellant: Mr. T.S. Chauhan, Advocate.

For the Respondent: Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

The instant appeal has been instituted against Judgment dated 20.5.2015 rendered by learned Special Judge-I, Sirmaur District at Nahan, HP in Sessions Trial No. 07-ST/7 of 2014, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), has been convicted and sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.1,00,000/-, and in default of payment of fine, to further undergo simple imprisonment for six months, for commission of offence under Section 20(b)(ii)(C) of the Act.

2. Case of the prosecution, in a nutshell, is that on 23.2.2014 at about 9.30 am, PW-9 ASI Jeet Ram alongwith PW-1 HHC Harender Singh, PW-8 HHC Ramesh Chand driver of Government vehicle No. HP-17B-1222 and Constable Raj Kumar was present at Shaya Ghat in connection with patrolling and Naka duty. They had checked about seven vehicles. A motor-cycle bearing registration No. CH-01-AV-8182 being driven by accused Kamaljeet came from Neripul side towards Sanora, which was signalled to stop. Accused had put on a black and brown check blanket and also kept one white coloured bag Ext. P-2 in between his legs and petrol tank of the motor cycle. PW-9 ASI Jeet Ram touched the bag and found something in the shape of sticks and balls in the bag and on opening the bag one another blue coloured bag Ext. P5 was found inside that white bag. PW-9 opened the blue coloured bag and found one plastic packet Ext. P4 inside it, wrapped with cello tape. In that plastic packet Ext. P4, Charas Ext. P5 was found in the shape of sticks and balls. It weighed 1.980 kg. Sealing process was completed on the spot. Case property was put in a cloth parcel Ext. P1, which was sealed with seal impression 'K'. Sample seal Ext. PE was drawn on a separate cloth piece, on which PW-1 and PW-7 put their signatures besides the accused. Motor-cycle was taken into possession. NCB form Ext. PW-3/D was filled in triplicate, on the spot. Rukka was prepared and sent to the police station, Rajgarh, for registration of FIR Ext. PB. PW-9 handed over the case property alongwith NCB form, sample seal and connected documents with MHC Parshotam Singh in safe condition. PW-3 MHC Parshotam Singh filled in columns No. 10 and 12 of the NCB form Ext. PW-3/D in triplicate. He made endorsement Ext. PW-3/E. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 9 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He denied the case of the prosecution. Trial Court convicted and sentenced the accused as noticed herein above. Hence, this appeal.

4. Mr. T.S. Chauhan, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. M.A. Khan, Additional Advocate General, has supported the judgment of conviction dated 20.5.2015.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 HHC Harender Singh deposed that at about 9.30 am on 23.2.2014, a motorcycle came from Neripul side towards Sanora. It was signalled to stop. Rama Nand was present at the spot. Accused Kamaljeet was riding the motorcycle. Accused was putting on a black and white check blanket. He had kept one white coloured bag in between his legs and petrol tank. Bag was opened. It contained charas. It weighed 1.980 kgs. Sealing process was completed. Parcel was sealed with seal impression 'K' at 9 places. Sample seal was drawn on a separate piece of cloth. Seal was handed over to witness Rama Nand. Investigating Officer also filled up NCB form in triplicate. He prepared Rukka Ext. PA. It was handed over to him to be taken to the Police Station Rajgarh. He handed over the same to MHC Purshotam Singh, who recorded FIR Ext. PB. Personal search of the accused was conducted after his arrest. While recording statement of PW-1 Harender Singh, case property was produced in the Court. Parcel was permitted to be opened by the learned Public Prosecutor. In his cross-examination, he has admitted that they have checked vehicles at Sanora chowk. He admitted that there is a tea-stall at Sanora Chowk, which belongs to one Kuldeep.

8. PW-2 SI Sucha Singh deposed that he remained posted as SI /SHO Rajgarh from July 2013 to July, 2014.

9. PW-3 Purshotam Singh deposed that on 23.2.2014, HHC Harender Singh brought Rukka Ext. PA to Police Station Rajgarh. He registered FIR Ext. PB. ASI Jeet Ram handed over parcel Ext. P1, which was properly intact with seal 'K' at 9 places, alongwith sample seal Ext. PE, NCB form in triplicate, alongwith other connected documents and motorcycle No. CH-01-AV-8182. ASI Jeet Ram also deposited a blanket, one purse. He put entry of the above said parcel Ext. P1 and articles in Malkhana Register at Sr. No. 303 and No. 304 dated 23.2.2014 vide Ext. PW-3/B and PW-3/C. He brought the original Malkhana register to the Court. He filled up column Nos. 10 and 12 of NCB form Ext. PW-3/E. He handed over parcel Ext. P1 alongwith sample seal and other connected documents to Constable Shrikant on 24.2.2014 for depositing with FSL Junga. He deposited the same at FSL Junga. In his cross-examination, he has admitted that no resealing was done in case FIR NOs. 15/14 and 16/14 dated 23.2.2014.

10. PW-4 Shrikant deposed that MHC Purshotam of Police Station had handed over to him case property of FIR Nos. 15/14, 16/14 and 17/14 vide RC No. 108/13-14 alongwith connected documents. He deposited the same with FSL Junga.

11. PW-7 Rama Nand is the independent witness. He deposed that on 23.2.2014, he had gone to Rajgarh due to personal work. At about 3 pm, police met him in Rajgarh Bazaar. He was taken to the Police Station, Rajgarh. His signatures were obtained on blank papers. Nothing was recovered in his presence from the accused. No charas was recovered from the accused. He was declared hostile and cross-examined by the learned Public Prosecutor. He identified his signatures on Ext. PW-1/A and Ext. PE. He further testified that he has not gone through the contents of the documents. He also denied that on 23.2.2014 at 9.30 am, he was present in his cowshed at Shaya Ghat. He deposed that portion 'A' to 'A' of his statement was not given to the police. He also denied that a person came on motorcycle from Neri Pul. He also denied that accused got checked documents of motorcycle. He also denied that on checking motorcycle, one white coloured bag was found in between the legs and fuel tank of the motorcycle hidden with blanket. He denied that some substance in the shape of sticks and balls was found. He denied that charas weighed 1.980 kgs. He also denied that seal after use was handed over to him. In his cross-examination by the learned defence Counsel, he has admitted that he has been citied as a witness by the police in a number of cases. His signatures were obtained on blank papers.

12. PW-8 Ramesh Chand deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. Rukka was prepared. It was sent to the Police Station, on the basis of which FIR was registered.

13. PW-9 ASI Jeet Ram is the Investigating Officer. He testified the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. NCB form in triplicate was filled in. Rukka was prepared and sent to the Police Station for registration of FIR. On their arrival in the Police Station Rajgarh, he handed over case property alongwith NCB form, sample seal and other connected documents to the MHC Purshotam Singh in safe condition.

14. What emerges from the facts is that on 23.2.2014, accused was apprehended. His bag was searched. Contraband was recovered. It weighed 1.980 kg. Rukka was prepared and sent to the Police Station. Case property was sealed on the spot with 9 seals of seal impression 'K'. However, fact of the matter is that case property was never produced before the SHO Sucha Singh by PW-2 Jeet Ram for resealing. Resealing is required to be done to ensure that the contraband was recovered from the conscious possession of accused and all the codal formalities were completed on the spot. PW-3 Purshotam Singh categorically admitted that no resealing was done in FIR No. 14/14 dated 23.2.2014. There is also no explanation why resealing was not done when SHO was present at the Police Station. SHO was required to fill up columns No. 9 to 11 of the NCB form, Ext. PW-3/D. Columns No. 10 and 12 were filled up by MHC. It has come on record that police party has gone on patrolling duty . They checked many vehicles. It was not an isolated or secluded place. Police should have associated occupants of the vehicles plying through the Chowk. Prosecution has produced PW-7 Rama Nand as independent witness. He has not supported the case of the prosecution. He was declared hostile. According to him, his signatures were obtained on blank papers . Nothing was recovered from accused in his presence. No charas was recovered from Kamaljeet. Though he has admitted his signatures on Ext. PW-1/A and Ext. PE. He has also admitted in his cross-examination done by learned defence counsel that he was cited as a witness by the police in a number of cases and he was called by the police from the Bus Stand Rajgarh. His signatures were obtained on blank papers on 23.2.2014 at 3.00 pm. It was necessary for the police to associate independent witnesses to inspire confidence in the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. Section 55 of the Narcotic Drugs & Psychotropic Substances Act, 1985 though directory in nature, its provisions are required to be followed scrupulously taking into consideration the stringent sentence under the Act. In case, resealing is not undertaken as per Section 55 of the Act, doubt is created whether the sample sent for chemical examination was of the same article which was recovered and seized from the possession of accused persons or the vehicle.

15. Case property was produced while examining PW-1 Harender Singh, by the learned Public Prosecutor. Who has brought the case property from Malkhana to the Court has not been examined. Entry in the Malkhana register to the effect that who has taken the property to the Court, is necessary as per Punjab Police Rules, 1934.

16. It is necessary that as and when case property is taken out from Malkhana, necessary entry is required to be made in the Malkhana Register and also at the time when case property is redeposited in the Malkhana. Case property in NDPS cases is required to be kept in safe custody from the date of seizure till its production in the Court. It is also necessary that when case property is taken out from Malkhana, DDR is made and also at the time when case property is redeposited in the Malkhana. Thus, it casts doubt whether it is the same case property which was recovered from the accused and sent to FSL or it was

case property of some other case. The prosecution has failed to prove case against the accused.

17. In view of the discussion and analysis made hereinabove, the present appeal is allowed. Judgment dated 20.5.2015 rendered by learned Special Judge-I, Sirmaur District at Nahan, HP in Sessions Trial No. 07-ST/7 of 2014 is set aside. Accused is acquitted of the commission of offence under Section 20(b)(ii)(C) of the Act. He is ordered to be released forthwith, if not required by the police in any other case. Fine amount, if any paid by the accused, be refunded to him. Registry is directed to prepare the release warrant of the accused and send the same forthwith to the Superintendent of Jail concerned forthwith.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Rajiv Sharma & another .....Appellants.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 421 of 2012
Reserved on: December 11, 2015.
Decided on: December 14, 2015.

Indian Penal Code, 1860- Section 302, 120-B and 201- The deceased had gone to his duty but had not returned- a missing report was lodged with the police- deceased had told his son that he would not return and would be going with accused 'R'- accused 'R' had illicit relation with the wife of the deceased- accused 'R' had got a bottle of liquor- deceased was made to consume alcohol and was subsequently pushed into the lake after tying stone to his feet with nylon rope- prosecution version regarding the illicit relation between the wife of the deceased and the accused 'R' was not proved satisfactorily- dead body could not be recovered- PW-5 who deposed about the accused and the deceased having been seen together admitted that his eye sight was slightly feeble, it was dark and he had seen the deceased from a distance of 20-25 meters- held that a person cannot recognize someone in the moon light beyond the distance of 17 yards- therefore, his testimony that he had seen the deceased and the accused together is not acceptable- extra judicial confession stated to have been made by the accused was not reliable- PW-17 stated that deceased had visited his shop and was drunk at that time- the disclosure statement was not proved satisfactorily- there was delay in recording the FIR which was not satisfactorily explained- call detail record was not proved in accordance with the Section 65(b) of Indian Evidence Act- the motive was not proved- chain of circumstances was not complete- in these circumstances, prosecution had failed to prove his case against the accused beyond reasonable doubt- accused acquitted. (Para-28 to 65)

Cases referred:

Vijay Shankar vrs. State of Haryana, JT 2015 (8) SC 216
Chattar Singh & another vrs. State of Haryana, AIR 2009 SC 378
Ajit Singh Harnam Singh Gujral vrs. State of Maharashtra, r (2011) 14 SCC 401
Dandu Jaggaraju vrs. State of Andhra Pradesh, (2011) 14 SCC 674
Sathya Narayan vrs. State rep. by Inspector of Police, (2012) 12 SCC 627
Majenderan Langeswaran vrs. State (NCT of Delhi) and another, (2013) 7 SCC 192

Rishipal vrs. State of Uttarakhand, r (2013) 12 SCC 551
State of Rajasthan vrs. Kashi Ram, (2006) 12 SCC 254
Ajay Singh vrs. State of Maharashtra, (2007) 12 SCC 341
Anvar P.V. vrs. P.K. Basheer and others, r (2014) 10 SCC 473
Rama Nand and others vrs. Stae of Himachal Pradesh, (1981) 1 SCC 511
Sevaka Perumal and another vrs. State of Tamil Nadu, (1991) 3 SCC 471,
Ram Gulam Chaudhary and others vrs. State of Bihar, (2001) 8 SCC 311

For the appellants: M/S Chander Shekhar Sharma and Nishi Goel, Advocates for respective appellants.
For the respondent: Mr. M.A.Khan, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 28.7.2012 and 2.8.2012, respectively, rendered by the learned Addl. Sessions Judge, Ghumarwin, Distt. Bilaspur, H.P., in Sessions Trial No. 15-7 of 2011, whereby the appellants-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 120-B, 302 and 201 IPC, have been convicted and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.3,000/- each under Section 302 IPC. They were also sentenced to suffer rigorous imprisonment for a period of seven years and to pay fine of Rs.3,000/- each for the offence punishable under Section 201 IPC. Both the sentences were ordered to run concurrently. In lieu of default of payment of fine, they were further ordered to undergo rigorous imprisonment for two months each under both the counts.

2. The case of the prosecution, in a nut shell, is that accused Reshma Devi lodged missing report Ext. PW-26/A of her late husband Balak Ram (hereinafter referred to as the deceased) on 22.5.2011, at about 1:05 PM with Police Station Talai. Jiwan Kumar PW-1, brother of deceased was informed by his wife Meena Kumari (PW-21) on 21.5.2011 over telephone that deceased had gone to duty on 20.5.2011 but he did not return to his house after duty. Jiwan Kumar came to the Village Badgaon on 22.5.2011 from Ludhiana. On 23.5.2011 and 26.5.2011, he went to the Police Station to enquire about the whereabouts of the deceased. Balak Ram deceased was not found and then report Ext. PW-1/A was lodged by Jiwan Kumar with the police on 28.5.2011. The deceased was part-time worker in Ayurvedic Dispensary, Dohak. On 20.5.2011, he had gone to attend his duties in the dispensary but did not return. Accused Rajiv Sharma used to visit the house of Balak Ram for the last one and a half year in the absence of deceased and his children. He used to serve liquor to the deceased. He was also having illicit relations with accused Reshma Devi, wife of the deceased. He had given one mobile phone to accused Reshma Devi. The mother of deceased, Juga Devi (PW-3) had deterred accused Rajiv Sharma few days back prior to the occurrence from visiting the house of deceased and thereafter accused stopped visiting the house. Accused Reshma Devi left the house on 20.5.2011, in the morning, in order to go to the house of her maternal Uncle at Thana Kalan to condole the death of her maternal cousin. She did not come back to the house on 20.5.2011 and she returned on 21.5.2011 at about 6:30-7:00 AM. Amrit Lal (PW-4) on 20.5.2011 after finishing his work was on his way to house and met Balak Ram at place Binkhiu Bawri at 7:00-7:15 PM and deceased had given three small packets containing the medicines as his son, namely, Munish Kumar, was suffering from dysentery. The deceased told Amrit Lal (PW-4) that he was to go to Proiyan

with accused Rajiv Sharma. Amrit Lal (PW-4) handed over the medicines to the daughter of deceased, namely, Shalu. Balak Ram (deceased) also told his son Munish Kumar (PW-6) on 20.5.2011 while leaving the house that he would not return on that day and would go with accused Rajiv Sharma. Accused Rajiv Sharma got a bottle of liquor through Raj Kumar (PW-18) on 20th and proceeded towards Binkhiu Bawri. PW-16 Shakti Chand marked absence of Balak Ram (deceased) in the attendance register after 20.5.2011 and sent the absent report Ext. PW-16/A to Distt. Ayurvedic Dispensary. PW-5 Julfi Ram had seen accused Rajiv Sharma and Balak Ram on 20.5.2011 at about 7:30-7:45 PM at Binkhiu Bawri going towards Dam side and Balak Ram (deceased) contacted accused Rajiv Sharma on telephone of Thakuri Devi. The call did not mature and then he talked on mobile of Prem Lal. Balak Ram (deceased) worked till 6:30-7:00 PM on 20.5.2011 on the stone crusher of Thakuri Devi. Accused Reshma Devi visited the shop of Ranjana (PW-9) and purchased a pair of sandals and left by saying that she would take bus for Proiyan. PW-12 Garib Dass had seen accused Reshma Devi at Proiyan going towards lake. PW-3 Juga Devi had weaved a cot with a thin thread like silk out of fish net and part of thread left was taken by accused Reshma Devi and given to accused Rajiv Sharma. Accused Rajiv Sharma had taken Balak Ram on 20.5.2011 for drinking alcohol towards lake side near Proiyan. He was made to consume alcohol and got intoxicated. Accused Rajiv Sharma, while in custody, made disclosure statement vide Ext. PW-8/A, in the presence of witnesses, namely, Ramesh Chand and Amar Singh to the extent that he could identify the place Binkhiu Bawri from where he and Balak Ram proceeded together and also place in the lake near Proiyan where Balak Ram (deceased) was pushed into the water by him after tying stone to his feet with nylon rope. He led the police to those places. Accused Rajiv Sharma also identified the boat which was boarded by him and Balak Ram (deceased) on 20.5.2011 at about 7:45 PM and went towards Proiyan. He also disclosed to the police that he had taken one of the Oars at Bhakra because while proceeding towards Proiyan, the boat slided due to storm and one of the Oars was broken. The said Oar belonged to Ravinder Singh (PW-13) taken from his boat at Bhakra. Accused Reshma Devi, while in police custody, made disclosure statement, Ext. PW-8/B, in the presence of witnesses, namely, Ramesh Chand and Amar Singh to the effect that she could recover the diary and pens from her house, which she had taken out from the bag of Balak Ram at the place, where she had thrown the bag into the water. Consequently, diary Ext. P-1 and ball pens Ext. P-2 were recovered vide memo Ext. PW-6/A. Mobile No. 90220-73801 belonged to accused Rajiv Sharma and mobile No. 98573-18473 belonged to accused Reshma Devi. The call details of the mobile numbers are Ext. PW-20/B and Ext. PW-20/C. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 30 witnesses. The accused were also examined under Section 313 Cr.P.C. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Chander Shekhar Sharma and Ms. Nishi Goel, Advocates, for the respective accused have vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 28.7.2012.

5. We have heard learned counsel for both the sides and gone through the judgment and records of the case carefully.

6. PW-1 Jiwan Kumar deposed that accused Reshma Devi is wife of his deceased brother Balak Ram. On 21.5.2011, his wife Meena Kumari intimated him over telephone at about 4:00-5:00 PM that Balak Ram (deceased) had gone to his duty on

20.5.2011 but did not come to his house. He came to house on 22.5.2011 from Ludhiana. He came to know that Reshma had lodged missing report of Balak Ram at PS Talai. They made search with their relatives and known places where he could have gone but to no avail. Accused Rajiv Sharma used to visit house of Balak Ram (deceased). The house of accused Rajiv Sharma was at a distance of 200 meters from their house. His mother had deterred accused Rajiv Sharma from visiting house of his deceased brother about 20-25 days before his brother went missing. Accused Rajiv Sharma had illicit relations with accused Reshma Devi, wife of his brother. On 20.5.2011 during the evening, his brother Balak Ram (deceased) had sent medicines for his ailing son through Amrit Lal and he came to know that after sending medicines, his brother left in the company of accused Rajiv Sharma. This fact was told to him by Amrit Lal. The dead body of his brother could not be recovered. The accused Rajiv Sharma and accused Reshma Devi disclosed to police in his presence that on 20.5.2011 they served liquor to Balak Ram at Proiyan and when he became intoxicated accused Rajiv Sharma and Reshma tied the feet of deceased Balak Ram with a nylon rope and the other end of rope was tied to a stone and then they threw Balak Ram in the water. FIR Ext. PW-1/A was registered on 28.5.2011. The police made efforts to fish out the dead body of his brother and even pressed into service the divers of BBMB but the dead body could not be traced. Accused Reshma Devi also disclosed to the police that she took out small diary and two pens from the bag of the deceased and threw the bag in the water after putting stones in the bag after they pushed Balak Ram in the water. She brought diary and pens to her house. In his cross-examination, he deposed that he had disclosed to the police about 20-25 days before his brother went missing that his mother had deterred accused Rajiv Sharma to not to visit their house. (Confronted with FIR Ext. PW-1/A, where words "20-25 days" are not mentioned) He had not disclosed to the police that medicines had been sent through Amrit Lal. Again said that he had disclosed to the police that medicines had been sent, but name of ailing son was not disclosed. He had not disclosed to the police that nylon rope was used to tie feet of Balak Ram. He had not disclosed to the police that both accused had made any confession in his presence. Balak Ram used to consume liquor from many years. He did not remember the date when he came to know about the visit of accused Rajiv Sharma to the house of his brother but he being their close neighbour was frequent visitor of house of his brother and he was aware of the same. He further stated that perhaps he came to know on 25.5.2011 about the illicit relations of accused Reshma with accused Rajiv Sharma. His wife told him that accused Rajiv Kumar visits the house of Balak Ram (deceased) in his absence. Except his wife, no other person told him this fact.

7. PW-2 Bal Krishan deposed that Balak Ram was part time employee in Ayurvedic Dispensary, Dohak and after leave, he used to do private work. Accused Rajiv Sharma used to visit the house of Balak Ram frequently. Balak Ram used to dine and drink with accused Rajiv Sharma. Accused Rajiv Sharma also used to visit the house of Balak Ram in his absence. About 20-25 days prior to Balak Ram went missing, mother-in-law of accused Reshma had asked accused Rajiv Sharma not to visit the house of Balak Ram. Thereafter, accused Rajiv Sharma reduced his visits. Lastly, he saw Balak Ram going to his duties on 20.5.2011 at 8:00 AM when he came to his shop. He used to carry a small bag with him. On 20.5.2011 accused Reshma had gone to Thana Kalan before departure of Balak Ram to condole the death of her cousin and she came back on 21.5.2011 at about 6:30-7:00 AM. On 21.5.2011, Reshma Devi came to his shop at about 7:00 PM and told that her husband had not returned on 20.5.2011. He telephonically informed Jiwan Kumar to come back to his house. On 28.5.2011, the police came to Brahmnighat with accused Rajiv Sharma and accused Rajiv Sharma took the police in boat to Proiyan and got the boat stopped at a point and told that he tied both legs of Balak Ram with a stone with nylon rope and pushed Balak Ram in water from the boat. He also confessed that he had served liquor

to Balak Ram and he became intoxicated. The police also sought the help of BBMB divers to trace out the dead body but the water was quite deep and they were not equipped with the relevant material to go more deep in the water. In his cross-examination, he admitted that mother-in-law of accused Reshma Devi had not asked accused Rajiv Sharma to not to visit her house in his presence. He had not disclosed to the police that Balak Ram had come to his shop at morning on 20.5.2011 and accused Reshma left for Thana Kalan before departure of Balak Ram and she came back at 6:30 /7:00 AM. He has not disclosed to the police that he has intimated Jiwan Kumar over telephone on 22.5.2011 requesting him to come back.

8. PW-3 Smt. Juga Devi is mother-in-law of accused Reshma Devi and mother of Balak Ram (deceased). According to her, accused Rajiv alias Chuha used to pretend to be God brother of Reshma but in fact, both were having illicit relations. The house of accused Chuha alias Rajiv is at a distance of 30-40 meters from their house. Accused Rajiv alias Chuha had given mobile phone to accused Reshma. She had weaved the cot with a thin thread like silk out of fish net. The part of thread was left which was taken by accused Reshma from her. Her son used to keep small bag with him. In her cross-examination, she categorically stated that she has told Bal Krishan that both the accused were having illicit relations. Except Bal Krishan, she did not tell this fact to any other person.

9. PW-4 Amrit Lal deposed that on 20.5.2011, when he reached near Binkhiu Bawri at 7:00-7:15 PM, Balak Ram met him there who was sitting. He told him that his son Munish was ill and suffering from dysentery. He gave him three small packets containing medicines which were to be given at his house. Balak Ram told him that he would go to Proiyan with Rajiv Sharma. Thereafter, he went to the house of Balak Ram and handed over three packets to Shalu, daughter of Balak Ram. Accused Rajiv Sharma used to visit the house of Balak Ram as they were having friendship. Jiwan had told him that both the accused were having illicit relations.

10. PW-5 Julfi Ram is the most material witness. According to him, at about 7:30-7:45 PM on 20.5.2011, he saw Balak Ram and accused Rajiv alias Chuha going together towards Dam site. Accused Rajiv alias Chuha was having an envelope in his hand and Balak Ram was having a small bag. After that date, he never saw Balak Ram. In his cross-examination, he admitted specifically that his eye sight was slightly feeble. He also admitted that it gets dark at 7:00 PM during summer. He saw Balak Ram and accused Chuha alias Rajiv Sharma from a distance of 20-25 meters.

11. PW-6 Munish Kumar is the son of deceased Balak Ram. He testified that his father went to office on 20.5.2011. His mother went to Village Thana Kalan to condole the death of her maternal cousin. His father did not come back from his duties. His mother also did not come back on 20.5.2011. She came on 21.5.2011. Accused Rajiv Sharma used to visit their house and used to serve liquor to his father. He also used to visit their house in the absence of his father. He identified two pens and one diary. In his cross-examination, he admitted that his father was having friendly relations with accused Rajiv Sharma. He did not know as to whether his father used to borrow money from accused Rajiv Sharma. He admitted that his father never objected to the visits of accused Rajiv Sharma to their house. He did not remember as to when accused Rajiv Sharma visited last time before his father went missing.

12. PW-7 Hukam Chand deposed that on 20.5.2011, he took out the fishing net from water and parked the boat on the side of lake at Badgaon. On 20.5.2011, due to inclement weather, he could not go to catch fishes. On 22.5.2011, when he visited his boat one of the Oars (Chappa) of his boat was broken whereas two Oars were intact. One of the

Oars was found to be of boat of Ravinder, resident of Bhakra. Accused Rajiv was present with police on 30.5.2011. He told the police in his presence that he had ferried his boat to Proiyan side with Balak Ram on 20.5.2011. He also disclosed that due to bad weather/storm, one of the Oars was broken and boat struck at Bhakra side and he brought Oar of the boat of Ravinder. The police had taken into possession his licence, broken Oar of his boat vide memo Ext. PW-7/A. In his cross-examination, he admitted that his licence had expired on 31.3.2011. Volunteered that he had already applied for renewal of licence and with renewal application, they were permitted to catch fishes. He had applied for renewal in March, 2011. He was not having any receipt of renewal of licence.

13. PW-8 Amar Singh deposed that he had gone to Police Station Talai on 30.5.2011 alongwith Ramesh Kumar and cousin of Balak Ram. Both the accused were in custody of police. They were being interrogated. Accused Rajiv Sharma made disclosure statement to the police in his presence on 30.5.2011 at about 12:30 PM to the effect that he could identify the place from where he accompanied Balak Ram to the place where they boarded boat and the place where he threw Balak Ram. It was signed by him. The statement is Ext. PW-8/A. Accused Reshma also made disclosure statement to the police in his presence and in the presence of Ramesh Chand that she could identify the place where she had thrown the bag of Balak Ram in the lake and could also get the diary and pencils recovered from her house. The disclosure statement is Ext. PW-8/B. Accused Rajiv Sharma also disclosed that he was having illicit relations with Reshma for the last 1-1/2 years and hatched a conspiracy to eliminate Balak Ram. The police got recovered diary and pens from the house of Reshma Devi. These were taken into possession vide memo Ext. PW-6/A. Thereafter, accused Rajiv Sharma led the police party to Binkhiu Bawri and got the place identified from where Balak Ram had gone together to take boat. Both had taken the boat and gone towards Proiyan side in the boat. The broken oar is Ext. P-4 and another oar is Ext. P-5.

14. PW-9 Ranjana Devi deposed that she runs a grocery shop at Thana Kalan. On 20.5.2011, a lady came to her shop at 4:30-4:45 PM and purchased a pair of sandals for Rs. 170/-. Accused Reshma had stated that she had come to condole the death of her maternal cousin and left the shop by saying that she would take bus for Proiyan.

15. PW-10 Balbir Singh deposed that he lost his son on 13.5.2011. His relatives came to condolence fixed on 20.5.2011. Accused Reshma is his maternal niece and daughter of the daughter of his Uncle. According to him, probably she came after 9:30 AM.

16. PW-11 Mehar Singh deposed that accused Reshma had come to condole the death of the son of Balbir Singh on 20.5.2011. Thereafter, she went away.

17. PW-12 Garib Dass deposed that he saw accused at Proiyan going towards lake side. Accused was wearing “Jamuni” coloured Kameez and Salwar with flower print at that time. After 13-14 days he saw accused Reshma in the custody of police at lake side at Proiyan. Many people were present there. In his cross-examination, he admitted that Proiyan is in district Una. He has not disclosed the name and address to the police as he was not aware of her name and address.

18. PW-13 Ravinder Chandel has deposed that he was summoned by the SHO to Badgaon to identify his missing Oar of the boat. The police took into possession Oar vide memo Ext. PW-7/A.

19. PW-14 Gujjar Ram deposed that Balak Ram used to come to crush stones at 3/3:15 PM and prior to that he used to attend to his duties in the dispensary. Balak Ram used to carry a small bag with him containing diary and pens etc. When they were engaged

in the work of stone crushing of Thakuri, Chuha came there and discussed with Balak Ram that 2-3 kg fishes and 2-3 bottles of liquor were required for a drinking programme at Bhakra. He did not remember the date and day when accused Chuha alias Rajiv Sharma had come. Again stated that accused had come to see Balak Ram on 18.5.2011 and had fixed the programme of 20.5.2011. On the next day, Balak Ram contacted accused on the mobile phone of Thakuri but call was not matured and then Balak Ram took the mobile of Prem Lal who had come there to keep his masonry tools. He was not aware of the deliberations over the phone. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he admitted that he was slightly hard of hearing. Accused Chuha talked to Balak Ram from a distance of about 3 meters.

20. PW-15 Kishori Lal deposed that during May, 2011, he Gujjar Ram and Balak Ram were engaged by Thakuri in stone crushing work. On 18.5.2011 at 3:00 PM accused Rajiv alias Chuha came to Balak Ram at the work site where they were working at about 4/4:30 PM and told Balak Ram that they would made programme of Proiyan/Bhakra site where they would eat and drink for which 2-3 kg fishes and 2-3 bottles of liquor were required. He also told that programme would be made of next day. On 19.5.2011, Balak Ram came to the work site where they were engaged and told them that he would confirm from Rajiv alias Chuha about the time when they would go to Proiyan and took mobile phone of Thakuri but the call did not mature. In the meantime Prem Lal came there to take his tools. Balak Ram requested Prem Lal to call on telephone No. 9022073801 of Rajiv alias Chuha but said number was not connected then Balak Ram told Prem Lal to prefix zero to the aforesaid number and then call matured. Balak Ram talked over mobile with accused Rajiv alias Chuha and then told them that programme of 19.5.2011 had been cancelled and instead, programme of 20.5.2011had been fixed. Balak Ram also came to the work site on 20.5.2011 and worked with them till 6:30-7:00 PM. Then they disbursed to their houses. After some distance, he and Gujjar Ram proceeded on a different way and Balak Ram proceeded towards Bawri. Near Bawri, Balak Ram saw Amrit Lal and gave him call to stop that he has some work with him. Balak Ram used to carry a hand bag of black colour in which he used to keep small diary and pencils etc.

21. PW-16 Shakti Chand deposed that Balak Ram was working as part time Safai Karamchari in their dispensary. Balak Ram used to open the dispensary and clean the same. He used to keep the keys in small bag. Balak Ram attended his duties lastly on 20.5.2011 and thereafter, he marked his absent in the attendance register and sent absentee report to Distt. Ayurveda Officer, Bilaspur vide Ext. PW-16/A.

22. PW-17 Gurmail Singh deposed that on 20.5.2011 Paramjeet had gone to his house and he was all alone in the liquor shop. At about 9:30/10:00 PM, Balak Ram came to his shop and demanded match box from him as other shops were closed. He gave half match sticks to him from his match box and then Balak Ram left towards lake. He appeared to be drunk at that time. Sister of Balak Ram is married in the adjoining village and as such he had seen Balak Ram going to the house of his sister through their village.

23. PW-18 Raj Kumar deposed that Rajiv Sharma had given him Rs. 200/- to fetch a liquor bottle from liquor shop Bhakra. Perhaps the date was 19th. He could not bring the bottle on that date and bought the bottle of liquor of Bagpiper on 20th and gave the same to accused Rajiv on the road at Badgaon at 5:00-6:00 PM. After taking bottle accused proceeded on the way towards Binkhiu Bawri. In his cross-examination, he deposed that Rajiv had told him that he required liquor to be served to his relatives and after taking bottle from him, he had gone to his house.

24. PW-21 Meena Kumari is the wife of PW-1 Jeewan Kumar. She deposed that accused Rajiv Sharma used to visit the house of Balak Ram and her mother-in-law had deterred him from visiting the house of Balak Ram few days prior to Balak Ram went missing. Accused Rajiv Sharma had stopped visiting the house of Balak Ram. When her mother-in-law deterred accused Rajiv Sharma, she had asked her mother-in-law, who told her that accused Rajiv Sharma and accused Reshma were having illicit relations.

25. PW-26 SI Ram Dass deposed that on 22.5.2011 at about 1:05 PM, Reshma Devi came to police station and lodged missing report of her husband Balak Ram vide Ext. PW-6/A. In between, Jiwan Kumar, brother of Balak Ram (deceased) came to Police Station perhaps on 23.5.2011 and on 26.5.2011 and inquired about the whereabouts of Balak Ram (deceased). Jiwan Kumar lodged report Ext. PW-1/A wherein he disclosed that Reshma was having illicit relations with Rajiv Sharma and both have abducted Balak Ram in order to keep their illicit relations. Mobile phones were also recovered alongwith other articles/ornaments vide memo Ext. PW-26/D. Rajiv Sharma made disclosure statement under Section 27 of the Evidence Act in the presence of Ramesh and Amar Singh, on the basis of which the recoveries were effected and the spot where they pushed down Balak Ram was identified. The boat used was also identified and the broken and unbroken Oars were also taken into possession. On 31.5.2015 the divers of BBMB were associated for fishing out the body of Balak Ram who dived 3-4 times but were unable to go deep beyond 80-90 feet as there was no visibility beyond that point. The dead body was not traced. The sims were found to be issued to accused Rajiv Sharma. The ownership record of mobile sim 90220-73801 is Ext. PW-26/J and ownership record of sim No. 98573-18473 is Ext. PW-26/K.

26. PW-27 Insp. Om Parkash deposed that ASI Ram Dass had recovered mobile phone from the personal search of accused Reshma. This was deposited by him with MHC alongwith other articles of Jamatalashi. In his cross-examination, he disclosed that he did not know that mobile Ext. P-7 was with accused Rajiv prior to 28.5.2011. He did not know that there was any entry of mobile phone in Malkhana register or not.

27. PW-28 Madan Lal Sharma deposed that letter Ext. PW-28/A was received in their office from S.P. Bilaspur through e-mail. Call detail record from 20.5.2011 to 24.5.2011 alongwith address of the owner of mobile number 98573-18473 was demanded by the police. The owner of the number was Rajiv Sharma. The aforesaid number was of reliance communication. However, later on stated that the number 98573-18473 was of Aircel and the number of reliance Tele-communication was 90220-73801, which was in the name of Rajiv Sharma. The call details were supplied to the police as per Ext. PW-28/B and PW-28/C.

28. The entire case of the prosecution is based on circumstantial evidence. In order to prove the case based on circumstantial evidence, it is necessary to complete the entire chain of events and all the incriminating circumstances must point towards the guilt of the accused. In the case based upon circumstantial evidence, motive plays a very important role. The motive attributed by the prosecution, in the present case, is that accused had illicit relations and thus they wanted to eliminate Balak Ram (deceased).

29. PW-1 Jiwan Kumar is the brother of the deceased Balak Ram. According to him, his mother had deterred accused Rajiv Sharma from visiting the house of his brother about 20-25 days before his brother went missing. According to him, accused Rajiv Sharma had illicit relations with accused Reshma, wife of his brother Balak Ram. In his cross-examination, he has admitted that perhaps he came to know only on 25.5.2011 about the illicit relations of accused Reshma with accused Rajiv Sharma. His wife told him that

accused Rajiv visits the house of Balak Ram (deceased) in his absence. Except his wife, no other person told him this fact. PW-2 Bal Krishan deposed that about 20-25 days prior to Balak Ram went missing, mother-in-law of accused Reshma had asked accused Rajiv Sharma not to visit the house of Balak Ram. Thereafter, accused Rajiv Sharma reduced his visits. In his cross-examination, he admitted that mother-in-law of accused Reshma Devi had not asked accused Rajiv Sharma not to visit her house in his presence. PW-3 Juga Devi, in her cross-examination, has categorically stated that she has told Bal Krishan that both the accused were having illicit relations. Except Bal Krishan, she did not tell this fact to any other person. PW-2 Bal Krishan has categorically stated in his cross-examination, as discussed hereinabove, that this fact was not stated by mother-in-law of accused Reshma in his presence. It is also surprising that if the wife of PW-1 Jiwan Kumar PW-21 Meena Kumari knew about these relations, she would have discussed this fact with her husband. PW-1 Jiwan Kumar has stated in his cross-examination that perhaps he came to know about this incident only on 25.5.2011. PW-2 Bal Krishan has categorically admitted that he has only seen both the accused sitting together. He has never seen both the accused naked or in compromising position.

30. PW-4 Amrit Lal deposed that Jiwan Kumar told him that both the accused were having illicit relations. It is not understandable as to why a person would disclose serious confidential matter to anyone i.e. PW-4 Amrit Lal. Rather, it has come in the statement of PW-1 Jiwan Kumar that accused Rajiv Sharma was frequent visitor of the house of his brother and he was aware of the same. PW-2 Bal Krishan has also admitted that accused Rajiv Sharma used to visit the house of Balak Ram for considerable long time. Balak Ram used to drink and dine with accused Rajiv Sharma.

31. PW-6 Munish Kumar is the son of deceased Balak Ram. He also admitted that accused Rajiv Sharma used to visit their house and used to serve liquor to his father. He also admitted that his father was having friendly relations with accused Rajiv Sharma. He admitted that his father never objected to the visits of accused Rajiv Sharma to their house. He did not remember as to when accused Rajiv Sharma visited last time before his father went missing.

32. PW-21 Meena Kumari deposed that she asked her mother-in-law who told her that accused Rajiv Sharma and accused Reshma were having illicit relations. PW-21 Meena Kumari deposed in her cross-examination that she disclosed to the police that she had asked her mother-in-law as to why she had deterred accused Rajiv Sharma from visiting the house of Balak Ram (Confronted with Mark-M1, wherein it is not so recorded). She only suspected that both the accused had illicit relations. We have already discussed that PW-3 Juga Devi has categorically stated that she has not narrated about the illicit relations of accused Rajiv Sharma and accused Reshma to any other person except Bal Krishan. Thus, the prosecution has failed to prove that both the accused were having illicit relations.

33. Now, the Court will advert to the theory of 'last seen together'. It is a fact that the body was never recovered. It has come in the statements of the witnesses that divers of BBMB had come on the spot but the dead body was not traced. The police has not recorded the statement of any diver as to why they could not locate the dead body when according to the prosecution, accused Rajiv Sharma has shown the place where the body of deceased was thrown into the lake.

34. The prosecution has relied upon the statement of PW-5 Julfi Ram to prove the theory of 'last seen together'. PW-5 Julfi Ram deposed that at about 7:30-7:45 PM on 20.5.2011, he saw Balak Ram and accused Rajiv alias Chuha going together towards Dam side. Accused Rajiv alias Chuha was having an envelope in his hand and Balak Ram was

having a small bag. In his cross-examination, he admitted specifically that his eye sight was slightly feeble. He also admitted that it becomes dark at 7:00 PM during summer. He saw Balak Ram and accused Chuha alias Rajiv Sharma from a distance of 20-25 meters.

35. Their lordships of the Hon'ble Supreme Court in the case of ***Vijay Shankar vrs. State of Haryana,*** reported in ***JT 2015 (8) SC 216,*** have held that as per Modi's Medical Jurisprudence and Toxicology, a man cannot recognize someone in moonlight beyond a distance of 17 yards. One yard is equivalent to 3 feet. PW-5 Julfi Ram has seen the accused in the company of Balak Ram at 7:30-7:45 PM from a distance of 20-25 meters and he has admitted categorically that his eye sight was slightly feeble. Their lordships have held as under:

> "13. Evidence of PW-11 is assailed contending that PW-11 is not a reliable witness and that he being the owner of sixty acres of land and also owning a petrol pump, it is quite unbelievable that he went in the midnight from one village to another in search of buffalo. Learned counsel for the appellant placed reliance on the Modis' Medical Jurisprudence and Toxicology 19th Edn. Para (2) at page No.61 contending that according to Tidy, "the best known person cannot be recognized in the clearest moonlight beyond a distance of seventeen yards...." and it is quite improbable that PW-11 could see the accused-appellant so clearly from such a long distance.
>
> 14. As the prosecution case mainly revolves around the evidence of PW-11, it is necessary to carefully consider whether the High Court and the trial court have properly appreciated the evidence of PW-11 and whether the courts below were right in accepting the prosecution case based on evidence of PW-11. PW-11 is a resident of village Dieghal. If we look at the economic position of PW-11, admittedly he owns sixty acres of land and also a petrol pump. It is quite improbable to believe that he was going alone from village Dujana to Dieghal which is at a distance of ten kilometers in the midnight in search of his buffalo. Trial court and the High Court erred in holding that the evidence of PW-11 cannot be brushed away as even a rich man may take the theft of petty items seriously and may take every effort to search the same. It is quite unnatural that in the midnight PW-11 went alone without informing anyone nor taking anyone with him. Further as pointed out by Sukhbir Singh (PW-10) the distance of the room where Satish Kumar was sleeping and the road leading to village Dujana is three killas i.e. three acres on the northern side and the southern and western side of the room, their fields are situated and as per the version of Vidya Rattan (PW-11) he had identified the appellant from a distance of twenty five feet in the moonlight and also in the light of a electric bulb fixed in the courtyard of the room. It is quite improbable that in the night from such a long distance PW-11 was able to identify the accused.
>
> 15. If the prosecution establishes the last seen theory, an inference can be drawn against the accused which may lead to the finding of his guilt. Considering the evidence of PW-11 and the improbabilities, evidence of PW-11 neither inspires confidence nor does it lead to a conclusion that the appellant was last seen with the deceased. As noticed earlier, PW-10 andn Satish Kumar had three servants; two were sleeping in the adjoining room where deceased-Satish Kumar was sleeping and the third one was sleeping in the truck parked at some distance from the farm. From the post-mortem certificate Ex.PS, it is seen that the deceased has sustained number of

injuries on the neck, chest and upper arm. From the post-mortem certificate it is also seen that deceased-Satish Kumar was well-built and nourished. Probably, deceased might have resisted and raised alarm, it is quite improbable that the farm servants never heard the noise and that none of the servants came to the rescue of deceased-Satish Kumar which again raises serious doubts about the prosecution case."

36. In this case also, the person who claimed to have seen the accused in the darkness had gone in the search of buffaloes at 2:30 AM. Now, as far as this case is concerned, in this case also PW-5 Julfi Ram deposed that he has left the cattle for grazing and thereafter he went in search of his cattle towards Binkhiu Bawri at 7:30-745 PM. The Court can take judicial notice of the fact that cattle are brought back before the sunset. The statement of PW-5 Julfi Ram does not inspire confidence. It was not possible for PW-5 Julfi Ram to see accused at a distance of 20-25 meters when his eye sight was also feeble.

37. The prosecution has also relied upon the extra-judicial confession made before PW-1 Jiwan Kumar by accused Rajiv Sharma and before PW-2 Bal Krishan. The disclosure statement has not been made before a person of authority. PW-1 Jiwan Kumar is the brother of the deceased. The extra-judicial confession made before PW-7 Hukam Chand is also not believable for the simple reason that his licence to catch fish had expired on 31.3.2011. In his cross-examination, PW-1 Jiwan Kumar has admitted that he has not disclosed to the police that Nylon rope was used to tie feet of Balak Ram. He has also not disclosed to the police that both the accused had made any confession before the police. Similarly, PW-2 Bal Krishan has also admitted in his cross-examination that he has not disclosed to the police in his statement that Reshma told that she was sitting on the bank of Govind Sagar when accused Rajiv Sharma pushed Balak Ram in water from boat. He had not disclosed to the police that accused Rajiv had brought stone of 20-25 kg to tie the same to the legs of Balak Ram and then Balak Ram was pushed down in the water.

38. Mr. M.A.Khan, learned Addl. Advocate General has drawn the attention of the Court to the statement of PW-4 Amrit Lal who has deposed that he has met Balak Ram in the evening on 20.5.2011. PW-4 Amrit Lal deposed that Balak Ram met him and told him that his son Munish is ill suffering from dysentery and gave him three small packet containing medicines that the same be given at his house. He handed over the same to Shalu, daughter of Balak Ram. He also admitted that accused Rajiv Sharma used to visit the house of Balak Ram as they were having friendship. In his cross-examination, he has admitted that he has not seen accused Rajiv Sharma in the company of Balak Ram on 20.5.2011. It is intriguing to note as to why deceased Balak Ram should have handed over the medicines to PW-4 Amrit Lal to be carried to his house for his son. The normal human conduct of a father whose son was ill would be to carry medicines himself to his house.

39. The prosecution has also relied upon the statements of PW-14 Gujjar Ram and PW-15 Kishori Lal to prove that Balak Ram used to work with them in stone crushing and deceased and accused Rajiv Sharma were talking about the drinking eating fish. According to PW-14 Gujjar Ram, accused Rajiv Sharma had come to Balak Ram on 18.5.2011 and had fixed the programme of 20.5.2011. PW-14 Gujjar Ram has also admitted that he was hard of hearing and the programme of drinking on 20.5.2011 was heard by him from a distance of 3 meters.

40. PW-18 Raj Kumar deposed that about 5-6 months prior, accused Rajiv Sharma had given him Rs. 200/- to fetch a liquor bottle from liquor shop Bhakra. Perhaps the date was 19th. He could not bring the bottle on that date and bought the bottle of liquor of Bagpiper on 20th and gave the same to accused Rajiv on the road at Badgaon at 5:00-6:00

PM. After taking bottle accused Rajiv Sharma proceeded on the way towards Binkhiu Bawri. In his cross-examination, he admitted that accused Rajiv had told him that he required liquor to be served to his relatives and after taking bottle from him, he had gone to his house. His statement does not inspire confidence. In case accused Rajiv had given him Rs. 200/- to fetch liquor bottle on 19th , he would have given him on 19th itself but he bought the bottle on 20th. According to him, accused Rajiv had gone towards Binkhiu Bawri. PW-17 Gurmail Singh has deposed that at about 9:30/10:00 PM, Balak Ram came to his shop and demanded match box from him as other shops were closed. He gave half match sticks to him from his match box and then Balak Ram left towards lake. He specifically deposed that Balak Ram appeared to be drunk at that time. The case of the prosecution is also that Balak Ram was found nearby banks of lake and thus, the possibility of his drowning being drunk cannot be ruled out.

41. Their lordships of the Hon'ble Supreme Court in the case of ***Chattar Singh & another vrs. State of Haryana,*** reported in ***AIR 2009 SC 378,*** have held that at a point of time when accused and deceased were seen together alive and time when deceased was found dead, the time gap between the two must be small. It has been held as follows:

> "14. So far as the last seen aspect is concerned it is necessary to take note of two decisions of this court. In State of U.P. v. Satish [2005 (3) SCC 114] it was noted as follows:
>
> > "22. The last seen theory comes into play where the time-gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found dead is so small that possibility of any person other than the accused being the author of the crime becomes impossible. It would be difficult in some cases to positively establish that the deceased was last seen with the accused when there is a long gap and possibility of other persons coming in between exists. In the absence of any other positive evidence to conclude that the accused and the deceased were last seen together, it would be hazardous to come to a conclusion of guilt in those cases. In this case there is positive evidence that the deceased and the accused were seen together by witnesses PWs. 3 and 5, in addition to the evidence of PW-2."

42. In the instant case, the dead body has not been recovered and thus the rigors of "last seen together" won't apply strictly. Moreover, very scanty evidence has been produced by the prosecution to prove theory of "last seen together" on the basis of statement of PW-5 Julfi Ram, who has admitted that his eye-sight was feeble and he has seen the accused from a distance of 20-25 meters.

43. Their lordships of the Hon'ble Supreme Court in the case of ***Ajit Singh Harnam Singh Gujral vrs. State of Maharashtra,*** reported in ***(2011) 14 SCC 401,*** have held that the duration of time between two events ought to be so small that possibility of any other person being author of crime can be rule out. It has been held as follows:

> "27. The last seen theory comes into play where the time gap between the point of time when the accused and deceased were last seen alive and when the deceased is found dead is so small that the possibility of any person other than the accused being the author of the crime becomes impossible, vide Mohd. Azad alias Samin vs. State of West Bengal 2008(15) SCC 449 = JT 2008(11) SC658 and State through Central Bureau of Investigation vs.

Mahender Singh Dahiya 2011(3) SCC 109 = JT 2011(1) SC 545, S.K. Yusuf vs. State of West Bengal, J.T. 2011 (6) SC 640 (para14).

28. In our opinion, since the accused was last seen with his wife and the fire broke out about 4 hours thereafter it was for him to properly explain how this incident happened, which he has not done. Hence this is one of the strong links in the chain connecting the accused with the crime.

29. The victims died in the house of the accused, and he was there according to the testimony of the above witnesses. The incident took place at a time when there was no outsider or stranger who would have ordinarily entered the house of the accused without resistance and moreover it was most natural for the accused to be present in his own house during the night."

44. Their lordships of the Hon'ble Supreme Court in the case of ***Dandu Jaggaraju vrs. State of Andhra Pradesh,*** reported in ***(2011) 14 SCC 674,*** have held that in a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution. It is this circumstance which often forms the fulcrum of prosecution story. It has been held as follows:

"9. It has to be noticed that the marriage between P.W. 1 and the deceased had been performed in the year 1996 and that it is the case of the prosecution that an earlier attempt to hurt the deceased had been made and a report to that effect had been lodged by the complainant. There is, however, no documentary evidence to that effect. We, therefore, find it somewhat strange that the family of the deceased had accepted the marriage for about six years more particularly, as even a child had been born to the couple. In this view of the matter, the motive is clearly suspect. In a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution and it is this circumstance which often forms the fulcrum of the prosecution story."

45. Their lordships of the Hon'ble Supreme Court in the case of ***Sathya Narayan vrs. State rep. by Inspector of Police,*** reported in ***(2012) 12 SCC 627,*** have held that in the case of circumstantial evidence, motive also assumes significance since absence of motive would put Court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omissions or conjectures do not take place of proof. It has been held as follows:

"42) In the case of circumstantial evidence, motive also assumes significance for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omission or conjecture do not take the place of proof. In the case on hand, the prosecution has demonstrated that initially, the deceased entered the Ashram in order to assist the devotees and subsequently became one of the Trustees of the Trust and slowly developed grudge with the appellants. PWs 35 and 36, sister and brother of the deceased Leelavathi deposed that since then she became a Trustee, there was a dispute with regard to the Management of the said Trust."

46. Their lordships of the Hon'ble Supreme Court in the case of ***Majenderan Langeswaran vrs. State (NCT of Delhi) and another,*** reported in ***(2013) 7 SCC 192,*** have held that onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court and all the circumstances must lead to the

conclusion that accused is the only one who has committed crime and none else. It has been held as follows:

> "3. On 30th November, 1996, an altercation is stated to have taken place between the accused and the deceased L. Shivaraman. As the accused had sustained some cut injuries on his hands, he reported the matter to the officials. On 1st December, 1996 when the ship was on high seas, the appellant took off from his duty as helmsman on the ground of pain in his hands due to cut injuries and another helmsman Baria was asked to do the duty as replacement. As the accused and the deceased were staying in Cabin No. 25, the accused was temporarily shifted from that cabin to Cabin No. 23 due to the above incident of assault. At about 1510 hours, the accused allegedly approached IInd Officer Kalyan Singh (PW-6) with a blood- stained knife in his hand and his hands smearing in blood and is alleged to have confessed before him that he had killed L. Shivaraman. On being asked by Kalyan Singh (PW-6), the appellant handed over the blood-stained knife to him which he placed in a cloth piece without touching the same. Kalyan Singh (PW-6) then intimated the Captain and other officers. The body of L. Shivaraman was found lying in Cabin No. 23 in such a way that half of it was inside the cabin and half of it outside. The officials of Shipping Corporation of India were informed. On incident being reported, pursuant to an instruction from concerned quarter, the ship was diverted to Hongkong. On being so directed by the Captain of the ship (PW-5), Kalyan Singh (PW-6) got the body of the deceased cleaned up for being preserved in the fish room with the help of Manjeet Singh Bhupal (PW-4) and Chief Officer V.V. Muralidharan (PW-18) took photographs. The blood-stained knife was kept in the safe custody of PW-5. The accused was then apprehended, tied and disarmed before being shifted to the hospital on board. Since the ship was having Indian Flag, as per the International Treaty of which India was a signatory, the act of the accused was subject to Indian laws. Accordingly, a case bearing R.C. No. 10(S) of 1996 was registered by the Central Bureau of Investigation (CBI) against the accused on 6th December, 1996.
>
> 16. Now, we have to consider whether the judgment of conviction passed by the trial court and affirmed by the High court can be sustained in law. As noticed above, the conviction is based on circumstantial evidence as no one has seen the accused committing murder of the deceased. While dealing with the said conviction based on circumstantial evidence, the circumstances from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused, which would mean that the onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court.
>
> 17. In the case of Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343, this Court observed as under:
>
> "It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence

so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. ...."

18. In the case of Padala Veera Reddy vs. State of A.P., 1989 Supp (2) SCC 706, this Court opined as under:

"10. Before adverting to the arguments advanced by the learned Counsel, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, (1982) 2 SCC 351)"

19. In the case of C. Chenga Reddy & Ors. vs. State of A.P., (1996) 10 SCC 193, this Court while considering a case of conviction based on the circumstantial evidence, held as under:

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

20. In the case of Ramreddy Rajesh Khanna Reddy vs. State of A.P., (2006) 10 SCC 172, this Court again considered the case of conviction based on circumstantial evidence and held as under:

"26. It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. (See Anil Kumar Singh v. State of Bihar,

(2003) 9 SCC 67 and Reddy Sampath Kumar v. State of A.P., (2005) 7 SCC 603)."

21. In the case of Sattatiya vs. State of Maharashtra, (2008) 3 SCC 210, this Court held as under:

"10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances." This Court further observed in the aforesaid decision that:

"17. At this stage, we also deem it proper to observe that in exercise of power underArticle 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court—Bharat v. State of M.P., (2003) 3 SCC 106. In the light of the above, we shall now consider whether in the present case the prosecution succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime."

22. In the case of State of Goa vs. Pandurang Mohite, (2008) 16 SCC 714, this Court reiterated the settled law that where a conviction rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

23. It would be appropriate to consider some of the recent decisions of this Court in cases where conviction was based on the circumstantial evidence. In the case of G. Parshwanath vs. State of Karnataka, (2010) 8 SCC 593, this Court elaborately dealt with the subject and held as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the

evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

24. In the case of Rajendra Pralhadrao Wasnik vs. State of Maharashtra, (2012) 4 SCC 37, while dealing with the case based on circumstantial evidence, this Court observed as under:

"12. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete as not to leave any substantial doubt in the mind of the court. Irresistibly, the evidence should lead to the conclusion which is inconsistent with the innocence of the accused and the only possibility is that the accused has committed the crime.

13. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person."

25. Last but not least, in the case of Brajendrasingh vs. State of M.P., (2012) 4 SCC 289, this Court while reiterating the above principles further added that:

"28. Furthermore, the rule which needs to be observed by the court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The court has to examine the complete

chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. (Ref. Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220; Shivu v. High Court of Karnataka, (2007) 4 SCC 713 and Shivaji v. State of Maharashtra, (2008) 15 SCC 269)"

26. As discussed hereinabove, there is no dispute with regard to the legal proposition that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as laid down by this Court. In such a case, all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else."

47. Their lordships of the Hon'ble Supreme Court in the case of ***Rishipal vrs. State of Uttarakhand,*** reported in ***(2013) 12 SCC 551,*** have held that motive does not have a major role to play in cases based on eye witnesses account of incident but it assumes importance in cases that rest entirely on circumstantial evidence. Their lordships have further held that circumstances sought to be proved against accused be established beyond reasonable doubt, but also that such circumstances form so complete a chain, as leaves no option for court, except to hold that accused is guilty of offences with which he is charged. It has been held as follows:

"15. The second aspect to which we must straightaway refer is the absence of any motive for the appellant to commit the alleged murder of Abdul Mabood. It is not the case of the prosecution that there existed any enmity between Abdul Mabood and the appellant nor is there any evidence to prove any such enmity. All that was suggested by learned counsel appearing for the State was that the appellant got rid of Abdul Mabood by killing him because he intended to take away the car which the complainant-Dr. Mohd. Alam had given to him. That argument has not impressed us. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased for the car could be taken away even without physically harming Abdul Mabood. It was not as though Abdul Mabood was driving the car and was in control thereof so that without removing him from the scene it was difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The appellant has been rightly convicted for that fraudulent act which conviction we have affirmed. Such being the position, the car was already in the possession and control of the appellant and all that he was required to do was to drop Abdul Mabood at any place en route to take away the car which he had ample opportunity to do during all the time the two were together while visiting different places. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [See Sukhram v. State of Maharashtra (2007) 7 SCC 502, Sunil Clifford Daniel (Dr.) v. State of Punjab (2012) 8 SCALE 670, Pannayar v. State of Tamil Nadu by Inspector of Police (2009) 9

SCC 152]. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.

19. It is true that the tell-tale circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong is not enough to justify conviction of the appellant for murder. The trial Court has, in our opinion, proceeded more on the basis that the appellant may have murdered the deceased-Abdul Mabood. In doing so the trial Court over looked the fact that there is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in the instant case. The legal position on the subject is well settled and does not require any reiteration. The decisions of this Court have on numerous occasions laid down the requirements that must be satisfied in cases resting on circumstantial evidence. The essence of the said requirement is that not only should the circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court except to hold that the accused is guilty of the offences with which he is charged. The disappearance of deceased-Abdul Mabood in the present case is not explainable as sought to be argued before us by the prosecution only on the hypothesis that the appellant killed him near some canal in a manner that is not known or that the appellant disposed of his body in a fashion about which the prosecution has no evidence except a wild guess that the body may have been dumped into a canal from which it was never recovered."

48. PW-7 Hukam Chand deposed that when he visited his boat on 22.5.2011, one of the Oars (Chappa) of his boat was broken whereas two Oars were intact. One of the Oars was found to be of boat of Ravinder, resident of Bhakra. Accused Rajiv Sharma was present with police on 30.5.2011, who told the police in his presence that he had ferried his boat to Proiyan side with Balak Ram on 20.5.2011. He also disclosed that due to bad weather/storm, one of the Oars was broken and boat struck at Bhakra side and he brought Oar of the boat of Ravinder. The police had taken into possession his licence, broken Oar of his boat vide memo Ext. PW-7/A. In his cross-examination, he admitted that his licence had expired on 31.3.2011. Volunteered that he had already applied for renewal of licence and with renewal application, they were permitted to catch fishes. He had applied for renewal in March, 2011. He was not having any receipt of renewal of licence. PW-13 Ravinder Chandel deposed that on 22.5.2011, he went to see his boat but one of the Oars of his boat was missing. However, surprisingly, he has not lodged any FIR. The explanation given for not lodging FIR is that he was busy in construction and the value of Oar was less than Rs. 100/-. In his cross-examination, he could not disclose the date when he commenced the construction and when his construction completed.

49. Mr. M.A.Khan, Addl. Advocate General for the State has placed strong reliance upon the disclosure statement made under Section 27 of the Evidence Act before PW-8 Amar Singh. PW-6 Munish Kumar, in his cross-examination admitted that Amar Singh and Ramesh were their relations. According to PW-8 Amar Singh, accused Rajiv Sharma has made disclosure statement vide Ext. PW-8/A and accused Reshma also made disclosure statement vide memo Ext. PW-8/B. Accused Rajiv had disclosed that he could identify the place from where he accompanied Balak Ram and from where they pushed the body into the water. Accused Reshma has made the statement that before drowning the bag in the lake, she has taken out diary and pens and has kept it in her house. There was no

occasion for accused Reshma to take the diary and pens to her house. She would have thrown the bag instead of retaining pens and diary to hide them in the house.

50. The I.O. should have recorded the statements of some independent witnesses instead of PW-8 Amar Singh and Ramesh Chand. Amar Singh and Ramesh Chand are close relatives of deceased. It is settled law that the statements of the close relatives can be relied upon but they have to be perused with caution. Moreover, Ramesh Chand has not been examined by the prosecution, though he has signed Ext. PW-8/A and PW-8/B as well as PW-8/C. PW-8 Amar Singh has admitted that Ramesh Kumar was cousin of Balak Ram in his examination-in-chief. PW-8 Amar Singh as also admitted in his cross examination that Ramesh Chand was his relative.

51. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Kashi Ram,*** reported in ***(2006) 12 SCC 254,*** have held that extra judicial confession is a weak piece of evidence and must be proved like any other fact. It has been held as follows:

> "14. On appeal, the High Court reversed the findings of fact recorded by the trial court and acquitted the respondent. Before adverting to the other incriminating circumstances we may at the threshold notice two of them namely - the circumstance that the respondent made an extra-judicial confession before PWs 3 and 4, and the circumstance that recoveries were made pursuant to his statement made in the course of investigation of the waist chord used for strangulating Kalawati (deceased) and the keys of the locks which were put on the two doors of his house. The High Court has disbelieved the evidence led by the prosecution to prove these circumstances and we find ourselves in agreement with the High Court. There was really no reason for the respondent to make a confessional statement before PWs 3 and 4. There was nothing to show that he had reasons to confide in them. The evidence appeared to be unnatural and unbelievable. The High Court observed that evidence of extra-judicial confession is a weak piece of evidence and though it is possible to base a conviction on the basis of an extra- judicial confession, the confessional evidence must be proved like any other fact and the value thereof depended upon the veracity of the witnesses to whom it was made. The High Court found that PW-3 Dinesh Kumar was known to Mamraj, the brother of deceased Kalawati. PW-3 was neither a Sarpanch nor a ward member and, therefore, there was no reason for the respondent to repose faith in him to seek his protection. Similarly, PW-4 admitted that he was not even acquainted with the accused. Having regard to these facts and circumstances, we agree with the High Court that the case of the prosecution that the respondent had made an extra-judicial confession before PWs-3 and 4 must be rejected."

52. Their lordships of the Hon'ble Supreme Court in the case of ***Ajay Singh vrs. State of Maharashtra,*** reported in ***(2007) 12 SCC 341,*** have held that extra-judicial confession must be voluntary and the person to whom confession is made should be unbiased and not inimical to the accused. It is for the Court to judge credibility of the witness' capacity and thereafter to decide whether his or her evidence has to be accepted or not. Their lordships have also explained the terms "confession" and "statement" as under:

> "8. We shall first deal with the question regarding claim of extra judicial confession. Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra judicial confession, Court has to satisfy that the same

was voluntary and without any coercion and undue influence. Extra judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may he many who are possessed of normal memory and do so. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous.

10. The expression 'confession' is not defined in the Evidence Act, 'Confession' is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement' is "act of stating; that which is stated; a formal account, declaration of facts etc." The word 'statement' includes both oral and written statement. Communication to another is not however an essential component to constitute a 'statement'. An accused might have been over-heard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid nevertheless constitute a statement. It such statement is an admission of guilt, it would amount to a confession whether it is communicated to another or not. This very question came up for consideration before this Court in Sahoo v. State of Uttar Pradesh, AIR 1966 SC 40: (1966 Cr1 U 68). After referring to some passages written by well known authors on the "Law of Evidence" Subba Rao, J. (as he then was) held that "communication is not a necessary ingredient to constitute confession". In paragraph 5 of the judgment, this Court held as follows:

> "...Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence presumably on the ground that as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession goes not to depend upon its communication to another, though, just like any other piece of evidence, it

> can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission pr confession. as the case may be.... If, as we have said, statement is the genus and confession is only a sub-species of that genus, we do not see any reason why the statement implied in the confession should be given a different meaning. We, therefore, hold that a statement, whether communicated or not, admitting guilt is a confession of guilt (Emphasis supplied)"

53. The prosecution has also tried to prove that accused Reshma Devi has left her house on 20.5.2011 and came back in the evening on 21.5.2011 at 7:15 AM. Mr. M.A.Khan, Addl. Advocate General has drawn the attention of the Court to the statement of PW-6 Munish Kumar son of the accused Reshma. According to him, his mother had gone to Thana Kalan to condole the death of her maternal cousin on 20.5.2011 but she did not come back on that date. She came back on 21.5.2011 at 7-7:15 AM. PW-9 Ranjana Devi deposed that she was running a grocery shop at Thana Kalan. On 20.5.2011, the accused came to her shop at 4:30-4:45 PM and purchased a pair of sandals. According to her, accused was her old customer. (confronted with mark-R, wherein it was not so recorded) She had gone, according to the prosecution to condole the death of her relation and there was no occasion for her to buy sandals and that too from village Thana Kalan.

54. PW-10 Balbir Singh deposed that he lost his son on 13.5.2011 and his condolence was fixed for 20.5.2011. The Court can take judicial notice of the fact that meeting of condolence in these areas is organized after 13 days and not after 7 days, as stated by PW-10 Balbir Singh. According to him, after condolence, accused went to the house of maternal Uncle Mehar Singh. However, in his cross-examination, he has deposed that he did not know as to where accused Reshma went after she left the house of Mehar Singh. He did not know that she had gone to the house of her sister or stayed for night. He did not remember the time when police recorded his statement. PW-11 Mehar Singh deposed that after condoling the death, accused Reshma left to her house, however, he was present at the house of Balbir Singh. He remained whole day in the house of Balbir Singh. In case Mehar Singh had stayed whole day in the house of Balbir Singh, there was no occasion for accused Reshma to visit the house of Mehar Singh his maternal uncle. PW-12 Garib Dass deposed that he saw accused at Proiyan going towards lake side. Accused was wearing "Jamuni" coloured Kameez and Salwar with flower print at that time. After 13-14 days he saw accused Reshma in the custody of police at lake side at Proiyan. Many people were present there. In his cross-examination, he admitted that he has not disclosed the name and address to the police as he was not aware of her name and address. It is not believable that the accused would be wearing the same dress which she was wearing on 20.5.2011 when she was noticed by PW-12 Garib Dass. His statement does not inspire confidence that he has seen the accused going towards lake side.

55. The deceased went missing on 20.5.2011. Accused Reshma had lodged the missing report on 21.5.2011. PW-1 Jiwan Kumar had come to the village Badgaon on 20.5.2011. However, the fact of the matter is that FIR PW-1/A was registered only on 28.5.2011. The FIR must be recorded promptly and in case there is inordinate delay, the same is required to be explained. The prosecution, in the instant case, has not explained the delay in lodging the FIR. We have also noted that the statements of the material witnesses were recorded either on 30.5.2011 or 2.6.2011 or 4.6.2011. PW-2 Bal Krishan is one of the material witness. His statement was recorded on 4.6.2011 under Section 161 Cr.P.C. The statement of PW-6 Munish Kumar was recorded on 30.5.2011 alongwith the

statement of Hukam Chand. The statement of PW-9 Ranjana Devi was recorded on 2.6.2011. The statement of Meena Kumari PW-21 was recorded on 4.6.2011. The statement of Kishori Lal PW-15 was recorded on 4.6.2011. The statements under Section 161 Cr.P.C. though recorded belatedly, can be considered, but delay is required to be explained. In the present case, the delay has also not been explained.

56. PW-26 SI Ram Dass deposed that both the accused were produced before the Medical Officer and got them medically examined. At the time of arrest of accused Reshma, mobile phone Nokia-1110 bearing SIM No. 98573-18473 was recovered alongwith other articles/ornaments which she was wearing. These articles were taken into possession vide Fard Jamatalashi Ext. PW-26/D. These were deposited with MHC. The ornaments were handed over to accused Reshma when she was sent to judicial custody on 10.6.2011, however, mobile was not returned. PW-25 HC Jagat Ram deposed that he was posted as MHC at Police Station Talai from 2007. The articles of jamatalashi of Reshma Devi i.e. two golden ear rings, one silver challa, two golden ear pins, two rings of gold of feet and a mobile phone Nokia 1110 with Aircel SIM 98573-19473 were deposited with him by SI Ram Dass. The mobile phone was taken back on 14.6.2011 by SHO Om Parkash that the same was required for investigation. It was sealed with three seals of "A" and taken into possession vide memo Ext. PW-25/A. It was signed by him as well as Surinder. Phone Ext. P-7 was produced while recording the statement of PW-25 HC Jagat Ram. He deposed that parcel containing mobile phone was deposited with him which he entered at Sr. No. 406 in the malkhana Register on 14.6.2011. In his cross-examination, he deposed that his statement was recorded by the police. He has disclosed to the police in his statement that on 14.6.2011, mobile phone was taken back from him by the I.O. (Confronted with Mark-J1, wherein it is not so recorded). He also admitted that he has not made entry of the aforesaid articles and mobile phone before 14.6.2011. He did not know that the mobile phone was given by accused Rajiv Sharma to accused Reshma to talk to her brother that police is about to arrest her. The mobile phone, as per PW-26 SI Ram Dass was recovered from Reshma and fard jamatalashi Ext. PW-26/D was also prepared. According to him, mobile phone and articles were deposited with MHC. Surprisingly enough, PW-25 HC Jagat Ram has admitted in his cross-examination that the items were handed over to him, including mobile phone, however, the same was taken back by the Inspector SHO Om Parkash for the purpose of investigation and that entry was made in the malkhana register on 14.6.2011. He has specifically testified in his cross-examination that before 14.6.2011, he has not made entries in the malkhana register.

57. According to the Punjab Police Rules, the case property is to be deposited in the malkhana and entry is required to be made in the Register No. 19 of the Punjab Police Rules. The entry of phone was required to be made when the same was deposited with the MHC after its alleged recovery from the accused Reshma. It casts doubt whether the phone was ever recovered from the possession of accused Reshma or not. As and when the case property is deposited and taken out, the entry is required to be made in the malkhana register. The prosecution has not even produced the malkhana register showing entry at Sr. No. 406 recorded on 14.6.2011. PW-27 Insp. Om Parkash has also deposed that articles recovered from the personal search of accused Reshma were deposited with MHC. He took mobile phone in possession from MHC On 14.6.2011 vide memo Ext. PW-25/A after wrapping and parceling the same in a parcel and was sealed with three seals of "A".

58. PW-28 Madan Lal Sharma deposed that call detail record from 20.5.2011 to 24.5.2011 alongwith address of the owner of mobile number 98573-18473 was demanded by the police. The aforesaid number was of reliance communication and the owner was Rajiv Sharma in their record. Again stated that phone no. 98573-18473 was a aircel and

the number of reliance was 90220-73801, which was in the name of Rajiv. He had intimated S.P. Bilaspur over e-mail Ext. PW-26/J. PW-28 Madan Lal Sharma has not testified the computer from which call details were recorded was in working condition or not. Even if assuming that conversation has taken place, what transpired between the two accused is not known. PW-28 Madan Lal Sharma has also admitted in his cross-examination that in Ext. PW-26/J, there is no parentage of the mobile phone holder. In order to duly prove the call detail records, the prosecution was required to prove that provisions of Section 65 B of the Indian Evidence Act, 1872 have been complied with in letter and spirit. PW-28 Madan Lal Sharma has to prove that the computer output containing the information was produced by the computer during the period over which the computer was used regularly and the information of the kind contained in the electronic record was regularly fed into the computer in the ordinary course of the said activities and the computer was operating properly. He was also required to give certificate as per Section 65B(4) containing the statement and describing the manner in which it was produced, giving details of device involved in the production of that electronic record, as may be appropriate. It is to be signed by the person holding responsible position.

59. Their lordships of the Hon'ble Supreme Court in the case of ***Anvar P.V. vrs. P.K. Basheer and others,*** reported in ***(2014) 10 SCC 473***, have held that production of copy of statement pertaining to electronic record in evidence not being the original electronic record, such statement has to be accompanied by a certificate as specified in S. 65-B(4) and such certificate must accompany electronic record like CD, VCD, pen drive etc. Their lordships have further held that under Section 65-B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the conditions are satisfied. It has been held as follows:

> "15. Under Section 65B(4) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:
>
> (a) There must be a certificate which identifies the electronic record containing the statement;
>
> (b) The certificate must describe the manner in which the electronic record was produced;
>
> (c) The certificate must furnish the particulars of the device involved in the production of that record;
>
> (d) The certificate must deal with the applicable conditions mentioned under Section 65B(2) of the Evidence Act; and
>
> (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.
>
> 16. It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

> 17. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.
>
> 18. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India."

60. The prosecution case is also that the deceased has not gone to dispensary on 20.5.2011 by relying upon the statement of PW-16 Shakti Chand. PW-16 Shakti Chand deposed that Balak Ram (deceased) used to open the dispensary and clean the same. Balak Ram attended his duties lastly on 20.5.2011 and thereafter he marked his absence in the attendance register and sent absentee report to Distt. Ayurveda Officer, Bilaspur. We have seen Ext. PW-16/A. It is apparent to naked eyes that "P" has been converted into "A" on 21.5.2011. It further casts doubt on the version of the whole story of the prosecution that the deceased had not gone to the office and gone to some other place.

61. In the present case, the dead body was not recovered. It has come on record that divers of BBMB were deployed but the statement of any diver was not recorded. Their lordships of the Hon'ble Supreme Court in the case of ***Rama Nand and others vrs. Stae of Himachal Pradesh,*** reported in ***(1981) 1 SCC 511,*** have held that homicidal death can be proved even on the basis of circumstantial evidence alone provided such evidence unerringly points to the only conclusion of guilt of the accused. It has been held as follows:

> "27. Although the High Court has held that the body recovered was that of Sumitra deceased and that the bones sent to the medical experts were not parts of the decomposed body found, but appeared to have been fraudulently replaced with the bones of a child during transmission to the medical experts, we would assume that the identity of the body found in the river was not established beyond reasonable doubt. In other words, we would take it that the corpus delicti, i.e., the dead-body of the victim was not found in this case. But even on that assumption, the question remains whether the other circumstances established on record were sufficient to lead to the conclusion that within all human probability, she had been murdered by Rama Nand appellant ? It is true that one of the essential ingredients of the offence of culpable homicide required to be proved by the prosecution is that the accused "caused the death" of the person alleged to have been killed.
>
> 28. This means that before seeking to prove that the accused is the perpetrator of the murder, it must be established that homicidal death has been caused. Ordinarily, the recovery of the dead-body of the victim or a vital part of it, bearing marks of violence, is sufficient proof of homicidal death of the victim. There was a time when under the old English Law, the finding of the body of the deceased was held to be essential before a person was convicted of committing his culpable homicide. "I would never convict", said Sir Mathew Hale, "a person of murder or manslaughter unless the fact were proved to be done, or at least the body was found dead". This was merely a rule of caution, and not of law. But in those times when execution was the only punishment for murder, the need for adhering to this cautionary rule was greater. Discovery of the dead-body of the victim bearing physical evidence of violence, has never been considered as the only mode of proving the corpus delicti in murder. Indeed, very many cases are of such a nature where the discovery of the dead-body is impossible. A blind adherence to this

> old "body" doctrine would open the door wide open for many a heinous murderer to escape with impunity simply because they were cunning and clever enough to destroy the body of their victim. In the context of our law, Hale's enunciation has to be interpreted no more than emphasising that where the dead-body of the victim in a murder case is not found, other cogent and satisfactory proof of homicidal death of the victim must be adduced by the prosecution. Such proof may be by the direct ocular account of an eye-witness, or by circumstantial evidence, or by both. But where the fact of corpus delicti, i.e. 'homicidal death' is sought to be established by circumstantial evidence alone, the circumstances must be of a clinching and definitive character unerringly leading to the inference that the victim concerned has met a homicidal death. Even so, this principle of caution cannot be pushed too far as requiring absolute proof. Perfect proof is seldom to be had in this imperfect world, and absolute certainty is a myth. That is why under Section 3, Evidence Act, a fact is said to be "proved", if the Court considering the matters before it, considers its existence so probable that a prudent man ought, under the circumstances of the particular case to act upon the supposition that it exists. The corpus delicti or the fact of homicidal death, therefore, can be proved by telling and inculpating circumstances which definitely lead to the conclusion that within all human probability, the victim has been murdered by the accused concerned. In the instant case, Circumstances (1) to (5), in their cumulative effect, are not only inconsistent with the innocence of Rama Nand appellant, but ineluctably and rationally compel the conclusion that Sumitra has died and it is Rama Nand appellant who has intentionally caused her death. Circumstance (3) involves an admission by Rama Nand and Shish Ram accused that Sumitra has met an unnatural death. The only difference between the prosecution version and the defence version is as to whether Sumitra committed suicide or had been killed by Rama Nand appellant. It has been found that the story of the suicide set up by the accused is false. The articles Salwar (Ex. P.14) and the shoes (Ex. P-15) do not belong to her. They were planted by the accused to lay a false trail and to mis-direct the investigation. This circumstance taken in conjunction with the others, irresistibly and rationally leads to the conclusion that she has been murdered by Rama Nand appellant and her dead body has been disposed of by the appellants Shish Ram and Kali Datt."

62. Their lordships of the Hon'ble Supreme Court in the case of ***Sevaka Perumal and another vrs. State of Tamil Nadu,*** reported in ***(1991) 3 SCC 471,*** have held that in some cases, in some cases corpus delicti may not be possible to be traced or recovered. What, therefore, is required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum of death was committed and it must be proved by direct or circumstantial evidence, although the dead body may not be traced. It has been held as follows:

> "5. Sri Raju Ramachandran contended that the dead body was admittedly found in a highly decomposed condition. There is no proper identification of the dead body to be of the deceased. Themother PW-2 identified only with reference to the photograph taken of the dead body. There is evidence that the deceased wrote a letter of leaving to unknown destination. Unless there is proof that the dead body belongs to Hariramachandran, it is not safe to convict to A-1 to a capital punishment of death sentence. We find no force in the contention. In a trial for murder it is

not an absolute necessity or an essential ingredient to establish corpus delicti. The fact of death of the deceased must be established like any other fact. Corpus delicti in some cases may not be possible to be traced or recovered. Take for instance that a murder was committed and the dead body was thrown into flowing tidal river or steam or burnt out. It is unlikely that the dead body may be recovered. If recovery of the dead body, therefore, is an absolute necessity to convict an accused, in many a case the accused would manage to see that the dead body is destroyed etc. and would afford a complete immunity to the guilty from being punished and would escape even when the offence of murder is proved. What, therefore, is required to base a conviction for an offence of murder is that there should be reliable and acceptable evidence that the offence of murder, like any other factum, of death was committed and it must be proved by direct or circumstantial evidence, although the dead body may not be traced. In this case the evidence of PWs.-7 to 10 would establish that they have seen the dead body of the deceased Hariramachandran in the well and brought it out and the photograph was taken at the time of inquest. It was identified to be that of the deceased by no other than his mother, PW-2. Thus we have no hesitation to hold that there is no doubt as regards the identity of the dead body and that the medical evidence establishers that the deceased died due to stabbing with sharp edged weapon like knife."

63. Their lordships of the Hon'ble Supreme Court in the case of ***Ram Gulam Chaudhary and others vrs. State of Bihar,*** reported in ***(2001) 8 SCC 311,*** have held that when corpus delicti is not found, even so accused can be convicted if there is direct or circumstantial evidence conclusively showing that the victim had died and that accused committed his murder. It has been held as follows:

"23. There can be no dispute with the proposition of law set out above. As is set out in the various authorities (referred to above) it is not at all necessary for a conviction for murder that the corpus delicti be found. Undoubtedly, in the absence of the corpus delicti there must be direct or circumstantial leading to the inescapable conclusion that the person had died and that the accused are the persons who had committed the murder. Both the Courts below have come to the conclusion, based upon the evidence of P.Ws. 3 and 4 (who were eye witnesses) that Appellant No. 9 had killed the accused before the body was taken away by all the Appellants. We have read the evidence of all the witnesses. We have given a careful consideration to the material on record. We see no reason to take a different view. The evidence in this case is direct and there is no reason to disbelieve this evidence. We see no substance in the submission of Mr. Mishra that these two ladies could not have seen the boy being killed and could not have in any case come to a conclusion that he had died. Their presence at the place of incident could not be doubted. Their evidence clearly indicates that the incident took place before their eyes. We cannot accept the submission of Mr. Mishra that their evidence discloses that the incident took place outside the courtyard and on the road. Mr. Mishra has relied on stray sentences. The evidence has to be read as a whole. Read as a whole both the ladies have given positive evidence that the murder took place in the courtyard. We also see no substance in the submission that PW 3 and PW 4 could not positively say that Krishnanand Chaudhary had been killed. The evidence is that Bijay Chaudhary stated that "he is still alive and should be killed". On this

statement Appellant 9 gave a chhura blow on the chest. The evidence is that Krishnanand Chaudhary, who was till then struggling twitched and thereafter his body became still. From this it could be concluded that death had taken place. It must be mentioned that even P.W. 1, whose evidence Mr. Mishra relied upon, has deposed that Krishnanand Chaudhary had died."

64. The prosecution has failed to prove the motive attributed to the accused persons. The chain of events is incomplete. The dead body was not recovered. Thus, the prosecution has failed to prove the case against both the accused beyond reasonable doubt.

65. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment and order of conviction and sentence dated 28.7.2012 and 2.8.2012, respectively, rendered by the learned Addl. Sessions Judge, Ghumarwin, Distt. Bilaspur, H.P., in Sessions trial No. 15-7 of 2011, is set aside. Accused are acquitted of the charges framed against them. Fine amount, if any, already deposited by the accused is ordered to be refunded to them. Since the accused are in jail, they be released forthwith, if not required in any other case.

66. The Registry is directed to prepare the release warrants of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

****

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

Smt. Roshani Devi. ....Petitioner.

Versus

State of Himachal Pradesh and others. ....Respondents.

CWP No. 2482 of 2009
Date of order: 14.12.2015

Constitution of India, 1950- Article 226- Respondent No. 3 was appointed as Anganwari Worker- her appointment was assailed before Deputy Commissioner who held that factum of separation of the respondent No. 3 from the family of her father-in-law was not preceded by any valid order of the Competent Authority- an appeal was preferred before Divisional Commissioner which was dismissed- held, that Deputy Commissioner and Divisional Commissioner had not taken into consideration the relevant material and had arrived at a wrong decision regarding the separation of respondent No. 3 from her father-in-law- consequently, order passed by them set aside and matter remanded to Deputy Commissioner with a direction to take into consideration the relevant material. (Para-2 to 4)

For the petitioner: Mr. Ramakant Sharma, Advocate.
For the respondents: Mr. Vivek S. Attri, Dy. AG, for respondents No. 1 & 2.
Mr. Rajesh Kumar, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge. *(Oral).*

Respondent No. 3, Smt. Jaya Devi, stood selected and appointed on 06.08.2007 as an Anganwari Worker at Anganwari Centre, Bijni. Her appointment stood

assailed before the Deputy Commissioner, Mandi by the petitioner herein. Under Annexure P-2, the Deputy Commissioner, Mandi, allowed the appeal preferred before him by the petitioner herein, wherein a challenge stood laid to the selection and appointment of respondent No. 3 as an Anganwari Worker. The reason for his accepting the appeal of the petitioner herein, challenging the selection and appointment of respondent No. 3 herein as an Anganwari Worker, stood founded upon the factum of the separation of the latter from the family of Umakant, her father-in-law, as stood purveyed in the relevant *pariwar register* being unauthorizedly recorded arising from the factum of its incorporation therein not standing preceded by any valid order of any competent authority. In sequel, the Deputy Commissioner, Mandi, under Annexure P-2 concluded of a portrayal therein of the separation of respondent No. 3 from the family of her father-in-law standing occurred, being sapped of its vigor rendering interferable her appointment as an Anganwari Worker. However, it is apparent on a reading of paragraph 3 of Annexure P-2 of the said separation of respondent No. 3 from her father-in-law, as reflected in the apt *pariwar register*, standing incorporated by the then Secretary of Tunj Panchayat who, however, remained unexamined. For want of examination by the Deputy Commissioner, Mandi, of the then Secretary of Tunj Panchayat who thereupon may have purveyed to him the authorization accorded to him by the competent officer for carving out a separation of respondent No. 3 from her father-in-law, renders legally flawed the rendition of the Deputy Commissioner in Annexure P-2 of the aforesaid reflection in the apt *pariwar register* of respondent No. 3 standing separated from her father-in-law standing unwarrantedly reflected. For reiteration the apposite authorization held by the then Secretary of Tunj Panchayat would only have lent sustenance to his recording in the apposite *pariwar register* of respondent No. 3 herein hence standing warrantedly depicted therein to stand separated from her father-in-law, one Shri Umakant besides would also have precluded the learned Deputy Commissioner to, arbitrarily even when the aforesaid apposite material for the reasons aforestated stood unadduced before him, conclude qua the separation of respondent No. 3 herein being unwarranted necessitating the cancellation of her appointment.

2. The learned Divisional Commissioner while dealing with an appeal, standing preferred thereupon before him at the instance of the aggrieved respondent No. 3 herein, without adverting to the aforesaid infirmity gripping Annexure P-2 arising from non-examination of the then Secretary of Tunj Panchayat has proceeded to impute reliance to *ration card* and report of Gram Panchayat Bijni for thereupon concluding of respondent No. 3 herein having proven hers standing separated from her father-in-law one Shri Umakant.

3. The discarding of the aforesaid apposite material by the learned Divisional Commissioner, which yet for reasons aforestated besides with the aforesaid constraints besetting it rendered any reliance thereupon to be grossly untenable, had led the Divisional Commissioner, Mandi, to commit a gross error in concluding thereupon qua respondent No. 3 having stood separated from her father-in-law.

4. The learned Divisional Commissioner, Mandi, having scored off from consideration the apt and germane material rather his having taken into consideration inapt and discardable material for setting at rest the controversy, has committed a gross illegality and impropriety. In sequel, the orders comprised in Annexures P-2, P-3 and P-4 are set aside. The matter is remanded to the Deputy Commissioner, Mandi, who shall examine the then Secretary of Tunj Panchayat, who in the relevant *pariwar register* recorded the separation of respondent No. 3 herein from her father-in-law one Shri Umakant besides unearth from him qua the reflection in the apt *pariwar register* qua the separation of respondent No. 3 from her father-in-law being a sequel to his holding an authorization from a competent officer whereafter he shall decide the matter afresh.

5. In view of the above, the writ petition stands disposed of so also pending application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Abdul Rasheed Paddar . ...Petitioner
Versus
Pramod Sood .....Respondent.

CMPMO No. 415 of 2015.
Judgment reserved on: 10.12.2015
Date of decision : 15. 12. 2015

Code of Civil Procedure, 1908- Order 9 Rule 7- An eviction petition was filed before the Rent Controller – notice of the petition was served on the tenant but he did not appear, therefore, he was proceeded ex parte- tenant subsequently filed an application for setting aside the ex-parte order stating that he had gone to Jammu & Kashmir – notice was delivered to him and it was impossible for him to appear on the date fixed- he remained under bona fide belief that fresh summons will be sent, but when no fresh summons received, he made an inquiry and came to know that he was proceeded ex parte- name of his father was also wrongly mentioned in the notice- application was dismissed by the Court on the ground that explanation furnished by the tenant was false- held, that Courts have wide discretion in deciding the "sufficient cause" keeping in view the peculiar facts and circumstances of each case – when the defendant approaches the Court immediately, the discretion is normally to be exercised in his favour- the fact that application was moved immediately shows that intention of the tenant was not to prolong the proceedings- petition allowed subject to the payment of cost of Rs. 25,000/-. (Para-6 to 20)

Cases referred:
Neelam Kumari vs. Yogender Singh and others, 2015 (3) Him. L.R.1895
Ajay Aggarwal vs. Narinder Kumar and others Latest HLJ 2014 (HP) 742

For the Petitioner : Mr. G.D. Verma, Senior Advocate, with Mr. B.C. Verma, Advocate.
For the Respondents : Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.

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 3.8.2015 passed by the learned Civil Judge (Junior Division), Court No. 3, Shimla whereby it refused to set-aside the *ex parte* order against the petitioner.

2. The respondent herein filed eviction petition before the learned Rent Controller on various grounds. On 2.7.2011, notice of this petition was ordered to be issued for the service of the petitioner who was duly served for the next date fixed on 27.8.2011. But, since the report of service was in Urdu, therefore, the Court ordered the case to be

listed on 7.9.2011 and directed the respondent to produce some interpreter knowing Urdu language, so that the report on the summons could be understood. On 7.9.2011, the statement of one Sh. R.N. Karol was recorded, who stated that he was conversant with the Urdu language and the report on the summons revealed that the summons had been duly acknowledged by the respondent/petitioner herein and, therefore, he was proceeded ex parte and case was ordered to be listed for ex-parte evidence on 3.11.2011. However, on 3.11.2011, the petitioner moved an application for setting aside the exparte order and permission to join the proceedings as also to file reply to the eviction petition. This application was contested by the respondent and the Rent Controller on 21.6.2012 proceeded to frame the following issues:

1. *Whether there are sufficient ground to set-aside order dated 27.08.2011/07.09.2011, vide which applicant was ordered to be proceeded against ex-parte, as prayed? OPP*
2. *Whether the present application is neither competent nor maintainable, as alleged? OPD*
3. *Whether the application is malafide, as alleged? OPD*
4. *Relief.*

3. The parties led evidence and ultimately after a period of nearly four years, the learned Rent Controller, eventually dismissed the petition by concluding that the defence set up by the petitioner in his application as also the evidence led in support thereof was false and lacked bona fides.

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

4. Adverting to the facts of the case, it would be seen that the petitioner though was duly served on 4.8.2011, whereas the date fixed for his service was fixed as 27.8.2011 when he admittedly did not appear. The reason assigned in the application under Order 9 Rule 7 CPC for non-appearance was that the petitioner was aged about 75 years and had gone to his native place in Jammu & Kashmir. Though, the petitioner was served with a notice but the same was delivered to him so late that it was impossible for him to appear in the case on 27.8.2011. On account of late service of summon, he remained under bonafide belief that he will be sent fresh summons in the case. However, he did not receive any fresh summons, he made enquiries through his counsel and it was revealed that he was proceeded exparte in the case on 27.8.2011. It was further averred that though he received the summons issued by the Court, but then the name of his father as reflected in the summons was Habeeb Ullah instead of Gulam Rasool Paddar. It was also averred that on account of old age and weak health the petitioner could not attend the case and there was no negligence or intentional lapses on the part of the petitioner for his non-appearance before the Court on 27.8.2011.

5. In response to the application, the respondent had averred that the application was malafide and had been filed with an intention of delaying the proceedings. The petitioner had been duly served for 27.8.2011 and he intentionally and deliberately failed to put in appearance before the Court and, therefore, the ex parte proceedings were rightly drawn against him.

6. The learned Court below has rejected the application on the ground that the explanation offered by the petitioner was false. It has been observed in paras 6 and 7 of the order as under:

"6. The falsity of the aforesaid claim of the applicant is evident from his cross-examination wherein he has admitted that he cannot read and write English language and he cannot explain the contents of his affidavit Ext.AW1/A and he has stated that his address is wrongly mentioned in the aforesaid affidavit whereas he is resident of District Kulgam in Kashmir and the summons were also received by him in Kashmir Ex.RX the summon which was served upon him and on the back side of the said summons, the report has been made by the process server in Urdu language, the translation of which has been proved as Ext.PX. It is clear from the said report that the summon was served upon the present applicant on 04.08.2011 whereas AW-1, has stated that he received the summons about four-five days prior to the date of hearing which goes against the report made by the process server on the summons and thereby falsifies the claim of the applicant to that extent. Even, the applicant EW one has admitted in his cross-examination that his address is mentioned correctly in summons Ext. RX and when he has himself admitted that the said summons were received by him much prior to the date of hearing, it was open for him to have appeared in the court or at least instruct his counsel to appear on his behalf. But, the applicant failed to do so whereas during cross-examination he has stated that he came to Shimla after receiving the summons and disclosed the aforesaid fact to his counsel and that being so, how come none appeared on behalf of the applicant on the date of hearing is not explained satisfactorily.

7. Another important aspect on which the emphasis has been laid by the applicant remains that he could not put in appearance in the court on the date of hearing due to his illness as he was operated. However, apart from the self serving statement of AW1 Abdul Rashid, there is nothing on record to believe that he was operated during the period when he received summons in the present case. There is nothing in the report on the back side of summons Ext.RX, the translation of which is Ext. PX that the applicant was in the hospital when he received summons whereas, the applicant has laid stress on the said fact alleging that he was in the hospital when he received summons. He has stated during cross-examination that he was operated in Srinagar Hadwin Hospital but no witness from the said hospital has been examined to substantiate the version. On one hand, the applicant states that he was in his native village when he received summons but during other course of his cross-examination, he has stated that he was in the hospital when he received summons and if his version is believed that he was in hospital, that means, he was in Srinagar whereas he was allegedly operated. But, that is not the case either pleaded by the applicant explaining his non appearance or that have come to the fore by way of his examination. The manner in which the applicant has deposed shows his lack of bona fides because during another course of his cross-examination he has stated that he was unconscious when he received the summons and in the next breath he has stated that the process server had come to his house where he had received the summons and in these circumstances, when the applicant himself has changed his version time and again, it will not be in the fitness of things to believe his testimony. There is nothing on record nor it has come in the cross examination of RW1 to show that he had wrongly and intentionally mentioned the wrong parentage of the present applicant/respondent in the array of parties in the petition and even if it is believed that the respondent is not son of Shri Habibulla, then also, he was not prejudiced due to the same because he had clarity at the time of

receipt of summons that the petition has been filed against him with respect to tenanted premises by the landlord and there was sufficient opportunity for him to have put in appearance in the Court and to contest the same but simply on the ground that his father's name has been mentioned as Shri Habibulla in the summons Ext. RX, the same is not sufficient to explain his non appearance in the court on the crucial date of hearing whereas, his version as discussed hereinabove clearly shows that the bonafides are not in his favour. Moreso, the record reveals that the applicant was proceeded against exparte on 07/09/2011 and he has come forward to seek setting aside of order dated 27th of August, 2011. Further, the petitioner has sought the eviction of the respondent from the demised premises on the ground that he had sublet the tenanted premises to someone else and is not residing therein and has shifted to his native place at Kashmir and during cross examination, AW1 has stated that he is running a school in his native village for the last 20 years due to which the possibility cannot be ruled out that the respondent is living in Kashmir, which is yet another circumstance against the applicant.

The knowledge of the dates of hearing can be attributed to the applicant as he has admitted that he had received summons on 04.08.2011 and no sufficient cause have been reflected in the present application to show as to why application was not moved within the period of limitation thereafter for setting aside exparte order which also goes against the relief set up by the applicant. Hence, applicant has not been able to put forth sufficient cause to show his non appearance on the date of hearing, as such, there are no sufficient grounds to set aside orders dated 27.08.2011 and 07.09.2011 as claimed. Hence, the issue in hand is decided against the applicant."

7. This Court ***in Neelam Kumari*** vs. ***Yogender Singh and others, 2015 (3) Him. L.R.1895***, while discouraging the practice of the Courts in adopting a hyper technical approach observed as under:

"7. The proposition that Rules of Procedure are handmaid of justice and cannot take away the residuary power in Judges to act ex debito justitiae, where otherwise it would be wholly inequitable, is by now well founded.

8. It must be remembered that the Courts are respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so and further taking into consideration the fact that when substantial justice and technical considerations are pitted against each other, cause of substantial justice deserves to be preferred for the other side cannot claim to have vested right in injustice being done.

9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the Statute, the provisions of the CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice.

10. The mortality of justice at the hands of law troubles a Judge's conscience and points an angry interrogation at the law reformer.

11. Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescriptions are the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice.

12. It is useful to quote the oft-quoted passage of Lord Penzance in 1879 (4) AC 504:

> *"Procedure is but the machinery of the law after all the channel and means whereby law is administered and justice reached. It strongly departs from its office when in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern when it ought to subserve."*

13. In the matter of ***Sangram Singh*** vs. ***Election Tribunal, Kotah reported in AIR 1955, S.C. 425***, the Hon'ble Apex Court has observed as under:

> *"Now a code of procedure must be regarded as such. It is procedure, something designed to facilitate justice and further its ends, not a penal enactment for punishment and penalties; not a thing designed to trip people up. Too technical a construction of sections that leaves no room for reasonable elasticity of interpretation should therefore be guarded against (provide always that justice is done to both sides) less the very means designed for the furtherance of justice be used to frustrate it."*
>
> *"Next, there must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. Of course there must be expectations and where they are clearly defined they must be given effect to. But taken by and large, and subject to that proviso our laws of procedure should be construed, wherever that is reasonably possible in the light of that principle."*

14. No person has a vested right in any course of procedure. He has only the right of prosecution or defence in the manner for the time being by or for the Court in which the case is pending, and if, by an Act of Parliament the mode of procedure is altered, he has no other right than to proceed according to the altered mode. (See: ***Blyth v. Blyth (1966 (1) All E.R. 524 (HL***).

15. In ***Balwant Singh Bhagwan Singh and another*** vs***. Firm Raj Singh Baldev Kishen*** reported in ***AIR 1969 Punjab and Haryana 197*** it was held that:

> *"Promptitude and despatch in the dispensation of justice is a desirable thing but not at the cost of justice. All rules of procedure are nothing but handmaids of justice. They cannot be construed in a manner, which would hamper justice. As a general rule, evidence should never be shut out. The fullest opportunity should always be given to the parties to give evidence if the justice of the case requires it. It is immaterial if the original omission to give evidence or to deposit process fee arises from negligence or carelessness."*

16. In the matter of ***State of Gujarat*** vs**. *Ramprakash P. Puri,*** reported in ***1970 (2) SCR 875,*** the Hon'ble Apex Court has held that:

> *"Procedure has been described to be a hand-maid and not a mistress of law, intended to subserve and facilitate the cause of justice and not to govern or obstruct it. Like all rules of procedure, this rule demands a construction which would promote this cause."*

17. The processual law so dominates in certain systems as to overpower substantive rights and substantial justice. The humanist rule that procedure should be the handmaid, not the mistress, of legal justice compels consideration of vesting a residuary power in judges to act ex debito justiciae where the tragic sequel otherwise would be wholly inequitable. - Justice is the goal of jurisprudence – processual, as much as substantive. (***See Sushil Kumar Sen v. State of Bihar (1975) 1 SCC 774).***

18. A procedural law should not ordinarily be construed as mandatory, the procedural law is always subservient to and is in aid to justice. Any interpretation which eludes or frustrates the recipient of justice is not to be followed. (See ***Shreenath and Another vs. Rajesh and others AIR 1998 SC 1827***).

19. The Hon'ble Supreme Court in ***(2007) 9 Scale 202 (R.N. Jadi & Brothers vs. Subhash Chandra***), considered the procedural law vis-à-vis substantive law and observed as under:

> *"9. All the rules of procedure are the handmaid of justice. The language employed by the draftsman of processual law may be liberal or stringent, but the fact remains that the object of prescribing procedure is to advance the cause of justice. In an adversarial system, no party should ordinarily be denied the opportunity of participating in the process of justice dispensation. Unless compelled by express and specific language of the statute, the provisions of CPC or any other procedural enactment ought not to be construed in a manner which would leave the court helpless to meet extraordinary situations in the ends of justice."*

20. Procedure is only handmaid of Justice:- All the rules of procedure are the handmaids of justice. Any interpretation which eludes substantive justice is not to be followed. Observing that procedure law is not to be a tyrant, but a servant, in ***Sambhaji and others*** vs. ***Gangabai and others (2008) 17 SCC 117,*** the Hon'ble Supreme Court held as under:

"6.(14) Processual law is not to be a tyrant but a servant, not an obstruction but an aid to justice. Procedural prescription is the handmaid and not the mistress, a lubricant, not a resistant in the administration of justice."

21. In ***2011 (1) Scale 469 Rajendra Prasad Gupta*** vs. ***Prakash Chandra Mishra and others,*** the issue before the Hon'ble Supreme Court was as to whether an application will be maintainable before the trial Court to withdraw the application filed earlier for withdrawal of the suit. The trial Court dismissed the application as not maintainable. The High Court held that once the application for withdrawal of the suit is filed the suit stands dismissed as withdrawn even without there being any order on the withdrawal application and as such another application at a later point of time to withdraw the suit was not maintainable. When the matter was taken up in appeal, the Hon'ble Supreme Court disagreed with the views expressed

by the High Court. While allowing the appeal, the Hon'ble Supreme Court observed thus:

> *"5. Rules of procedure are handmaids of justice. Section 151 of the Code of Civil Procedure gives inherent powers to the court to do justice. That provision has to be interpreted to mean that every procedure is permitted to the court for doing justice unless expressly prohibited, and not that every procedure is prohibited unless expressly permitted."*

22. The Hon'ble Supreme Court in ***2011 (6) Scale 1 Mahadev Govind Gharge and others*** vs. ***The Special Land Acquisition Officer, Upper Krishna Project, Jamkhandi, Karnataka***, reiterated the legal position regarding procedural law and observed:

> *"28. Thus, it is an undisputed principle of law that the procedural laws are primarily intended to achieve the ends of justice and, normally, not to shut the doors of justice for the parties at the very threshold....."*

8. Rule 7 of Order 9 reads as follows:

> ***"R.7. Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance. –*** *Where the court has adjourned the hearing of the suit ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs or otherwise, be heard in answer to the suit as if he had appeared on the day fixed for his appearance."*

9. The term "good cause" for the purpose of Order 9 Rule 7 has to be construed as an elastic expression for which no hard and fast rule can be prescribed. The courts have a wide discretion in deciding the "sufficient cause" keeping in view the peculiar facts and circumstances of each case. In a case where the defendant approaches the Court immediately, the discretion is normally exercised in his favour. As against the expression "sufficient cause" in Order 9 Rule 13, the expression used in Order 9 Rule 7 is "good cause". However, there is no material difference between the facts to be established for satisfying the two tests of "good cause" and "sufficient cause". There cannot be a "good cause" which is not "sufficient" as affording an explanation for non-appearance nor conversely a "sufficient cause" which is not a good one and further either of these is not different from "good and sufficient cause" which is used in this context in other statutes. If on the other hand, there is any difference between the two, it can only be that the requirement of a "good cause" is complied with on a lesser degree of proof than that of "sufficient cause" assuming the applicability of the principle of resjudicata to the decisions in the two proceedings, if the Court finds in the proceeding under Order 9 Rule 7, the lighter burden if not discharged, it must fortiori bar the consideration of the same matter in the later proceeding under Order 9 Rule 13 where the standard of proof of that matter is anything higher.

10. The term "good cause" has to understand in its proper spirit and philosophy and purpose regard being had to the fact that the term is basically elastic and is to be applied in a proper perspective to the fact obtaining situation.

11. A liberal and pragmatic justice oriented and non-pedantic approach has to be adopted while considering the reasons offered to explain the "good cause". Undoubtedly, a litigant cannot be permitted to ask the Court at his personal negligence and unsettle the litigation and in case he is grossly negligent or reasons offered are stereo type, vague or lack bona fides, the same may be taken to be a circumstance going against the litigant while adjudging "good cause". But if then a liberal concession has to be adopted to advance

substantial justice while deciding whether there is a "good cause" or not, the Court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the Court from doing so.

12. As observed earlier, the main ground which weighed the learned Rent Controller to reject the application of the petitioner under Order 9 Rule 7 is that there was a falsity in the claim set up by the petitioner, but then it must be remembered that in every case of delay there would be some lapses on the part of litigant concerned. That alone is not enough to turn down his plea and shut the door against him if the explanation does not smack of mala fides or it is put forth as part of a dilatory strategy. The Court must show utmost consideration to the suitor and it is normally when there is a reasonable govern to think that the party was deliberately trying to gain time then the Court should lean against the acceptance of the explanation.

13. The petitioner admittedly is 73 years old and is a resident of Jammu and Kashmir, no motive to delay the proceedings could be attributed to the petitioner since admittedly he had moved the application on the first date fixed for recording of the exparte evidence. It must be re-capitulated that it was on 7.9.2011 that the petitioner was proceeded exparte and the case was then fixed for recording exparte evidence on 3.11.2011 on which date the petitioner admittedly moved an application for setting aside the exparte order and sought permission to join the proceedings and file reply to the eviction petition.

14. This Court has no hesitation to observe that it was not because of the petitioner alone but on account of the procedural delay that it took the learned trial Court four years to decide the application moved by the petitioner under Order 9 Rule 7 CPC and in case the proceedings would have been permitted to continue, then the same by now would have culminated in a decision on merit. If it was the intention of the petitioner to delay the proceedings, then I see no reason why he would have moved an application immediately before the exparte evidence of the petitioner could have commenced. He could have conveniently waited to join the proceedings at any later stage rather than approach the Court well before the trial of the case had commenced. The approach of the learned Court below to say the least is absolutely conservative, non-pragmatic and pedantic.

15. However, to be fair to the petitioner, he has placed reliance on the judgment rendered by this Court in ***Ajay Aggarwal vs. Narinder Kumar and others Latest HLJ 2014 (HP) 742*** to contend that in similar circumstances this Court had rejected the application for setting aside the *exparte* order and strong reliance is placed on paras 11 and 12 of the judgment, which read thus:

> *"11. The address mentioned in registered letter sent to respondent No.2 was correct. Publication has also been ordered on the same address. Version of respondent No.2 that he did not read newspaper can not be believed. Respondent No.2 was proceeded ex parte on 2.12.2008. Application has been filed under Order 9 Rule 7 CPC after more than four years of the passing of order dated 2.12.2008.*
>
> *12. It is held that respondent No.2 was duly served. He has rightly been ordered to be proceeded ex parte on 2.12.2008. Respondent No.2 has not shown any good cause for setting aside order dated 2.12.2008. Respondent No.2 has not filed a separate application under Section 5 of the Limitation Act alongwith application under Order 9 Rule 7 of Civil Procedure Code, for setting aside order dated 2.12.2008. Only averment made in the application is that application was within*

limitation from the date of knowledge. According to the petitioner, application was barred by limitation."

16. It would be evident from the perusal of the paragraphs quoted above, that there were two main circumstances which pre-dominantly weighed with the Court in dismissing the application. Firstly, that there was no good cause shown in the application and secondly, in absence of a separate application under Section 5 of the Limitation Act, the application under Order 9 Rule 7 CPC was itself not maintainable. These are not the facts obtaining in the instant case.

17. As already noticed above, the case for the first time came up before the learned Rent Controller on 2.7.2011 on which date the notices were ordered to be issued to the petitioner herein for 27.8.2011 for which date though he was served but did not put in appearance and was proceeded *exparte* on 7.9.2011. On 7.9.2011 the case was ordered to be listed for *exparte* evidence on behalf of the respondent on 3.11.2011. However, before the respondent's evidence could commence, the petitioner admittedly appeared before the learned Rent Controller on 3.11.2011 and moved the application for setting aside the *exparte* order. There was no undue or deliberate delay on the part of the respondent and therefore no prejudice can be said to have been caused to him by permitting the petitioner to join the proceedings.

18. In view of the aforesaid discussion, I find merit in this petition and the same is accordingly allowed and the impugned order dated 3.8.2015 passed by the learned Court below is quashed and set-aside.

19. The Court cannot be oblivious to the fact that the respondent has been made to contest this application as also the consequential proceedings over a period of four years and, therefore, deserves to be compensated for the same. Accordingly, the petition though has been allowed the same shall however be subject to the petitioner paying an amount of Rs.25,000/- as costs which shall be paid by the petitioner to the respondent on or before the next date of hearing, failing which the order dated 3.8.2015 passed by the Court below shall automatically revive. The parties through their counsel are directed to appear before the learned Rent Controller (3), Shimla on the date already fixed on **1.1.2016.**

20. Since the proceedings have been unduly delayed for a period of more than four years from the date of its institution, it is expected that the learned Court below shall decided the same as expeditiously as possible and in no event later than **31.12.2016.**

21. Before parting, I may observe that the jurisdiction exercised by the learned Presiding Judge in this case was in the capacity of Rent Controller and not as a Civil Judge, but despite this, the various orders passed in this case reflect that the same have been shown to be passed not in the capacity of Rent Controller but as Civil Judge. It goes without saying that it is the same Presiding Judge who is vested with jurisdictions under various different Acts. For example, under the Employees Workmen's Compensation Act, the Presiding Judge is designated as Commissioner, in civil matters as Civil Judge, in criminal matters as Judicial Magistrate and in matters arising out of rent litigation referred to as the Rent Controller. It is not the designation alone, but even the jurisdiction exercised by him which is distinct and separate under the different statutes and, therefore, these jurisdictions and designations cannot be intermingled. This practice not only deserves to be deprecated but must be discontinued forthwith. Therefore, the Registrar (Judicial) of this Court is directed to issue necessary instructions to all the subordinate Courts, Tribunals, Rent Controllers etc. in this regard.

The petition is disposed of in the aforesaid terms, so also the pending application(s) if any. Interim order dated 1.10.2015 passed by this Court is vacated.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Bal Krishan and others ...Petitioners

Versus

State of H.P. and others ...Respondents.

CWP No. 4366 of 2015 a/w others
Judgment reserved on: 07.12.2015
Date of Decision : December 15, 2015.

Constitution of India, 1950- Articles 243(O) and 226- Petitioners have called in question the constitution, re-constitution, de-limitation, reservation of the respective Panchayat areas, merger of Panchayats with Municipal areas and vice versa, change of headquarters of Gram Panchayats, amalgamation and alteration of respective Panchayat areas on the ground that such action has been taken by the respondents in violation of the Himachal Pradesh Panchayati Raj Act, 1994, Himachal Pradesh Panchayati Raj (Election) Rules, 1994, and Himachal Pradesh Municipal Act, 1968- a preliminary objection was raised by the respondent regarding the maintainability of the petition- bar laid down in Article 243(O) is very wide and pervasive- any challenge to the election or any election dispute can be adjudicated in the first instance only by an authority constituted by or under any law made by the State Legislature and not otherwise- the High Court cannot entertain a writ petition directly under Article 226- power of judicial review is postponed in the matters involving challenge to delimitation of constituencies, allotment of seats or election to Panchayats until after completion of the process of election – the word 'election' in Article 243(O) embraces and includes all the aspects from the date of the notification by the Competent Authority- Article debars all Courts from entertaining any challenge to delimitation of constituencies or allotment of seat- the challenge to the delimitation may be entertained in exceptional cases where no objections were invited and no hearing was given before issuing the notification for holding election- the bar would operate immediately after the publication of notification of delimitation and will continue till the adjudication of election dispute by an Adjudicatory Forum created by or under any law made by the statute- however, there is no bar to challenge the constitutionality of statutory provision. (Para-4 to 33)

Cases referred:

N.P. Ponnuswami Vs. Returning Officer, AIR 1952 SC 64
Meghraj Kothari Vs. Delimitation Commission and others AIR 1967 SC 669
Mohinder Singh Gill Vs. The Chief Election Commissioner, (1978) 1 SCC 405
Nanhoo Mal Vs. Hira Mal, AIR 1975 SC 2140
Sundarajas Kanyalal Bhathua Vs. Collector, Thane, AIR 1990 SC 261,
State of U.P. and others Vs. Pradhan Sangh Kshettra Samiti, AIR 1995 SC 1512
Anugrah Narain Singh & another Vs. State of Uttar Pradesh & others (1996) 6 SCC 303
Jaspal Singh Arora Vs. State of M.P. and others (1998) 9 SCC 594
Election Commission of India Vs. Ashok Kumar and others AIR 2000 SC 2977

Jasbir Hussain Nasir Ahmed Boga Vs. State of Gujarat & others, AIR 2006 Gujarat 53
Prithvi Raj Vs. State Election Commission, AIR 2007 PH 178
Lal Chand Vs. State of Haryana, AIR 1999 P&H 1
Association of Residents of Mhow (Rom) Vs. Delimitation Commission of India (2009) 5 SCC 404
Angdui Norbu & others Vs. State of Himachal Pradesh & others AIR 2012 HP 36,

For the petitioner(s) M/s R.K.Gautam, Bimal Gupta, B.C.Negi, Sanjeev Bhushan, Senior Advocates, with M/s Gaurav Gautam, Vineet Vashisht, Pranay Pratap Singh, Abhilasha Kaundal, Rajiv Rai, Shikha Chauhan, Vinod Thakur, Tara Singh Chauhan, Kulbhushan Khajuria, Anand Sharma, Vikas Rathore, Praveen Chandel, Vijay Kumar Arora, M. L. Sharma, Ajay Sharma, Chetna Thakur, Sanjay Kumar Sharma, Daleep Kumar Sharma, Subhash Sharma, P. D. Nanda, S.C. Sharma, Sushil Gautam, Onkar Jairath, Ravinder Singh Jaswal, Surender Sharma, Ramakant Sharma, Ashwani Sharma, Salochana Rana Kaundal, Sanjeev Kumar Suri, Naresh Kaul, Ajay Kumar Dhiman, Raman Jamalta, Arush Matlotia and Ms. Suman Thakur, Advocates, for the respective petitioners.

For the respondent(s) : Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Mr. Romesh Verma, Addl. Advocate Generals and Mr. J. K. Verma, Dy. Advocate General, for the respondents-State.

Mr. Dilip Sharma, Senior Advocate, with Ms. Nishi Goel, Advocate, for the State Election Commission in CWP No. 4366 of 2015.

Ms. Nishi Goel, Advocate, for the State Election Commission in all the cases.

Mr. Sandeep Sharma, Senior Advocate, with Mr. Pankaj Negi, Advocate, for respondent No. 6 in CWP No. 4518 of 2015.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

In this batch of Writ Petitions, the petitioner(s) have called in question the constitution; re-constitution; delimitation; reservation of the respective Panchayat areas; merger of Panchayats with Municipal areas and vice versa; change of headquarters of Gram Panchayats; amalgamation and alteration of respective Panchayat areas, on the ground that such action has been taken by the respondents in violation to the Himachal Pradesh Panchayati Raj Act, 1994, Himachal Pradesh Panchayati Raj (Election) Rules, 1994, Himachal Pradesh Municipal Act, 1968 etc.

2. Learned Advocate General has raised a preliminary objection regarding the maintainability of these petitions, in view of the dates of the elections for the second phase having been duly notified, whereby the elections are to be conducted on 1st, 3rd and 5th January, 2016, save and except where the elections took place during the first phase and District Kangra, Pangi and Bharmour Block of Chamba where elections are due in June, 2016, where the elections have yet not been notified. The learned Advocate General in support of his submissions has relied upon the various provisions of the Constitution of India, more particularly Article 243-O to argue that since Article 243-O starts with non-

obstante clause, therefore, the other provisions of the Constitution including Article 226 thereof will not apply to the subject matter covered by the aforesaid provisions and consequently, all these petitions are not maintainable.

3. On the other hand, the learned counsel for the petitioners would vehemently argue that the power of the judicial review as vests with this Court under Article 226 has not taken away even by Article 243-O, more particularly when the action of the respondents is in derogation and conflict and without following the procedure of the Act and Rules governing the same.

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

4. For the purpose of deciding whether the bar contained in Article 243-O operates against the power vested in the High Court under Article 226 of the Constitution of India to issue directions, orders or writs including writs in the nature of mandamus, prohibition, quo warranto and certiorari or any of them for the enforcement of any right conferred by part III of the Constitution or for any other purpose, it will be useful to notice the relevant constitutional and legal provisions.

5. Part III of the Constitution contains various fundamental rights guaranteed to the citizens and other persons. Part IV enumerates the Directive Principles of State Policy. By virtue of Article 37, it has been declared that the provisions contained in Part IV are not enforceable by any Court, but the principles contained therein are fundamental in the governance of the country and it is the duty of the State to apply the same in making laws. Article 40, which forms part of the Directive Principles of State Policy, ordains the States to take steps to organize village Panchayats and endow them with powers and authority necessary to enable them to function as units of self-government. To achieve this goal, the legislature of State of Himachal Pradesh had enacted various laws including the Himachal Pradesh Gram Panchayat Act, 1968, The Himachal Pradesh Panchayati Raj (Election) Rules, 1971 and Himachal Pradesh Municipal Act, 1968. Likewise, the legislatures of all other States enacted similar legislations.

6. Thereafter, the Parliament enacted Constitution (Seventy-third Amendment) Act 1992 and Constitution (Seventy-fourth Amendment) Act, 1992 whereby Parts DC and IX-A were added to the Constitution. With these amendments, Panchayats and Municipal Bodies have been declared as units of self-Government. The provisions contained in these two parts are of far reaching significance. The same are intended to make the Panchayats and Municipal Bodies fully autonomous partners in the governance of the nation.

7. Article 243(d) defines the term “Panchayat”, as an institution of self-Government constituted under Article 243-B of the rural areas. Article 243-B provides for constitution of Panchayats. Article 243-C relates to composition of Panchayats; Article 243-D regulates reservation of seats for Scheduled Castes and Scheduled Tribes. Article 243-E prescribes duration of Panchayats. Article 243-G enumerates power, authority and responsibility of Panchayats. Article 243-H contemplates that the legislature of the State may, by law, authorize a Panchayat to levy, collect and appropriate taxes, duties, tolls and fee. It also postulates making of a provision for grant-in-aid to the Panchayats and constitution of Panchayat fund. Article 243-I provides for constitution of Finance Commission to review financial position of the Panchayats and to make recommendations to the Government on various matters specified in that Article. Article 243-K regulates elections to the Panchayats. Article 243-M declares that provisions of Part IX shall not apply to the Scheduled Areas. Clause (4) thereof empowers the legislature of a State to enact law

for extending the provisions of Part IX to the Scheduled Areas and Tribal Areas. Article 243-O which begins with a non-obstante clause contains a bar to the Court's interference in electoral matters.

8. To bring the existing legislations in tune with the provisions contained in Part IX of the Constitution, the Himachal Pradesh State legislature enacted the 1994 Act and repealed the Himachal Pradesh Panchayati Raj Act, 1968, the Himachal Pradesh Panchayati Raj (Election) Rules, 1971 and Himachal Pradesh Municipal Act, 1968.

9. Chapter-III of the 1994 Act contains provisions relating to constitution, administration and control of Gram Panchayats. Section 120 lays down the duration of Panchayats. Section 125 of the Act provides for reservation of seats for Scheduled Castes, Scheduled Tribes, Backward Classes and Women. Sections 12, 13, 14 and 15 prescribe the procedure for preparation and publication of electoral roll for a Gram Panchayat. Chapters XI and X-A of 1994 Act contains provisions relating to constitution of State Election Commission, conduct of elections and election offences. Section 162 contains a prohibition against challenge to elections except by way of an election petition. Chapter-CIII contains special provisions relating to the Panchayats. Section 186 empowers the Government to make rules to carry out all or any of the purposes of the Act. In exercise of the powers vested in it under Sections 183 and 186 of the Himachal Pradesh Panchayati Raj Act, 1994, the Government of Himachal Pradesh framed the Himachal Pradesh Panchayati Raj (Election) Rules, 1994 (for short, 'the 1994 Rules'). Rule 93 of these Rules contains a reiteration to the bar against challenge to the election held under the 1994 Act except by an election petition.

10. Articles 243(d), 243-D, 243-E, 243-K(1), 243-M(1) and (4), Article 243-O and Article 329 of the Constitution and Sections 119, 125, 160, 162 and 192 of the 1994 Act, which have bearing on the decision of this petition, read as under:-

> Constitution of India.
>
> *243(d) "Panchayat" means an institution (by whatever name called) of self-Government constituted under Article 243-B, for the rural areas.*
>
> *243-D. Reservation of seats:*
>
> *(1) Seats shall be reserved for-*
>
> *(a) the Scheduled Castes; and*
>
> *(b) the Scheduled Tribes,*
>
> *(2) Not less than one-third of the total number of seats reserved under Clause (1) shall be reserved for women belonging to the Scheduled Castes or, as the case may be, the Scheduled Tribes.*
>
> *(3) Not less than one-third (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 Panchayat shall be reserved for women and such seats may be allotted by rotation to different constituencies in a Panchayat.*
>
> *(4) The offices of the Chairpersons in the Panchayats at the village or any other level shall be reserved for the Scheduled Castes, the Scheduled Tribes and Women in such manner as the Legislature of a State may, by law, provide:*
>
> *Provided that the number of offices of Chairpersons reserved for the Scheduled Castes and the Scheduled Tribes in the Panchayats at each level in any State shall bear, as nearly as may be, the same proportion to the total number of such offices in the Panchayats at each level as the population of the*

Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the total population of the State;

Provided further that not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level shall be reserved for women: Provided also that the number of offices reserved under this clause shall be allotted by rotation to different Panchayats at the each level.

(5) The reservation of seats under Clauses (1) and (2) and the reservation of offices of Chairpersons (other than the reservation for women) under Clause (4) shall cease to have effect on the expiration of the period specified in Article 334.

(6) Nothing in this Part shall prevent the Legislature of a State from making any provision for reservation of seats in any Panchayat or offices of Chairpersons in the Panchayats at any level in favour of backward class of citizens.

243-E. Duration of Panchayats etc :-(1) Every Panchayat, unless sooner dissolved under any law for the time being in force, shall continue for five years from the date appointed for its first meeting and no longer.

(2) No amendment of any law for the time being in force shall have the effect of causing dissolution of a Panchayat at any level, which is functioning immediately before such amendment, till the expiration of its duration specified in Clause (1).

(3) An election to constitute a Panchayat shall be completed- (a) before the expiry of its duration specified in Clause (1) : (b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Panchayat would have continued is less than six months, it shall not be necessary to hold any election under this clause for constituting the Panchayat for such period.

(4) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayat would have continued under Clause (1) had it not been so dissolved.

243-K. Elections of the Panchayats:-The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of, all elections to the Panchayats shall be vested in a State Election Commission consisting of a State Election Commissioner to be appointed by the Governor.

243-M. Part not to apply to certain areas:- (1) Nothing in this Part shall apply to the Scheduled Areas referred to in Clause (1), and the Tribal Areas referred to in Clause (2), of Article 244.

(2)...
(3)...
(4) Notwithstanding anything in this Constitution,-

(a) the Legislature of a State referred to in Sub-clause (a) of Clause (2) may, by law, extend this Part to that State, except the areas, if any, referred to in Clause (1), if the Legislative Assembly of that State passes a resolution to that effect by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting;

(b) Parliament may, by law, extend the provisions of this Part to the Scheduled Areas and the Tribal Areas referred to in Clause (1) subject to such exceptions and modifications as may be specified in such law, and no such law shall be deemed to be an amendment of this Constitution for the purposes of Article 368.

243-O. Bar to interference by Courts in electoral matters:-Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 243K, shall not be called in question in any Court;

(b) no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as is provided for by or under any law made by the Legislature of a State.

329. Bar to interference by Courts in electoral matters:-Notwithstanding anything in this Constitution,-

(a) the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies, made or purporting to be made under Article 327 or Article 328, shall not be called in question in any Court:

(b) no election to either House of Parliament or to the House or either House of the Legislature of a State shall be called in question except by an election-petition presented to such authority and in such manner as may be provided for by or under any law made by the appropriate Legislature."

Himachal Pradesh Panchayati Raj Act, 1994

*Section **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 subsection (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), 5[(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.

120. ***Duration of Panchayats.****- (1) Every Panchayat shall continue for five years from the date appointed for its first meeting and no longer unless sooner dissolved under this Act.*

(2) An election to constitute a Panchayat shall be completed-

(a) before the expiry of its duration specified in sub-section (1); and

(b) before the expiration of a period of six months from the date of its dissolution:

Provided that where the remainder of the period for which the dissolved Panchayat would have continued is less than six months it shall not be necessary to hold any election under this clause for constituting the Panchayat for such period.

(3) A Panchayat constituted upon the dissolution of a Panchayat before the expiration of its duration shall continue only for the remainder of the period for which the dissolved Panchayats, would have continued under sub-section (1) had it not been so dissolved.

125. ***Reservation for Chairpersons.-*** *(1) There shall be reserved by the Government, in the prescribed manner such number of offices of Chairpersons in Panchayats at every level in the State for the persons belonging to the Scheduled Castes and Scheduled Tribes and the number of such offices, bearing as may be the same proportion to the total number of offices in the State as the population of the Scheduled Castes in the State or of the Scheduled Tribes in the State bears to the population of the State.*

(2) [One-half] of offices of Chairpersons reserved in each category, for persons belonging to the Scheduled Castes and Scheduled Tribes and of the non-reserved offices in the Panchayats at every level shall be reserved for women.

(3) The State Government may, by general or special order, reserve such number of offices of chairpersons for persons belonging to Backward Classes in Panchayats at every level, not exceeding the proportion to the total number of offices to be filled by direct election in the Panchayat as the population of the persons belonging to Backward Classes in the State bears to the total population of the State and may further reserve [one-half] of the total seats reserved under this sub-section for women belonging to Backward Classes.

(4) The offices of Chairpersons reserved under sub-sections (1), (2) and (3) shall be allotted by rotation to different constituencies in the district in such manner as may be prescribed.

Explanation.- For the removal of doubt it is hereby declared that the principle of rotation for the purposes of reservation of office under this section shall commence from the first election to be held after the commencement of this Act.

160. ***State Election Commission.-*** *(1) There shall be a State Election Commission constituted by the Governor for superintendence, direction and control of the preparation of electoral rolls for, and the conduct of all elections to the Panchayat bodies in the State under this Act and the rules made thereunder. The Commission shall consist of a State Election Commissioner to be appointed by the Governor.*

(2) The salary and allowances payable to, tenure of office and conditions of service of the State Election Commissioner shall be such as the Governor may by rule determine:

Provided that the State Election Commissioner shall not be removed from his office except in the like manner and on the like grounds as a judge of

the High Court and the conditions of service of the State Election Commissioner shall not be varied to his disadvantage after his appointment.

(3) The Governor shall, when so requested by the State Election Commissioner make available to him such staff as may be necessary for the discharge of the functions conferred on him under this Act.

182. ***Bar of interference by Courts in election matters.*** *Notwithstanding anything contained in this Act, the validity] of any law relating to the delimitation of constituencies, or the allotment of seats in such constituencies, made or purported to be made under this Act shall not be called in question in any Court."*

11. Before proceeding further, we consider it proper to observe that even though Section 182 of 1994 Act contains a bar against challenge to the election except by an election petition, the same does not in any manner impinge on the High Court's power to issue appropriate directions, orders or writs under Article 226 of the Constitution.

12. However, the moot question which requires determination is-whether the bar to Court's interference in electoral matters contained in Article 243-O operates qua the High Court's power of judicial review under Article 226.

13. A plain reading of the language of Article 243-O makes it clear that the ambit and reach of the bar contained therein is very wide and pervasive. The non-obstante clause contained in that article excludes all other provisions of the Constitution, which necessarily include Article 226. It lays down that the validity of any law relating to the delimitation of constituencies or the allotment of seats to such constituencies made or purporting to be made under Article 243-K shall not be called in question in any Court. It also declares that no election to any Panchayat shall be called in question except by an election petition presented to such authority and in such manner as provided for by or under any law made by the Legislature of a State. In other words, the power of the judicial review conferred upon the High Courts under Article 226 of the Constitution of India is not available to an aggrieved person until after the adjudication of the election dispute by an authority constituted under the law enacted by the Legislature of the concerned State.

14. To put it differently, any challenge to the election or any election dispute can be adjudicated in the first instance only by an authority constituted by or under any law made by the Legislature of a State and not otherwise. The High Court can entertain writ petition against an adjudicatory order made by the Tribunal etc. constituted under the State Legislation, but cannot entertain a petition directly filed under Article 226 of the Constitution questioning the law relating to delimitation of constituencies or the allotment of seats or election to any Panchayat.

15. The reason why the Parliament did not want any judicial intervention in the process of election is clearly discernible from the scheme of various provisions contained in Part DC. While making the Panchayats as units of self-Government, the Parliament also ensured that they are controlled by democratically elected bodies having a fixed tenure of five years.

16. These provisions are also reflective of the legislative intendment that the electorates of the Panchayats should be able to exercise their franchise to choose the candidates of their choice at the end of five years period, if not before. While enacting Clause (3) of Article 243-E, which, as mentioned above, mandates that election to constitute a Panchayat shall be completed before expiry of its duration of five years, the Parliament must have taken into consideration that the provisions contained in various statutes for

appointment of administrative and executive officers to manage the affairs of the local bodies in urban as well as rural areas at the end of the term of the elected bodies and the fact that these provisions are generally misused and efforts are made by the interested parties and persons to deprive the people of their right to choose their representatives. The Parliament must also have taken note of the fact that process of election to various bodies including Panchayats, which are intended to be units of self-Government, is often frustrated by judicial interventions at various stages like delimitation of constituencies, issuance of notification for holding election, preparation and publication of the electoral rolls, filing of nomination papers, actual poll, counting of votes and declaration of result. Therefore, with a view to ensure that the elections to the Panchayats, which have been declared as units of self Government, are held without interruption on account of intermediate/ interlocutory judicial interventions, the Parliament designedly enacted Article 243-O and introduced a complete bar to Courts' interference in the electoral matters and also incorporated non-obstante clause which operates qua all other provisions contained in the Constitution.

17. It could be well conceived that in case the Parliament intended to exclude Article 226 from the purview of the non-obstante clause contained in Article 243-O, then the language of that Article would have been like that of Articles 116, 120, 128, 133(2), (3), 136, 145, 170(1), 196, 197(3), 204(3), 206, 210, 224-A, 226(1), 231(1), 239(2), 243-M(1), 243-N, 243-ZC, 246(1) and (2), 247, 249(1), 250(1), 253, 266(1), 271, 276(1), 301, 303(1), 304, 312(1), 317(1), 330(3), 331, 332(B), 333, 334, 343(1), 345, 348(1), (2), 376(1) and 378-A, wherein the non-obstante clauses contained in these Articles have limited operation. For example, non-obstante clause contained in Article 116 operates against the provisions contained in Chapter II of Part IV. Similarly, the non-obstante clause contained in Article 120 operates against the provisions contained in Part XVII. Against this, the non-obstante clauses contained in Articles 243-O, 243-ZG, 244-A, 258(1), 258-A, 262(2), 329, 363, 363-A, 368, 369, 371(2), 371-A(1), (2), 371-B, 371-C, 371-F, 371-H and 371-I are very wide. The expression used in these articles is "notwithstanding anything contained in this Constitution". This means that the provisions contained therein operate against all other articles of the Constitution. If the non-obstante clause contained in Article 243-O and similar clause contained in Article 243-ZG is interpreted in the backdrop of the fact that the Parliament did not want intermediary/interlocutory judicial interventions in the process of election which constitutes an integral part of the democratic set up of our country, it becomes clear that the High Court's power of judicial review under Article 226 of the Constitution is postponed in the matters involving challenge to delimitation of constituencies or allotment of seats or election to Panchayats until after completion of the process of election and adjudication of election dispute by an adjudicatory forum created under the law enacted by the Legislature of the State.

18. Having noticed the various provisions of the Constitution as also the Himachal Pradesh Panchayati Raj Act, 1994, we may now proceed to notice certain judicial pronouncements on the subject.

19. In ***N.P. Ponnuswami Vs. Returning Officer, AIR 1952 SC 64,*** the Hon'ble Constitution Bench of the Hon'ble Supreme Court held that the inherent restriction of exercise of writ jurisdiction in election matters are recognized and the word "election" is used to embrace the whole procedure of election and is not confined to final result thereof. It was further held that the law does not contemplate two attacks on matters connected with election, one under Article 226 during the process of election and the other when it is completed by election petition under Representation of the People Act. It was held that

rejection or acceptance of nomination paper cannot be called in question under Article 226 of the Constitution of India.

20. Constitution Bench of the Hon'ble Supreme Court in ***Meghraj Kothari Vs. Delimitation Commission and others AIR 1967 SC 669***, held that once the orders of delimitation had been made and published in the official gazette, then these matters could no longer be re-agitated in a Court of law, because in case these orders were not treated as final, the effect would be that any voter could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. It was observed that:-

> *"19. In our view, therefore, the objection to the delimitation of constituencies could only be entertained by the Commission before the date specified. Once the orders made by the Commission under Ss.8 and 9 were published in the Gazette of India and in the official gazettes of the States concerned, these matters could no longer be reagitated in a court of law. There seems to be very good reason behind such a provision. If the orders made under Ss. 8 and 9 were not to be treated as final, the effect would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Section 10(2) of the Act clearly demonstrates the intention of the Legislature that the orders under Ss. 8 and 9 published under S. 10 (1) were to be treated as law which was not to be questioned in any court."*

21. The decision in Ponnuswami (supra) was followed in number of decisions and subsequently in case of ***Mohinder Singh Gill Vs. The Chief Election Commissioner, (1978) 1 SCC 405***, another Hon'ble Constitution Bench considered the ambit of the bar contained in Article 329 (b) of the Constitution and it was held that:-

> ***"28.*** *What emerges from this perspicacious reasoning, if we may say so with great respect, is that any decision sought and rendered will not amount to 'calling in question' an election if it subserves the progress of the election and facilitates the completion of the election. 'Ale should not slur over the quite essential observation "-Anything done towards the completion of the election proceeding can by no stretch of reasoning be described as questioning the election. Likewise, it is fallacious to treat 'a single step taken in furtherance of an election as equivalent to election.*
>
> ***29.*** *Thus, there are two types of decisions, two types of challenges. The first relates to proceedings which interfere with the progress of the election. The second accelerates the completion of the election and acts in furtherance of an election. So, the short question before us, in the light of the illumination derived from Ponnuswami, is as to whether the order for re-poll of the Chief Election Commissioner is "anything done towards the completion of the election proceeding' and whether the proceedings before the High Court facilitated the election process or halted its progress. The question immediately arises as to whether the relief sought in, the writ petition by the present appellant amounted to calling in question the election. This, in turn, revolves round the point as to whether the cancellation of the poll and the reordering of fresh poll is 'part of election' and challenging it is 'calling it in question'.*
>
> ***30.*** *The plenary bar of Art. 329 (b) rests on two principles: (1)*
>
> *The peremptory urgency of prompt engineering of the whole election process without intermediate interruptions by way of legal proceedings challenging the steps and stages in between the commencement and the conclusion. (2) The provision of a special jurisdiction which can be invoked by an aggrieved party*

at the end of the election excludes other form, the right and remedy being creatures of statutes and controlled by the Constitution. Durga Shankar Mehta(1) has affirmed this position and supplemented it by holding that, once the Election Tribunal has decided, the prohibition is extinguished and the Supreme Court's over-all power to interfere under Art. 136 springs into, action. In Hari Vishnu(2) this Court upheld the rule in Ponnuswami excluding any proceeding, including one under Art. 226, during the on- going process of election, understood in the comprehensive sense of notification down to declaration. Beyond the declaration comes the election petition, but beyond the decision of the Tribunal the ban of Art. 329(b) does not bind.

31. *If 'election' bears the larger connotation, if 'calling in question' possesses a semantic sweep in plain English, if policy and principle are tools for interpretation of statutes, language permitting the conclusion is irresistible' even though the argument contra may have emotional impact and ingenious appeal, that the catch-all jurisdiction under Art. 226 cannot consider the correctness, legality or otherwise of the direction for cancellation integrated with re-poll. For, the prima facie purpose of such a re-poll was to restore a detailed Poll process and to, complete it through the salvationary effort of a repoll. Whether in fact or law, the order is validly made within his powers or violative of natural justice can be examined later by the appointed instrumentality, viz., the Election Tribunal. That aspect will be explained presently. We proceed on the footing that re-poll in one polling station or it many polling stations for good reasons, is lawful. This shows that re-poll in many or all segments, all- pervasive or isolated, can be lawful. We are not considering whether the act was bad for other reasons. We are concerned only to say that if the regular poll, for some reasons, has failed to reach the goal of choosing by plurality the returned candidate and to achieve this object a fresh poll (not a new election) is needed, it may still be a step in the election. The deliverance of Dunkirk is part of the strategy of counter-attack. Wise or valid, is another matter.*

32*. On the assumption, but leaving the question of the validity of the direction for re-poll soon for determination by the Election Tribunal, we hold that a writ petition challenging the cancellation coupled with re-poll amounts to calling in question a step in 'election! and is there, fore barred by Art. 329(b). If no re-poll had been directed the legal perspective would have been very different. The mere cancellation would have then thwarted the course of the election and different considerations would have come into play. We need not chase a hypothetical case."*

22. In ***Nanhoo Mal Vs. Hira Mal, AIR 1975 SC 2140***, it was held that after the decision in N.P. Ponnuswami's case (supra), there is hardly any room for Courts to entertain applications under Article 226 of the Constitution in matters relating the election.

23. In ***Sundarajas Kanyalal Bhathua Vs. Collector, Thane, AIR 1990 SC 261***, it was held by the Hon'ble Supreme Court that the exercise of delimitation of municipal area is a legislative function, therefore, the right of hearing or principle of natural justice is not applicable.

24. In ***State of U.P. and others Vs. Pradhan Sangh Kshettra Samiti, AIR 1995 SC 1512,*** the Hon'ble Supreme Court held that after publication of notification of

delimitation, the bar under Article 243-O of the Constitution of India operates and therefore, neither the delimitation of the Panchayat areas nor of the constituencies in the said area and allotment of seats to the constituencies could have been challenged or the Court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification to hold the election was issued. The Hon'ble Supreme Court refused to interfere in the matter of delimitation of constituencies after publication of the notification of delimitation of Panchayat areas even where the writ petitions had been filed prior to the notification of election. It was held that:

> **"*11*.....**
>
> *It is for the Government to decide in what manner the panchayat areas and the constituencies in each panchayat area will be delimited. It is not for the court to dictate the manner in which the same would be done. So long as the panchayat areas and the constituencies are delimited in conformity with the constitutional provisions or without committing a breach thereof, the courts cannot interfere with the same. We may, in this connection, refer to a decision of this Court in The Hingir-Rampur Coal Co, Ltd. and Others v. The State of Orissa and Others [(1961) 2 SCR 537]. In this case, the petitioner mine owners, had among others, challenged the method prescribed by the legislature for recovering the cess under the Orissa Mining Areas Development Fund Act, 1952 on the ground that it was un- constitutional. The majority of the Bench held that the method is a matter of convenience and, though relevant, has to be tested in the light of other relevant circumstances. It is not permissible to challenge the vires of a statute solely on the ground that the method adopted for the recovery of the impost can and generally is adopted in levying a duty of excise.*
>
> *What is more objectionable in the approach of the High Court is that although clause (a) of Article 243-0 of the Constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243-K and the election to any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this Court in Meghraj Kothari v. Delimitation Commission & Ors. (1967) 1 SCR 400. In that case, a notification of the Delimitation Commission whereby a city which had been a general constituency was notified as reserved for the Scheduled Castes. This was challenged on the ground that the petitioner had a right to be a candidate for Parliament from the said constituency which had been taken away. This Court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any court of law. There was a very good reason for such a provision because if the orders made under sections 8 and 9 were not to be treated as final, the result would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Although an order under Section 8 or 9 of the Delimitation Commission Act and*

published under Section 10 [1] of that Act is not part of an Act of Parliament, its effect is the same. Section 10 [4] of that Act puts such an order in the same position as a law made by the Parliament itself which could only be made by it under Article 327. If we read Articles 243-C, 243-K and 243-0 in place o Article 327 and sections 2 [kk], 11-F and 12-BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged or the Court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievances although the challenge was made after the notification for the election was issued on 31st August, 1994."

25 In ***Anugrah Narain Singh & another Vs. State of Uttar Pradesh & others (1996) 6 SCC 303*** the Hon'ble Supreme Court on interpretation of Article 243-ZG of the Constitution, held that once the process of election has been set into motion, the Court should not intervene to stop election in the midway. It is apt to reproduce para 24, which read thus:-

"*24. The validity of Sections 6-A, 31, 32 and 33 of the U.P. Act dealing with delimitation of wards cannot be questioned in a court of law because of the express bar imposed by Article 243-ZG of the Constitution. Section 7 contains rules for allotment of seats to the Scheduled Castes, the Scheduled Tribes and the Backward Class people. The validity of that Section cannot also be challenged. That apart, in the instant case, when the delimitation of the wards was made, such delimitation was not challenged on the ground of colourable exercise of power or on any other ground of arbitrariness. Any such challenge should have been made as soon as the final order was published in the Gazette after objections to the draft order were considered*
and not after the notification for holding of the elections was issued. As pointed out in Lakshmi Charan Sen's Case, that the fact that certain claims and objections had not been disposed of before the final order was passed, cannot arrest the process of election."

26. In ***Jaspal Singh Arora Vs. State of M.P. and others (1998) 9 SCC 594***, the Hon'ble Supreme Court, set aside the order of the Madhya Pradesh High Court on the ground that bar contained under Article 243-ZG was overlooked. It was held that:-

"3. These appeals must be allowed on a short ground. In view of the mode of challenging the election by an election petition being prescribed by the M.P. Municipalities Act, it is clear that the election could not be called in question except by an election petition as provided under that Act. The bar to interference by courts in electoral matters contained in Article 243-ZG of the Constitution was apparently overlooked by the High Court in allowing the writ petition. Apart from the bar under Article 243-ZG, on settled principles interference under Article 226 of the Constitution for the purpose of setting aside election to a municipality was not called for because of the statutory provision for election petition and also the fact that an earlier writ petition for

the same purpose by a defeated candidate has been dismissed by the High Court."

27. The Hon'ble Supreme Court in ***Election Commission of India Vs. Ashok Kumar and others AIR 2000 SC 2977*** further elaborated the observations made in *Mohinder Singh Gill's* case (supra) and observed as under:-

> "***22***. *In Lakshmi Charan Sen Vs. A.K.M. Hassan Uzzaman (AIR 1985 SC 1233) writ petitions under Article 226 of the Constitution were filed before the High Court asking for the writs of mandamus and certiorari, directing that the instructions issued by the Election Commission should not be implemented by the Chief Electoral Officer and others; that the revision of electoral rolls be undertaken de novo; that claims, objections and appeals in regard to the electoral roll be heard and disposed of in accordance with the rules; and that, no notification be issued under S.15(2) of the Representation of the People Act, 1951 calling for election to the West Bengal Legislative Assembly, until the rolls were duly revised. The High Court entertained the petitions and gave interim orders. The writ petitioners had also laid challenge to validity of several provisions of Acts and Rules, which challenge was given up before the Supreme Court. The Constitution Bench held though the High Court was justified in entertaining the writ petition and issuing a rule therein since, the writ petition apparently contained a challenge to several provisions of Election Laws, it was not justified in passing any order which would have the effect of postponing the elections which were then imminent. Even assuming, therefore, that the preparation and publication of electoral rolls are not a part of the process of election within the meaning of Article 329(b), we must reiterate our view that the High Court ought not to have passed the impugned interim orders, whereby it not only assumed control over the election process but, as a result of which, the election to the Legislative Assembly stood the risk of being postponed indefinitely.*
>
> ***23***. *In Election Commission of India Vs. State of Haryana AIR 1984 SC 1406 the Election Commission fixed the date of election and proposed to issue the requisite notification. The Government of Haryana filed a writ petition in the High Court and secured an ex-parte order staying the issuance and publication of the notification by the Election Commission of India under Sections 30, 56 and 150 of the Representation of the People Act, 1951. This Court deprecated granting of such ex-parte orders. During the course of its judgment (vide para 8) the majority speaking through the Chief Justice observed that it was not suggested that the Election Commission could exercise its discretion in an arbitrary or mala fide manner; arbitrariness and mala fide destroy the validity and efficacy of all orders passed by public authorities. The minority view was recorded by M.P. Thakkar, J. quoting the following extract from A.K.M. Hassan Uzzaman (1982) 2 SCC 218 :-*
>
> > *"The imminence of the electoral process is a factor which must guide and govern the passing of orders in the exercise of the High Courts writ jurisdiction. The more imminent such process, the greater ought to be the reluctance of the High Court to do anything, or direct anything to be done, which will postpone that process indefinitely by creating a situation in which, the Government of a State cannot be carried on in accordance with the provisions of the Constitution."*

and held that even according to Hassans case the Court has the power to issue an interim order which has the effect of postponing an election but it must be exercised sparingly (with reluctance) particularly when the result of the order would be to postpone the installation of a democratic elected popular Government.

24. *In Digvijay Mote Vs. Union of India & Ors. (1993) 4 SCC 175 this Court has held that the powers conferred on the Election Commission are not unbridled; judicial review will be permissible over the statutory body, i.e., the Election Commission exercising its functions affecting public law rights though the review will depend upon the facts and circumstances of each case; the power conferred on the Election Commission by Article 324 has to be exercised not mindlessly nor mala fide nor arbitrarily nor with partiality but in keeping with the guidelines of the rule of law and not stultifying the Presidential notification nor existing legislation.*

25*. Anugrah Narain Singh and Anr. Vs. State of U.P. & Ors. - 1996 (6) SCC 303 is a case relating to municipal elections in the State of Uttar Pradesh. Barely one week before the voting was scheduled to commence, in the writ petitions complaining of defects in the electoral rolls and de-limitation of constituencies and arbitrary reservation of constituencies for scheduled castes, scheduled tribes and backward classes the High Court passed interim order stopping the election process. This Court quashed such interim orders and observed that if the election is imminent or well under way, the Court should not intervene to stop the election process. If this is allowed to be done, no election will ever take place because someone or the other will always find some excuse to move the Court and stall the elections. The importance of holding elections at regular intervals cannot be over-emphasised. If holding of elections is allowed to stall on the complaint of a few individuals, then grave injustice will be done to crores of other voters who have a right to elect their representatives to the democratic bodies.*

26*. In C. Subrahmanyam Vs. K. Ramanjaneyullu and Ors. (1998) 8 SCC 703 this Court has held that non-compliance of a provision of the Act governing the elections being a ground for an election petition, the writ petition under Article 226 of the Constitution of India should not have been entertained.*

27*. In Mohinder Singh Gills case (supra) the Election Commission had cancelled a poll and directed a re-polling. The Constitution Bench held that a writ petition challenging the cancellation coupled with repoll amounted to calling in question a step in election and is therefore barred by Article 329 (b). However, vide para 32, it has been observed that had it been a case of mere cancellation without an order for repoll, the course of election would have been thwarted (by the Election Commission itself) and different considerations would have come into play.*

28. *Election disputes are not just private civil disputes between two parties. Though there is an individual or a few individuals arrayed as parties before the Court but the stakes of the constituency as a whole are on trial. Whichever way the lis terminates it affects the fate of the constituency and the citizens generally. A conscientious approach with overriding consideration for welfare of the constituency and strengthening the democracy is called for. Neither turning a blind eye to the controversies which have arisen nor assuming a role of over- enthusiastic activist would do. The two extremes have to be avoided in dealing with election disputes.*

29. *Section 100 of the Representation of the People Act, 1951 needs to be read with Article 329 (b), the former being a product of the later. The sweep of Section 100 spelling out the legislative intent would assist us in determining the span of Article 329 (b) though the fact remains that any legislative enactment cannot curtail or override the operation of a provision contained in the*

Constitution. Section 100 is the only provision within the scope of which an attack on the validity of the election must fall so as to be a ground available for avoiding an election and depriving the successful candidate of his victory at the polls. The Constitution Bench in Mohinder Singh Gills case (vide para 33) asks us to read Section 100 widely as covering the whole basket of grievances of the candidates. Sub-clause (iv) of clause (d) of sub-section (1) of Section 100 is a residual catch-all clause. Whenever there has been non-compliance with the provisions of the Constitution or of the Representation of the People Act, 1951 or of any rules or orders made thereunder if not specifically covered by any other preceding clause or sub-clause of the Section it shall be covered by sub-clause

(iv). The result of the election insofar as it concerns a returned candidate shall be set aside for any such non-compliance as abovesaid subject to such non-compliance also satisfying the requirement of the result of the election having been shown to have been materially affected insofar as a returned candidate is concerned. The conclusions which inevitably follow are: in the field of election jurisprudence, ignore such things as do not materially affect the result of the election unless the requirement of satisfying the test of material effect has been dispensed with by the law; even if the law has been breached and such breach satisfies the test of material effect on the result of the election of the returned candidate yet postpone the adjudication of such dispute till the election proceedings are over so as to achieve, in larger public interest, the goal of constituting a democratic body without interruption or delay on account of any controversy confined to an individual or group of individuals or single constituency having arisen and demanding judicial determination.

30. *To what extent Article 329 (b) has an overriding effect on Article 226 of the Constitution? The two Constitution Benches have held that Representation of the People Act, 1951 provides for only one remedy; that remedy being by an election petition to be presented after the election is over and there is no remedy provided at any intermediate stage. The non-obstante clause with which Article 329 opens pushes out Article 226 where the dispute takes the form of calling in question an election (see para 25 of Mohinder Singh Gills case, supra). The provisions of the Constitution and the Act read together do not totally exclude the right of a citizen to approach the Court so as to have the wrong done remedied by invoking the judicial forum; nevertheless the lesson is that the election rights and remedies are statutory, ignore the trifles even if there are irregularities or illegalities, and knock the doors of the courts when the election proceedings in question are over. Two-pronged attack on anything done during the election proceedings is to be avoided--one during the course of the proceedings and the other at its termination, for such two pronged attack, if allowed, would unduly protract or obstruct the functioning of democracy.*

31. *The founding fathers of the Constitution have consciously employed use of the words no election shall be called in question in the body of Section 329 (b) and these words provide the determinative test for attracting*

applicability of Article 329 (b). If the petition presented to the Court calls in question an election the bar of Article 329 (b) is attracted. Else it is not."

28. The Hon'ble Supreme Court in Election Commission's case (supra) after detailed consideration with regard to the power to be exercised by the Courts in matters relating to elections in para 32 of the said judgment summarized the following general principles:-

"32. For convenience sake we would now generally sum up our conclusions by partly restating what the two Constitution Benches have already said and then adding by clarifying what follows therefrom in view of the analysis made by us hereinabove:-

1) If an election, (the term election being widely interpreted so as to include all steps and entire proceedings commencing from the date of notification of election till the date of declaration of result) is to be called in question and which questioning may have the effect of interrupting, obstructing or protracting the election proceedings in any manner, the invoking of judicial remedy has to be postponed till after the completing of proceedings in elections.

2) Any decision sought and rendered will not amount to calling in question an election if it subserves the progress of the election and facilitates the completion of the election. Anything done towards completing or in furtherance of the election proceedings cannot be described as questioning the election.

3) Subject to the above, the action taken or orders issued by Election Commission are open to judicial review on the well-settled parameters which enable judicial review of decisions of statutory bodies such as on a case of mala fide or arbitrary exercise of power being made out or the statutory body being shown to have acted in breach of law.

4) Without interrupting, obstructing or delaying the progress of the election proceedings, judicial intervention is available if assistance of the Court has been sought for merely to correct or smoothen the progress of the election proceedings, to remove the obstacles therein, or to preserve a vital piece of evidence if the same would be lost or destroyed or rendered irretrievable by the time the results are declared and stage is set for invoking the jurisdiction of the Court.

5) The Court must be very circumspect and act with caution while entertaining any election dispute though not hit by the bar of Article 329(b) but brought to it during the pendency of election proceedings. The Court must guard against any attempt at retarding, interrupting, protracting or stalling of the election proceedings. Care has to be taken to see that there is no attempt to utilise the courts indulgence by filing a petition outwardly innocuous but essentially a subterfuge or pretext for achieving an ulterior or hidden end. Needless to say that in the very nature of the things the Court would act with reluctance and shall not act except on a clear and strong case for its intervention having been made out by raising the pleas with particulars and precision and supporting the same by necessary material."

29. In ***Jasbir Hussain Nasir Ahmed Boga Vs. State of Gujarat & others, AIR 2006 Gujarat 53***, Full Bench of the Gujarat High Court held that the bar imposed by Article 243-ZG, which is pari materia with the bar under Article 243-O (a) of the Constitution is absolute and the resolution of any dispute pertaining to an election which

has the effect of interrupting, obstructing or protracting the election shall be postponed until after the completion of the election. The Court shall desist from making any order; interim or otherwise, which has the effect of postponement of the election. It is apt to reproduce paragraph 14, which reads thus:-

> *"14. We have carefully considered the above referred judgments relied upon by the learned advocates. We are of the view that none of the aforesaid judgments supports the contentions raised by Mr.Raval and Mr.Vyas. It is the consistent view of this Court and the Hon'ble Supreme Court that the bar imposed by Article 243-ZG is absolute and that the resolution of any dispute pertaining to an election which has the effect of interrupting, obstructing or protracting the election shall be postponed until after the completion of the election. The Court shall desist from making any order; interim or otherwise, which has the effect of postponement of the election. The process of election, as defined in Clause 7A of Section 2 of the Act of 1963, shall be deemed to have commenced from the date the order of delimitation of wards is made by the Election Commission of the State. Hence, once the order of delimitation of wards is made no court shall entertain any dispute concerning the delimitation of wards or any other matter concerning the election. The resolution of such disputes shall be postponed until after the election is complete."*

30. Learned five Judges Bench of Punjab and Haryana High Court in ***Prithvi Raj Vs. State Election Commission, AIR 2007 PH 178***, while dealing with the bar of interference by the Court in elections to the Municipality, held that the elections can be called in to question by way of election petition before the authority or tribunal provided by the statute enacted by the State legislature, but this did not oust the jurisdiction of the High Court under Article 226 of the Constitution, but its power of judicial review was merely postponed to a stage after the election tribunal had adjudicated upon the election petition. It also overruled the earlier view of Full Bench in ***Lal Chand Vs. State of Haryana, AIR 1999 P&H 1,*** wherein it had been held that Article 243-ZG (b) could be read down and held ultra virus to the provisions of Article 226 of the Constitution, it was held that the challenge to an election under Article 226 would be postponed to a time and stage after the conclusion of the "election" and that too by an election petition, the High Court would in exercise of judicial restraint, postpone judicial review to a stage after the Election Tribunal adjudicates the election petition. Meaning thereby, that the Court unequivocally held that the High Court could not entertain a writ petition calling in question elections once the elections have been notified.

31. In ***Association of Residents of Mhow (Rom) Vs. Delimitation Commission of India (2009) 5 SCC 404***, the Hon'ble Supreme Court considered the scope of interference by the Courts in matters of delimitation and in view of clause A of Article 243-O held that the order under the Delimitation Act, 2002 is law made under Article 327 of the Constitution and cannot be called in question in any Court by virtue of Article 329 and therefore, the High Court rightly relied on this short ground, when it summarily dismissed the writ petition under Article 226 praying for writ of certiorari for quashing the notification issued in pursuance of Section 10 (1) of the Act. It was held that:-

> *"**28**. The Commission's power to determine delimitation of the constituency is not unlimited but is structured by the provisions of the Act and more particularly by Sections 8 and 9 of the Act apart from the Constitution (Eighty-fourth Amendment) Act, 2001 and Constitution (Eighty-seventh Amendment) Act, 2003 which have, inter alia, amended Articles 81, 82, 170, 330 and 332 of the Constitution of India. The effect of these amendments to the Constitution*

inter alia is that each Parliamentary Constituency in each State shall be an integral multiple of the number of seats comprised therein and no Assembly Constituency shall extend to more than one Parliamentary Constituency.

***29**. The Commission in the present case appears to have determined the delimitation of both Dhar and Indore Parliamentary Constituencies in such a manner whereby each of the Parliamentary Constituency shall consist of equal number of 8 Assembly Constituencies. It appears the Commission had also taken into consideration the contiguity, geographical features, public convenience etc. before finally determining the delimitation of both the Parliamentary Constituencies. We find no illegality to have been committed by the Commission.*

***30**. In the present case, the High court of Madhya Pradesh at Jabalpur summarily dismissed the writ petition under Article 226 of the Constitution praying for writ of certiorari for quashing the notification issued in pursuance of sub-section (1) of Section 10 of the Act in respect of the delimitation of Indore Parliamentary Constituency. The petition was rejected on the short ground that the order of the Commission once published under Section 10(2) of the Act is law made under Article 327 of the Constitution and cannot be called in question in any court by virtue of Article 329 of the Constitution.*

***31**. The learned counsel for the appellants submitted that only such decision of the Commission determining delimitation of Constituencies after following the mandatory procedure under Section 9 (2) of the Act, if it is published, becomes a force of law and it cannot be questioned in any court. Thus, the protection under Section 10 (2) of the Act as well as Article 329(a) is available only when the mandatory requirements of Section 9(2) are complied with by the Commission. In support of the submission reliance was placed on the decision of this Court in State of U.P. Vs. Pradhan Singh Khesttra Samiti [1995 suppl. (2) SCC 305.*

***32.** The decision in Pradhan (supra) upon which reliance has been placed by the learned counsel for the appellants in no manner supports the contention urged before us. On the other hand, this Court found the approach of the High Court to be objectionable for it had gone into the question of validity of the delimitation of the constituencies and also allotments of seats to such constituencies although clause (a) of Article 243-O of the Constitution enacts a bar on the interference by the courts in electoral matters.*

***33.** In Padhan Sangh case, this court dealt with the provisions of Articles 243-C, 243-K and 243-O and the provisions of Panchayat Raj Act,1947 and Section 9 of the Delimitation Act, 1950. It was observed:*

> *"45. What is more objectionable in the approach of the High Court is that although clause (a) of Article 243-O of the Constitution enacts a bar on the interference by the courts in electoral matters including the questioning of the validity of any law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made or purported to be made under Article 243-K and the election to any panchayat, the High Court has gone into the question of the validity of the delimitation of the constituencies and also the allotment of seats to them. We may, in this connection, refer to a decision of this Court in Meghraj Kothari v. Delimitation Commission3. In that case, a notification of the Delimitation Commission whereby a city which had*

been a general constituency was notified as reserved for the Scheduled Castes. This was challenged on the ground that the petitioner had a right to be a candidate for Parliament from the said constituency which had been taken away. This Court held that the impugned notification was a law relating to the delimitation of the constituencies or the allotment of seats to such constituencies made under Article 327 of the Constitution, and that an examination of Sections 8 and 9 of the Delimitation Commission Act showed that the matters therein dealt with were not subject to the scrutiny of any court of law. There was a very good reason for such a provision because if the orders made under Sections 8 and 9 were not to be treated as final, the result would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Although an order under Section 8 or Section 9 of the Delimitation Commission Act and published under Section 10(1) of that Act is not part of an Act of Parliament, its effect is the same. Section 10(4) of that Act puts such an order in the same position as a law made by Parliament itself which could only be made by it under Article 327. If we read Articles 243-C, 243-K and 243-O in place of Article 327 and Sections 2(kk), 11-F and 12- BB of the Act in place of Sections 8 and 9 of the Delimitation Act, 1950, it will be obvious that neither the delimitation of the panchayat area nor of the constituencies in the said areas and the allotments of seats to the constituencies could have been challenged nor the court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given. Even this challenge could not have been entertained after the notification for holding the elections was issued. The High Court not only entertained the challenge but has also gone into the merits of the alleged grievances although the challenge was made after the notification for the election was issued on 31- 8-1994."

34. *It is true the observations made in this judgment*

> *"that neither the delimitation of the Panchayat area nor the constituencies in the said area and the allotments of seats to the constituencies could have been challenged nor the court could have entertained such challenge except on the ground that before the delimitation, no objections were invited and no hearing was given" (SCC p.332, para 45)*

may lend some support to the submission made by the learned counsel for the appellant that there could be a challenge in case where final determination of delimitation of constituencies was made without inviting any objections whatsoever. But that is not the ratio of the judgment.

35. *This court in Pardhan (supra) was not considering any similar issue as the one that had arisen for our consideration in the present case. This Court did not take any view that the proposals in respect of each constituency shall have to be treated as an independent proposal and the Commission's power to determine delimitation of the constituencies is with reference to each constituency. The objections and/or suggestions, as the case may be, are required to be taken into consideration treating the proposals as for whole of*

the State and delimitation of the constituencies with reference to a State as a Unit.

***36**. In Meghraj Kothari Vs. Delimitation Commission & Ors. (1967) 1 SCR 400, a Constitution Bench of this court while interpreting Sections 8, 9, and 10 of the Delimitation Commission Act, 1962 which are in pari materia with the provisions of the present Act, observed: (AIR p. 675 paras 19-20)*

> *"19. In our view, therefore, the objection to the delimitation of constituencies could only be entertained by the Commission before the date specified. Once the orders made by the Commission under Sections 8 and 9 were published in the Gazette of India and in the official gazettes of the States concerned, these matters could no longer be reagitated in a court of law. There seems to be very good reason behind such a provision. If the orders made under Sections 8 and 9 were not to be treated as final, the effect would be that any voter, if he so wished, could hold up an election indefinitely by questioning the delimitation of the constituencies from court to court. Section 10 (2) of the Act clearly demonstrates the intention of the Legislature that the orders under Sections 8 and 9 published under Section 10 (1) were to be treated as law which was not to be questioned in any court. 20. It is true that an order under Section 8 or 9 published under Section 10 (1) is not part of an Act of Parliament, but its effect is to be the same."*

***37**. The Constitution Bench went to the extent of saying that: (Meghraj Kothari case, AIR pp 674 & 677, paras 18 & 32)*

> *"18. An examination of Sections 8 and 9 of the Act shows that the matters therein dealt with were not to be subject to the scrutiny of any court of law.....*
>
> *32.....the provision of Section 10(4) puts orders under Sections 8 and 9 as published under Section 10 (1) in the same street as a law made by Parliament itself which.....could only be done under Article 327, and consequently the objection that the notification was not to be treated as law cannot be given effect to".*

Conclusion

***38**. In the present case, the Commission finally determined the delimitation of Parliamentary Constituencies in the State of Madhya Pradesh after considering all objections and suggestions received by it before the specified date and got published its orders in the Gazette of India and in the Official Gazette of the State as is required under Section 10 (1) of the Act. The orders so published puts them "in the same street as a law made by Parliament itself". Consequently that Notification is to be treated as law and required to be given effect to."*

32. A learned Division Bench of this Court in ***Angdui Norbu & others Vs. State of Himachal Pradesh & others AIR 2012 HP 36***, held that a petition can be said to be an election petition under Section 162 of the Panchayati Raj Act only if the same is filed on any one of the grounds as prescribed under Section 175 (1) of the Act. However, in case no ground as prescribed is available to the petitioner under Section 175 (1) to maintain an election petition under Section 162 of the Act, then the plea that there is an alternative remedy by way of election petition and the bar under Article 243 O of the Constitution would not be attracted. It is apt to reproduce paras 15 and 18 of the judgment, which read thus:-

"***15***. *Section 163(1), provides that "Any elector of a Panchayat may, on furnishing the prescribed security in the prescribed manner, present within 30 days of the publication of the result, on one or more of the grounds specified in sub-section (1) of section 175, to the authorised officer an election petition in writing against the election of any person under this Act." Thus, an election petition would lie only on the ground specified under Section 175(1). Section 175(1) provides for grounds for declaring the elections to be void, which read as follows:*

> *"**175.Grounds for declaring elections to be void.**-(1) If the authorised officer is of the opinion-*
>
> *(a) that on the date of his election the elected person was not qualified, or was disqualified to be elected under this Act; or*
>
> *(b) that any corrupt practice has been committed by the elected person or his agent or by any other person with the consent of the elected person or his agent; or*
>
> *(c) that any nomination has been improperly rejected, or*
>
> *(d) that the result of the election, in so far as it concerns the elected person, has been materially affected-*
>
> *(i) by the improper acceptance nomination, or*
>
> *(ii) by the improper reception, or rejection of any vote reception of any vote which is void, or*
>
> *(iii) by any non-compliance of provisions of this act or of any rule made under this Act, the authorised officer shall declare the election of the persons to be void."*

18. *Since an election petition in the prescribed manner is not maintainable, as stated above, the constitutional bar also is not attracted in this case. The contention that invalidation of an election is contemplated only in an election petition is also without any basis. Section 127(2), provides for a statutory invalidation of the election in the event of an elected member not entering office within the prescribed period. Section 127(2) has provided that the election of a member who has not entered office within the prescribed period shall be deemed to be invalid. A consequence also is provided in the Act that a fresh election should take place. Thus, the statute has not only provided a deemed invalidity but has also provided for the consequence thereof. Having provided a deeming provision also providing for the consequence for the deemed event, is not required under law that a particular authority should again declare or endorse what has taken place by the deemed event and the consequence thereof. The legislature has consciously intended to avoid such redundant provision action and a cumbersome procedure, with a view to effectively activate democratic institutions without wasting time. To hold otherwise would be doing violence to the scheme of the Act and would be a dis-service to a democratic set up. Therefore, in the extraordinary jurisdiction of this Court under Article 226 of the Constitution of India, only this Court can look into such issues and Election Tribunal is incompetent to deal with such matters. Thus, the Petition is perfectly maintainable, nay, the Petition is the only remedy."*

33. The proposition which can now be culled out from the above noted judgments of the Hon'ble Supreme Court and other High Courts including this Court is that:-

(1) The word "election" appearing in Article 243-O and the provisions contained in the 1994 Act and the rules framed thereunder bears larger connotation. It embraces and includes all steps commencing from the date of notification by the Competent Authority, whereby the electorates are called upon to elect Pradhans and Up-Pradhans and ending with declaration of result. Reservation of offices of Pradhan and Wards in favour of Scheduled Castes, Scheduled Tribes, Backward Classes and Women, preparation, printing and publication of electoral rolls (provisional and final), filing of nomination papers, scrutiny of nomination papers and withdrawal thereof, publication of the list of eligible candidates, allotment of symbols, appointment of election agents, the conduct of poll, counting of votes, declaration of results and all other ancillary steps taken for the purpose of holding elections fall within the ambit of the term "election". {N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, Mohinder Singh Gill v. Chief Election Commissioner, Election Commission of India v. Shivaji and Election Commission of India v. Ashok Kumar (supra)}

(2) (i) The bar contained in Article 243-O, which begins with non-obstante clause, debars all Courts from entertaining any challenge to law relating to delimitation of constituencies or allotment of seat made or purporting to be made under Article 243-K or election to the Panchayats. This bar also operates against the High Court's power of judicial review under Article 226. (N.P. Ponnuswami v. Returning Officer, Namakkal Constituency, Durga Shankar Mehta v. Raghuraj Singh, Election Commission of India v. Shivaji and Election Commission of India v. Ashok Kumar (supra)}

(ii) The proposition contained in Clause (i) above is subject to the condition that challenge to the delimitation may be entertained in exceptional cases where no objections were invited and no hearing was given provided that such challenge is made before issue of notification for holding election. {State of U.P. v. Pradhan Sangh Kshetra Samiti (supra)}

(iii) The bar contained in Article 243-O (a) would operate immediately after publication of notification of delimitation of Panchayat areas even in cases where the same is challenged prior to issuance of notification of election.

(iv) The bar contained in Article 243-O(b) operates only till the adjudication of election dispute by an adjudicatory forum created by or under any law made by the Legislature of the State. An order made by an adjudicatory forum constituted under the law made by the State Legislature can be called in question by filing a petition under Article 226 of the Constitution.

(3) The bar contained in Article 243-O operates at all stages of the election i.e. notification issued by the State Election Commission calling upon the electorate to elect Pradhans and Up-Pradhans; reservation of offices of Pradhans in favour of Scheduled Castes, Scheduled Tribes, Backward Classes and Women; preparation, printing and publication of electoral rolls (provisional and final), filing of nomination papers, scrutiny and withdrawal thereof; allotment of symbols; appointment of election agents; counting of votes and declaration of result.

(4) The bar contained in Article 243-O(b) does not operate qua challenge to the constitutionality of a statutory provision relating to elections, though, even in such a case, the High Court will be extremely loath to pass an interlocutory order which has the effect of stalling or jeopardizing the process of election or which may result in the constitutional hiatus on account of indirect violation of Article 243-K(3) read with Article 243-K(1).

(5) Where the petitioner raises grounds which is not barred under the aforesaid provisions of the Constitution and is not covered in any one of the grounds as prescribed under Section 175(1) of the Himachal Pradesh Panchayati Raj Act, then the bar of alternate remedy by way of election petition under Section 162 of the Act and further bar under Article 243-O of the Constitution would not be attracted. Even in such cases, the Court will not normally pass interlocutory orders, which has effect of interrupting, obstructing or protracting the election.

34. Having laid down the above said principles, the individual claims as raised in these petitions would now have to be considered and determined in light of these principles, therefore, list all these petitions for admission/hearing on ***23rd December, 2015.***

In order to facilitate the arguments, the Registry is directed to upload copy of this order forthwith on its official website.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Gurcharan Singh (deceased) through his LRs ...Appellants.

Versus

State of Himachal Pradesh and others ...Respondents.

LPA No. 143 of 2015
Reserved on: 08.12.2015
Decided on: 15.12.2015

Industrial Disputes Act, 1947- Section 25- Deceased was appointed as Beldar and was holding the charge of pump operator on the date of his termination- his termination was made without conducting any inquiry- he filed a Reference Petition before the Labour Court which was partly allowed- respondent filed a Writ Petition against the award of the Tribunal- workman was arrested in FIR no. 220 of 1990 and was convicted of the commission of offence punishable under Section 324 of IPC- this was the foundation for his termination- held, that termination could not have been ordered without conducting any inquiry- the workman had completed 240 days and was entitled to an inquiry- further, Writ Petition does not lie against the findings of fact recorded by learned Trial Court. (Para-7 to 17)

Cases referred:

Ajaypal Singh versus Haryana Warehousing Corporation, (2015) 6 Supreme Court Cases 321

Mackinnon Machenzie and Company Limited versus Mackinnon employees Union, (2015) 4 Supreme Court Cases 544

Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157
Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr., 2014 AIR SCW 3298

For the appellants: Mr. Rahul Mahajan, Advocate.
For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. Anup Rattan, Additional Advocate Generals, and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 and 2.
Nemo for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this Letters Patent Appeal is to the judgment and order, dated 20.05.2015, made by the learned Single Judge/Writ Court in CWP No. 4295 of 2013-J, titled as The State of H.P. & others versus Gurcharan Singh & others, whereby the writ petition filed by the State-respondents came to be allowed and the award, dated 02.07.2012, passed by the Labour Court-cum-Industrial Tribunal, Dharamshala, H.P. (Camp at Una) (for short "the Labour Court") was quashed (for short "the impugned judgment").

Brief facts:

2. Deceased-Gurcharan Singh was appointed as Beldar by the respondents and was holding the status of Pump Operator at the relevant point of time, i.e. on the date of his termination. His termination was made without conducting any inquiry and following the mandate of the provisions of the Industrial Disputes Act, 1947 (for short "the Act"), constraining him to approach the concerned authority and reference was made. The Labour Court entered upon the reference. The parties filed pleadings and documents.

3. Following issues came to be framed by the Labour Court on 01.12.2010:

> *"1. Whether the termination of late Sh. Gurcharan Singh w.e.f. 03.8.1990 is violative of the provisions of Section 25-F as alleged. If so, to what relief the petitioner is entitled to? OPP*
>
> *2. Whether the reference is not maintainable as alleged. If so, its effect thereto? OPR*
>
> *3. Whether the petitioner is estopped from filing present claim as alleged. If so, to what effect thereto? OPR*
>
> *4. Whether the reference is hit by the vice of delay and laches as alleged. If so, its effect thereto? OPR*
>
> *5. Relief."*

4. Parties have led evidence. After scanning the evidence, oral as well as documentary, the Tribunal decided issue No. 1 in favour of the appellants, issues No. 2 and 3 were not pressed and issue No. 4 was decided against the respondents.

5. It is apt to reproduce para 33 of the award made by the Labour Court herein:

> *"33. As a sequel to my findings on the various issues, the instant claim petition/reference succeeds in part and the same is partly allowed. The retrenchment of the petitioner (late Sh. Gurcharan Singh) is set aside and quashed. Since the petitioner has already*

died, no orders regarding the reinstatement in service are being passed. He shall be entitled to the seniority and continuity in service from the date of his illegal termination i.e. 03.8.1990 except back wages. The respondent is directed to examine the case of the petitioner(s)/legal heirs of the deceased and whatever benefits are found due and payable to them in terms of this Award, the same shall be made available to them within a period of three months from the date of receipt of a copy of this Award. The amount payable, if any, to the legal heirs of the deceased shall be paid to them in equal hares. Parties to bear their own costs."

6. The respondents questioned the said award by the medium of writ petition, which came to be allowed in terms of the impugned judgment.

7. Deceased-Gurcharan Singh was arrested in FIR No. 220 of 1990 and was later on, acquitted for the commission of offence punishable under Section 376 of the Indian Penal Code (for short "IPC"), but was convicted for the commission of offence punishable under Section 324 IPC, which was upheld by the High Court also and perhaps, that was the foundation for making his termination.

8. The moot question is - whether termination can be ordered without conducting any inquiry? The answer is in the negative for the following reasons:

9. It would be profitable to reproduce Section 25-F of the Act herein:

*"**25-F. Conditions precedent to retrenchment of workmen.** - No workman employed in any industry who has been in continuous service for not less than one year under an employer shall be retrenched by that employer until-*

(a) the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice:

(b) the workman has been paid, at the time of retrenchment, compensation which shall be equivalent to fifteen days' average pay [for every completed year of continuous service] or any part thereof in excess of six months; and

(c) notice in the prescribed manner is served on the appropriate Government [or such authority as may be specified by the appropriate Government by notification in the Official Gazette.]"

10. While going through the impugned award and the writ petition, one comes to an inescapable conclusion that the termination of deceased-Gurcharan Singh was made without following the mandate of law.

11. The Apex Court in a case titled as **Ajaypal Singh versus Haryana Warehousing Corporation,** reported in **(2015) 6 Supreme Court Cases 321,** has laid down the same principle. It is apt to reproduce paras 19 and 22 of the judgment herein:

"19. Section 25-F of the Industrial Disputes Act, 1947 stipulates conditions precedent to retrenchment of workmen. A workman employed in any industry who has been in continuous service for not less than one year under an employer is entitled to benefit under said provision if the employer retrenches workman. Such a workman

cannot be retrenched until he/she is given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of the notice apart from compensation which shall be equivalent to fifteen days' average pay for every completed year of continuous service or any part thereof in excess of six months. It also mandates the employer to serve a notice in the prescribed manner on the appropriate Government or such authority as may be specified by the appropriate Government by notification in the Official Gazette. If any part of the provisions of Section 25-F is violated and the employer thereby, resorts to unfair trade practice with the object to deprive the workman with the privilege as provided under the Act, the employer cannot justify such an action by taking a plea that the initial appointment of the employee was in violation of Articles 14 and 16 of the Constitution of India.

xxx xxx xxx

22. It is always open to the employer to issue an order of "retrenchment" on the ground that the initial appointment of the workman was not in conformity with Articles 14 and 16 of the Constitution of India or in accordance with rules. Even for retrenchment on such ground, unfair labour practice cannot be resorted and thereby workman cannot be retrenched on such ground without notice, pay and other benefits in terms of Section 25F of the Industrial Disputes Act, 1947, if continued for more than 240 days in a calendar year."

12. The Apex Court in another case titled as **Mackinnon Machenzie and Company Limited versus Mackinnon employees Union,** reported in **(2015) 4 Supreme Court Cases 544,** has also taken the same view. It is apt to reproduce para 34 of the judgment herein:

"34. Further, with regard to the allegation against the appellant-Company that its action of retrenchment of the concerned workmen is in contravention with the provisions of Section 25-F clauses (a), (b) and (c) of the ID Act. Section 25-F clause (a) states that no workmen employed in continuous service for not less than one year under an employer shall be retrenched until the workman has been given one month's notice in writing indicating the reasons for retrenchment and the period of notice has expired, or the workman has been paid in lieu of such notice, wages for the period of notice. In the case on hand, the workman were served with the retrenchment notice on 27-7-1992 stating that their services stand retrenched from the close of business hours on 4-8-1992 in terms of the reasons appended to the said notice and further stated the amount of retrenchment compensation and one month's salary in lieu of notices that would be due to the concerned workmen. However, no cogent evidence has been brought before us by the appellant-Company to prove that the above referred one month's salary of the concerned workmen in lieu of the retrenchment notice has been actually paid to them. Further, the concerned workmen were given notice of retrenchment with Statement of Reasons appended therewith by the appellant- Company only on 27-7-1992 which was effective from 4-8-

> *1992. Therefore, one month notice was not given to the concerned workmen before their retrenchment came into effect nor one month's salary in lieu of the retrenchment notice was paid to the concerned workmen. Therefore, the said action by the appellant-Company is a clear cut breach of the above said provision of condition precedent for retrenchment of the workmen as provided under Section 25-F clause (a) of the ID Act. The Industrial Court after examining the facts and evidence on record has rightly answered the question of breach of Section 25-F clause (b) in the negative since no evidence has been produced by the respondent-Union to prove the same and further no calculation is brought to our notice as to the amount received by way of retrenchment compensation and also the actual amount sought to have been paid to the retrenched workmen. Further, with regard to the provision of Section 25-F clause (c), the appellant-Company has not been able to produce cogent evidence that notice in the prescribed manner has been served by it to the State Government prior to the retrenchment of the concerned workmen. Therefore, we have to hold that the appellant-Company has not complied with the conditions precedent to retrenchment as per Section 25-F clauses (a) and (c) of the ID Act which are mandatory in law."*

13. In the instant case, deceased-Gurcharan Singh had completed 240 days in a calendar year, as discussed and held by the Labour Court, after scanning the evidence, the inquiry was required, not to speak of only issuance of the notice.

14. The question is - whether the Writ Court can sit as an Appellate Court and set aside the award made by the Labour Court, which is based on evidence? The answer is in the negative for the following reasons:

15. The Apex Court in the case titled as **Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** held that the findings of fact recorded by Tribunal as a result of the appreciation of evidence cannot be questioned in writ proceedings and the Writ Court cannot act as an Appellate Court. It is profitable to reproduce para 18 of the judgment herein:

> *"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."*

16. This Court has also laid down the same principle in a batch of writ petitions, **CWP No. 4622 of 2013,** titled as **M/s Himachal Futuristic Communications Ltd. versus State of HP and another,** being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:

> *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*

17. This Court in a series of cases, being **CWP No. 4622 of 2013 (supra)**; **LPA No. 485 of 2012,** titled as **Arpana Kumari versus State of H.P. and others,** decided on 11th August, 2014; **LPA No. 23 of 2006,** titled as **Ajmer Singh versus State of H.P. and others,** decided on 21st August, 2014; and **LPA No. 125 of 2014,** titled as **M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others,** decided on 21st October, 2014; while relying upon the latest decision of the Apex Court in **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. 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 rendered by the Apex Court in **Bhuvnesh Kumar Dwivedi's case (supra)** 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. 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 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 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 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:

"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]

18. Having said so, the Writ Court/learned Single Judge has fallen in an error in passing the impugned judgment.

19. 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."*

20. The Labour Court has also held that the deceased-workman had completed 240 days of continuous service, which is not in dispute and which aspect has not been discussed by the Writ Court/learned Single Judge and without returning any findings, in a cursory manner, has set aside the award made by the Labour Court, is not permissible, as per law.

21. Having glance of the above discussions, the impugned judgment is to be set aside, the appeal is to be allowed and the writ petition is to be dismissed. Accordingly, the

appeal is allowed, the impugned judgment is set aside, the writ petition is dismissed and the award made by the Labour Court is upheld.

22. Respondents are directed to release all the benefits in favour of the appellants-legal representatives/heirs of deceased-Gurcharan Singh within eight weeks in terms of the award made by the Labour Court and report compliance.

23. Pending applications, if any, are also disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Himachal Pradesh Ex-Servicemen Corporation ...Petitioner

Versus

District Magistrate, Solan and others ...Respondents

CWP No. 2881 of 2015
Reserved on 11.12.2015
Date of decision: December 15, 2015

Constitution of India, 1950- Article 226- Writ petition was filed by respondent no. 2 Zila Solan Bhootpurav Sainik Parivahan Co-operative Society Ltd. stating that it was not getting its due share of transportation work from the petitioner- respondent No. 2 also demanded separate quota and sought quashing of order passed by petitioner on 21.4.2010 affixing the quota of 30 trucks for the ex-servicemen of Shimla, Solan and Kullu- writ petition was disposed of with a direction to apply to the District Magistrate for allotting work in accordance with law- an order was passed by District Magistrate reducing the allotment of the petitioner in so far as it only relates to the work of lifting of cement from Rauri Unit of Ambuja Cement from existing 10% to 7½% and the reduced quota of 2½% quota was allotted to respondent No. 2- petitioner filed the present writ petition challenging the order passed by the District Magistrate- held, that power of judicial review is not directed against the decision but is confined to the decision making process- petitioner is claiming a monopoly in the distribution and allocation of work in favour of those trucks which were initially attached by the petitioner with the respondent No. 3- petitioner is a statutory body constituted for the welfare of ex-servicemen and it cannot be permitted to act arbitrarily or in a discriminatory manner thereby discriminating between one ex-serviceman and the other- District Magistrate had passed the order because ex-servicemen of district Solan were not given their due share in the transportation work despite the fact that plant of respondent No. 3 was situated in district Solan- order passed by the High Court was also taken into consideration- petitioner did not state that it was not associated or given an opportunity to put forth its case before passing of the order- respondent No. 2 has 145 members and petitioner has 227 trucks- therefore, reduction of quota of the petitioner and allotment in favour of the respondent No. 2 is not illegal- writ petition dismissed.

(Para-7 to 13)

For the Petitioner: Mr. Vikas Chauhan, Advocate.

For the Respondents: Mr.V.K. Verma, Additional Advocate General with Ms.Parul Negi and Mr.Vikram Thakur, Deputy Advocate Generals, for respondent No. 1.

Mr. Ramakant Sharma, Senior Advocate with Mr.Tara Singh Chauhan, Advocate, for respondent No. 2.

Mr.Ajay Mohan Goel, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This writ petition has been filed claiming therein the following substantive reliefs:-

> *"i. By issuing writ in the nature of mandamus or any other writ, order or direction, quashing the impugned order dated 04.02.2015 (Annexure P-5)"*

2. The brief facts of the case are that respondent No. 2, i.e. Zila Solan Bhootpurav Sainik Parivahan Co-operative Society Ltd., Darlaghat had earlier filed CWP No. 4040 of 2013 on the ground that it was not getting its due share of transportation work from the petitioner. Respondent No. 2 also demanded a separate quota on the analogy of Rishi Markanday Ex-serviceman Transport and Kalyan Samiti, Jukhala, District Bilaspur. Lastly, it had sought quashing of the order passed by the petitioner herein dated 21st April, 2010, whereby quota of only 30 trucks for the ex-servicemen of Shimla, Solan and Kullu had been fixed.

3. This Court vide its order dated 12th November, 2013 in CWP No. 4040 of 2013 passed the following order:-

> *"The grievance of the petitioner in this petition is essentially that the communication issued by respondent No.4, Annexure P-9, is in the teeth of the direction issued by the District Magistrate vide order dated 26th March, 2010. In that case, it is open to the petitioner to approach the District Magistrate, Solan, District Solan for ensuring proper enforcement of the order dated 26th March, 2010. If such application is filed, the same be decided expeditiously, after giving notice to all concerned.*
>
> *2. It will be open to the petitioner to also apply to the District Magistrate to issue appropriate direction for allotting work to the petitioner, in accordance with law. We are not expressing any opinion about the said claim of the petitioner. It will have to be decided by the competent Authority on its own merits.*
>
> *3. The writ petition is disposed of, so also the pending applications, if any."*

4. In compliance to the aforesaid order, respondent No. 1 passed an order reducing the allotment and transportation work of the petitioner in so far as it only relates to the work of lifting of cement from Rauri Unit of respondent No. 3, i.e. Ambuja Cement from existing 10% to 7½% and the 2½% quota so reduced was ordered to be allotted to respondent No. 2. It is this order which has been assailed by the petitioner on the ground that the impugned decision of respondent No. 1 is arbitrary and discriminatory, because it is the petitioner Corporation, which has been constituted under the statute for the benefit of the ex-service men in the entire State. Whereas, respondent No. 2 is simply a Co-operative Society and could not have been allotted the 2½% by reducing the same from the petitioner's share.

5. Respondent No. 1 has filed its reply and has supported its decision. Whereas, respondent No. 2, who is the main contesting party in its reply has raised various preliminary objections including the objection that the members of petitioner Corporation were earlier having six tyres truck and now without there being any order from the competent authority have purchased multi-excel vehicles and lifting more load than the

normal truck, thereby depriving the members of respondent No. 2 from allotment of any work. It is also averred that the trucks, which are affiliated with the petitioner are mostly belonging to the people who are not ex-service men, but are running the trucks under the name of ex-service men. Whereas, on the other hand, the members of the respondent are was widows and soldiers injured during the war.

6. Respondent No. 3 in its separate reply has raised preliminary objections regarding maintainability. On merits, it is stated that in so far as the distribution of work is concerned, the same initially was governed by the order dated 26th March, 2010, in which the petitioner was allotted 10% of the transportation work of cement and clinker. Now by way of order dated 4th February, 2015, respondent No. 1 has modified its earlier order and out of 10% quota of work allotted in favour of the petitioner, 2½%, share of the petitioner pertaining only to the allocation of transportation work of Rauri Unit has been reduced and allotted in favour of respondent No. 2. It was further clarified that in Rauri Unit only clinker is produced, whereas cement is not produced, therefore, the position which exist after passing of the impugned order is that distribution of work in favour of the petitioner, as far as Suli Unit is concerned, the same remained undisturbed and this Unit produces both clinker and cement. It is further averred that though the impugned order was passed without associating the respondent but it was bound to abide by the orders passed by respondent No. 1, pursuant to the directions issued by this Court.

I have heard the learned counsel for the parties and have also gone through the records of the case.

7. It is trite law that the power of judicial review under Article 226 of the Constitution of India is not directed against the decision but is confined to the decision making process. The judicial review is not an appeal from a decision, but a review of the manner in which the decision is made and the Court sits in judgment only on the correctness of the decision making process and not on the correctness of the decision itself.

8. It is only on account of members of respondent No. 2, who admittedly are ex-service men or their dependents, failing to get sufficient work to make both ends meet through the petitioner Corporation, that they formed respondent No. 2 Society. Even during the course of hearing of this petition, a proposal was mooted to the petitioner to enroll the members of respondent No. 2 in the petitioner society and allot them work at par with the other ex-service men of the petitioner Corporation, but the said proposal was turned down by the petitioner on the ground that 227 trucks which have been initially attached with the petitioner are firstly to be provided work and it is only thereafter that the other ex-service men even though enrolled with the petitioner can claim a share in the allocation and distribution of work. The petitioner claims that out of 227 trucks engaged by it with respondent No. 3, only 30 trucks involved are of ex-service men of Solan District. Thus what the petitioner in fact is claiming is nothing, but a monopoly in the distribution and allocation of work, that too only in favour of those 227 trucks, which were initially engaged by the petitioner with respondent No. 3, without really caring for the remaining ex-service men.

9. Indisputably, the petitioner is a statutory body incorporated and constituted under the Ex-Servicemen Corporation Act, 1979 for the welfare and economic upliftment of the ex-servicemen, which means the entire body of ex-servicemen and not selected few. Once the Corporation is a statutory body and a State within the meaning of Article, then its actions have to be inconformity with the Constitution, more particularly Article 14 thereof. The petitioner cannot be permitted to act arbitrarily or in a discriminatory manner, thereby discriminating between one ex-service man and the other, particular when the ex-service men in themselves constitute a homogeneous class. The petitioner being a State within the meaning of Article 12 of the Constitution of India has to act within the four corners of law.

10. Now adverting to the decision impugned herein, it would be noticed that what primarily weighed with respondent No. 1 was the fact that the ex-servicemen of District Solan had not been given the due share in the transportation work despite the fact that the plant of respondent No. 3 was itself situate in district Solan. Since the major impact of the plant was in District Solan, therefore, the residents of this district must be given priority in the allocation and distribution of work. Respondent No. 1 also took into consideration the order passed by this Court on 13.12.2012 in CWP Nos. 5985 and 5736 of 2012m, wherein a separate quota had been allocated to the Rishi Markanday Ex-servicemen Transport and Kalyan Samity, Jukhala. Lastly, respondent No. 1 also took into consideration the fact that the ex-servicemen of the district Kangra, Hamirpur, Bilaspur, Una and Solan were mainly dependent for their livelihood on the transportation work, therefore, in case the ex-service men of Solan district are given exclusive quota from the State ex-service men quota, then it would not adversely effect the residents of other districts.

11. In this background, it would be seen that it is not even the case of the petitioner that it was not associated or given an opportunity to put forth its case before passing of the impugned order. The only grievance made out is that respondent No. 1 failed to take into consideration the fact that out of 227 trucks engaged by the petitioner with respondent No. 3, as many as, 30 trucks involved were those of ex-servicemen of Solan district.

12. At this stage, it may be observed that the petitioner has not chosen to file rejoinder to the reply of respondent No. 2 and therefore, its allegations that many trucks of ex-service men are being operated by non-ex-servicemen and some of the ex-servicemen have been re-employed in the Government service but their trucks are still attached and being plied by the non-ex-servicemen, remains uncontroverted. Even the further averments of respondent No. 2 that its members mainly comprises of war widows, injured soldiers who are medically boarded out from the service and unemployed ex-servicemen, will have also to be taken correct.

13. That apart, even if the merits of the decision rendered by respondent No 1 are required to be gone into, it would be seen that respondent No. 2 has 145 members, whereas the petitioner has 227 trucks, therefore, in such circumstances, even if the quota of the petitioner is reduced from 10% to 7½% and granted in favour of respondent No. 2, I do not see any illegality in such decision, particularly, when the petitioner does not deny that the members of respondent No. 2 themselves are ex-servicemen or their dependents. After all, the petitioner cannot claim any monopoly.

Having said so, I find no merit in this petition and the same is dismissed, leaving the parties to bear their costs.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, JUDGE.

Kavita Gupta and another ...Petitioners.

Versus

Bharat Sanchar Nigam Limited and another ...Respondents.

CWP No. 4474 of 2015
Reserved on: 09.12.2015
Decided on: 15.12.2015

Constitution of India, 1950- Article 226- Respondent issued a circular for conducting competitive examination for promotion to the post of JTO under 35% quota and 15% quota for the vacancies up to 31.03.2012 in Himachal Pradesh- writ petitioner participated in the Competitive Examination under 35% quota - provisional answer key was uploaded- objections were filed- representations were examined, some mistakes were found which were rectified- the result was declared – however, names of the petitioners were not figuring in the list of selected candidates- they filed representations which were rejected- petitioners filed original application before Central Administrative Tribunal which dismissed the application- held, that the expert opinion has been sought- the application was rightly dismissed by the Central Administrative Tribunal- petition dismissed. (Para-7 to 12)

For the petitioners: Mr. Ajay Mohan Goel, Advocate.
For the respondents: Mr. Sandeep Sharma, Senior Advocate, with Mr. Pankaj Negi, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this writ petition is to the order, dated 13.03.2015 (Annexure P-12), made by the Central Administrative Tribunal, Chandigarh Bench (for short "CAT") in Original Application No. 1629/HP/2013 titled as Kavita Gupta and another versus Bharat Sanchar Nigam Limited and another, whereby the Original Application filed by the writ petitioners came to be dismissed (for short "the impugned order").

2. By the medium of this writ petition, the writ petitioners have sought writ of certiorari to quash order, dated 13.03.2015 (Annexure P-12) made by the CAT, result of the Limited Internal Competitive Examination (for short "the Competitive Examination") for the post of Junior Telecom Officer (for short "JTO"), dated 16.09.2013 (Annexure P-7A) and memos (Annexures P-7/B & P-7/C) in terms of which the representations of the writ petitioners came to be rejected. Further sought the writ of mandamus for re-checking and correction of mistake in answer to Question No. 99 in Part-B of the Competitive Examination, on the grounds taken in the writ petition.

3. The respondents issued a circular on 20.02.2013 for conducting the Competitive Examination for promotion to the post of JTO under 35% quota and 15% quota for the vacancies upto 31.03.2012 in Himachal Pradesh Circle. The writ petitioners alongwith other candidates participated in the Competitive Examination for the post of JTO under 35% quota and the result was declared. The provisional answer key of the Competitive Examination was uploaded on 20.06.2013 and objections/representations were invited. Representations were filed and it was averred that fifteen wrong questions were recorded, two questions were time consuming, twelve questions were out of syllabus and the provisional answer key qua three questions was wrong.

4. Respondent No. 2 examined the representations, High Power Expert Committee was constituted, some mistakes were found and accordingly, the mistakes were rectified. However, the High Power Expert Committee categorically reported that answer to Question No. 99 in Part-B of the Limited Examination was correct. The result was declared and the names of the writ petitioners were not figuring in the list of the selected candidates. They filed representations, which came to be rejected, constraining them to file Original Application before the CAT and it was pleaded that answer to Question No. 99 in Part-B of

the Competitive Examination was not correct and had the Examiner recorded the correct answer, the writ petitioners would have been able to make the grade.

5. The Original Application was resisted by the respondents by the medium of reply and in the reply, it was stated that a High Power Expert Committee was constituted, the mention of which has been made by the Tribunal in para 5 of the impugned order.

6. The CAT, after examining the report of the High Power Expert Committee and the pleadings, dismissed the Original Application in terms of the impugned order. Feeling aggrieved, the writ petitioners have questioned the impugned order by the medium of this writ petition.

7. The stand of the respondents before the CAT was that they have constituted the High Power Expert Committee and after finding some mistakes, rectified the same. But, it was reported that answer to Question No. 99 in Part-B of the Competitive Examination was correct. Therefore, it would not lie in the mouth of the writ petitioners to plead that the answer was not correct. It is the domain of the Experts and the High Power Expert Committee was already constituted. It is beaten law of land that in the given circumstances, courts cannot interfere.

8. This Court, after relying upon the various judgments rendered by the Apex Court on the issue, has laid down the same principle in **CWP No. 4412 of 2014,** titled as **Ekansh Kapil versus H.P. Public Service Commission,** decided on 09.07.2014; **CWP No. 9169 of 2013,** titled as **Vivek Kaushal & others versus Himachal Pradesh Public Service Commission** alongwith other connected matters, decided on 17.07.2014; and **CWP No. 6812 of 2014,** titled as **Arvind Kumar & others versus Himachal Pradesh Public Service Commission** alongwith other connected matters, decided on 16.10.2014.

9. We deem it proper to reproduce paras 11 to 16, 20, 22 and 23 of the judgment in **Arvind Kumar's case (supra)** herein:

> *"11. 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."*
>
> *12. 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 the delay and to avoid recurrence of such lapses.*

13. The same view was 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].***

14. 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:-*
>
> > *"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."

15. 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."

16. The Apex Court, after discussing the authorities, which were governing the field till the date of the decision in the case, has used the words : ".....the Court should not generally direct revaluation". Meaning thereby, it suggests that if there is some mistake apparent on the face of it, the Court may interfere and may direct for revaluation."

10. Applying the test to the instant case, at the best, the Expert opinion could have been sought, which has already been sought in the present case.

11. Having said so, no case for interference has been carved out by the writ petitioners and the Tribunal has rightly dismissed the Original Application in terms of the impugned order, merits to be upheld.

12. Having glance of the above discussions, the impugned order is upheld and the writ petition is dismissed in limine.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

RSA Nos. 571 and 500 of 2004
Reserved on 10.12.2015
Date of decision: December 15, 2015

1. RSA No. 571 of 2004

Shri Kulbhushan ...Appellant

Versus

Sh. Prem Singh (deceased) through his LRs. Smt. Kaushalya Devi and others. ...Respondents

2. RSA No. 500 of 2004

Shri Kulbhushan ...Appellant

Versus

Giano alias Gian Chand (deceased) through his LRs Sh.Joginder Singh and others. ...Respondents

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration pleading that he is owner in possession of the suit land- mutation No. 191 is illegal and defendant started interfering with the possession of the plaintiff on the basis of mutation- plaintiff claimed that suit land was originally owned by 'K' who was widow- plaintiff was tenant at Will and had become the owner- defendant shown to be owner on the basis of mutation of inheritance- trial Court dismissed the suit- an appeal was preferred which was accepted- held, that all the tenants other than the occupancy tenants were conferred proprietary right- limited protection was granted to the owner- the conferment was automatic in favour of other tenants- widow succeeding to the property of her husband is entitled to retain the property during her life time and no right to resumption has been given to her- there can be no succession of her right. (Para-16 to 24)

For the Appellant(s): Mr. Sanjay Dutt Vasudeva, Advocate.
For the Respondents: Mr.Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

RSA No. 571 of 2004

This appeal under Section 100 of the Code of Civil Procedure is directed against the judgment and decree dated 1.10.2004 passed by learned District Judge, Kangra at Dharamshala in Civil Appeal No. 9-N/XIII/04, whereby the judgment and decree dated 23.10.2003 passed by learned Sub Judge (2), Nurpur, District Kangra, H.P. in Civil Suit No. 28 of 1999 has been reversed.

2. The facts of the case are that late Sh. Prem Singh, original respondent/plaintiff filed a suit for declaration along with consequential relief of permanent injunction on the ground that the land comprised in Khata No. 79 min, Khatauni No. 171, Khasra Nos. 766, 1567/767, 1575/1107, Plots-3 area measuring 0-61-51 HM, situate in Tikka Chauki, Mauja Milakh Tehsil Nurpur, District Kangra, H.P. was owned and possessed by the plaintiff/respondent and the mutation No. 191 dated 9.7.1998 was illegal, wrong, without jurisdiction, null and void and not binding on the rights of the plaintiff. It was further pleaded that the defendant on the basis of mutation No. 191 had started interfering in the ownership and possession over the suit land and proclaiming himself to be owner of the same and threatening to take forcible possession of the suit land. According to the plaintiff, the suit land was originally owned by Kamla Devi Wd/o Rai Singh and she was the last owner of the suit land and the plaintiff was tenant at 'Will' at the time of coming into force the H.P. Tenancy and Land Reforms Act and on the appointed date the aforesaid act, he has become full owner of the suit land, but the landlord Kamla Devi being a widow, the proprietary rights of the plaintiff remained suspended under Section 104 of the H.P. Tenancy and Land Reforms Act. It was further pleaded that said Kamla Devi, the last owner of the suit land, died in the beginning of 1998 and the plaintiff at the time of her death, had become owner of the suit land. As per plaintiff, the defendant vide mutation of inheritance No. 191 dated 9.7.1998 was shown as owner of the suit land and in place of Kamla Devi. It was alleged that the defendant was claiming ownership over the suit land on the basis of will executed by late Kamla Devi. According to the plaintiff, he asked the defendant to admit his claim several times, but in vain.

3. The defendant contested and resisted the suit by filing written statement, in which he had taken preliminary objections with regard to maintainability, locus standi, estoppel, cause of action and jurisdiction. On merits, the description of the suit land was admitted. It was denied that the plaintiff is owner of the suit land. It was admitted that the plaintiff is tenant under the defendant and the defendant being ex-serviceman has filled LR-V form before LRO Nurpur for the resumption of land from the plaintiff. It was admitted that earlier the suit land was owned by late Kamla Devi. It was denied that the plaintiff had become owner of the suit land after coming into force the H.P. Tenancy and Land Reforms Act. As per defendant, he being ex-serviceman has every right to get his share resumed under the provisions of LR-V after his retirement. It was denied that late Kamla Devi had lost her proprietary rights in the suit land. According to defendant, late Kamla Devi had executed a registered will in his favour and on the basis of that Will he became owner of the suit land. As per defendant, the plaintiff had no cause of action. It is denied that the defendant was interfering in possession of the plaintiff.

4. From the pleadings of the parties, the learned trial Court on 3.4.2000 framed the following issues:-

"1. Whether the plaintiff is owner in possession of the suit land, as alleged? OPP

2. Whether the plaintiff is entitled for the relief of permanent injunction, as prayed for? OPP

3. Whether the suit is not maintainable? OPD

4. Whether the jurisdiction of civil court is barred under Specific Statute, as alleged? OPD

5. Relief."

5. After recording evidence and evaluating the same, the learned trial Court dismissed the suit. Aggrieved by the judgment and decree passed by the learned trial Court, plaintiff preferred an appeal before the learned lower Appellate Court, who vide judgment and decree dated 1.10.2004 allowed the appeal, constraining the defendant/appellant to file the present appeal.

6. On 3.11.2005, this Court admitted the appeal on the following substantial question of law:-

"*Whether a widow, who succeeds her husband, as land owner is not entitled to resume the tenanted land, under Section 104 of the H.P. Tenancy and Land Reforms Act."*

RSA No. 500 of 2004

7. This Regular Second Appeal under Section 100 of the Code of Civil Procedure is preferred by the appellant/defendant against the concurrent findings of fact recorded by the learned Courts below whereby the suit of the plaintiff/respondents for declaration and injunction came to be allowed.

8. The brief facts of the case are that Giano alias Gian Chand, predecessor-in-interest of the respondents filed a suit for declaration against the appellant claiming that he was owner in possession of the land comprised in Khata No. 79 min, Khatauni No. 169, Khasra No. 774, 840, measuring 0-52-95 HM, situated in Tikka Chauki, Mauza Milakh, Tehsil Nurpur, District Kangra, H.P. (hereinafter referred to as the 'suit land'). It was averred that prior to settlement the land comprised in Khasra No.564 and 565 was owned by one Smt. Kamla Devi Wd/o Rai Singh and the same was in possession of the respondent as tenant at 'Will' as per jamabandi for the year 1966-67. During the settlement, Khasra No. 774 and 840 were carved out from khasra Nos. 565 and 564 and remained in possession of the plaintiff/respondent as tenant at Will. Originally Smt. Kamla Devi Wd/o Rai Singh was the last owner of the suit land and the plaintiff was tenant at 'Will' and being a tenant at the time of enforcement of H.P. Tenancy and Land Reforms Act, on the appointed date, had become full owner of the suit land by operation of the said Act. The proprietary rights of the plaintiff remained suspended under Section 104(8) of the said Act till her death, but the plaintiff continued to be in possession of the suit land as tenant under Smt. Kamla Devi, who died in the year 1998. The suit land remained in possession of the respondent/plaintiff. The entry of the appellant/defendant as owner of the suit land on the basis of inheritance mutation No. 191 dated 9.7.1991 is wrong, illegal, null and void and against the fact Smt. Kamla Devi was not competent to 'Will' away the property nor she executed any 'Will' in favour of the defendant. The mutation of inheritance could not effect her right as she was not owner of the suit land and was only to sold the property till her death and was only having life interest in the property in the shape of receiving rent from the plaintiff. The appellant in the last week of December, 1998 started interfering in the rights of the ownership and possession of the plaintiff an wanted to take the forcible possession of the

suit land. On 28.12.1998 the appellant with his men came at the spot and started proclaiming to be the owner and wanted to take forcible possession of the suit land, but he was not allowed to do so. The appellant had been asked to admit the rights of the respondent/plaintiff, but from 3.1.1999 he refused to do so and filed the suit.

9. The suit was resisted and contested by the appellant by filing written statement wherein preliminary objections regarding maintainability, locus-standi, estoppel, plaintiff/respondent having no cause of action and jurisdiction were taken. On merits, it was averred that the respondent was tenant under the appellant and the appellant filed an application in LR-V form for the resumption of the land, which was pending before LRO, Nurpur. The mutation sanctioned in favour of the appellant is legal and according to the wish of Kamla Devi as she had not lost her right during her life time and after her death, same were vested in favour of the appellant through valid registered 'Will'. It was further averred that the appellant was not interfering in possession of the respondent at all.

10. The respondent filed replication in which he reasserted and reaffirmed the averments made in the plaint and denied the claim of the appellant made in the written statement.

11. On the pleadings of the parties, following issues were framed by the learned trial Court on 3.3.2000:

1. *Whether the plaintiff is owner in possession of the suit land as alleged? OPP*
2. *Whether the plaintiff is entitled for relief of permanent injunction as alleged? OPP*
3. *Whether the suit is not maintainable in the present form? OPD*
4. *Whether the jurisdiction of Civil Court is barred under specific statue, as alleged? OPD*
5. *Relief.*

12. The learned trial Court after recording and evaluating the evidence decreed the suit by holding the plaintiff to be the owner in possession of the suit land and is entitled to remain as owner in possession in future as well. The mutation No. 191 dated 9.7.1998 is wrong, illegal and is not binding upon the rights of the plaintiff. Aggrieved by the judgment and decree passed by the learned trial Court, the defendant/appellant filed an appeal before the learned Additional District Judge (1), Kangra at Dharamshala, who vide judgment and decree dated 5.8.2004 dismissed the same.

13. Aggrieved by the judgment and decree dated 5.8.2004 passed by the learned lower Appellate Court, the appellant/defendant has come in second appeal before this Court.

14. On 3.11.2005, this Court admitted the appeal on the following substantial question of law:

> *"Whether a widow, who succeeds her husband, as land owner is not entitled to resume the tenanted land, under Section 104 of the H.P. Tenancy and Land Reforms Act."*

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

15. Since both the appeals have been admitted on a common question of law, I proceed to determine the same.

16. The H.P. Tenancy and Land Reforms Act, 1972 was enacted "to unify, amend and consolidate the laws relating to tenancies of agricultural lands and to provide for certain measures of land reforms in Himachal Pradesh. "This Act received the assent of the President of India on 2nd February, 1972 and came into force at once. It was eventually amended by the Amendment Act of 1976 with retrospective effect. This Amendment Act received the assent of the President on 20th April, 1976 and is "deemed to have come into force from the date of the commencement" of the principal Act. This principal Act, as amended, is hereinafter referred to either as "the impugned Act" or "the Act".

17. Before this Act came into force different enactments of land reforms were in force in the old area of Himachal Pradesh as well as in the new area which was added to Himachal Pradesh a result of reorganization of the erstwhile State of Punjab in the year 1966.

18. As per the Statement of Objects and Reasons attached to Bill No. 32 of 1972, by which the Act was brought into force, the Act was enacted for the following purposes:

> "Statement of objects and Reasons:
>
> As a result of the re-organisation of the erstwhile State of Punjab in November, 1966, some areas were integrated in Himachal Pradesh under section 5 of the Punjab Re-organisation Act, 1966. There are different enactments regarding tenancy and agrarian reforms in force in new and old areas of the Pradesh. In the areas as comprised in Himachal Pradesh immediately before 1st November, 1966, the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act, 1953 is in force which is a progressive legislation about the security of tenures of tenants and their other rights. In the areas added to Himachal Pradesh under Section 5 of the Punjab Re-organisation Act, 1966, however, occupancy tenants have been vested with proprietary rights under two Acts on the subject namely, the Punjab Occupancy Tenants (Vesting of Proprietary Rights) Act, 1953, and the Pepsu Occupancy Tenants (Vesting of Proprietary Rights) Act, 1954. In the old areas the occupancy tenants have to apply for ownership under section 11 of the Himachal Pradesh Abolition of Big Landed Estates and Land Reforms Act.
>
> It has, therefore, been considered necessary to unify the various laws relating to tenancies as in force in the Pradesh and to provide for measure of land reforms to remove disparities.
>
> Restrictions have been imposed to purchase land by the non-agriculturists to avoid concentration of wealth in the hands of non-agriculturists moneyed class.
>
> The Bill is to achieve the above objects."

19. The impugned Act is thus obviously enacted under the subject mentioned in Entry No. 18 of the State List of Schedule VII which speaks of "land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization." This Act is put in Ninth Schedule of the Constitution at Entry No. 138 by the Constitution (40th Amendment) Act, 1976 on 27th May, 1976 in the following terms:

> "138. Himachal Pradesh Tenancy and Land Reforms Act, 1972 (Himachal Pradesh Act 8 of 1974)."

Rules under the Act were framed in the year 1975 and they came into force on 4.10.1975.

20. It is not in dispute that the aforesaid Act is an agrarian reforms Act, since it seeks to consolidate various enactments of agrarian reforms.

21. This Court in the instant case is primarily concerned with the provisions of Section 104, contained in Chapter X of the Act, pertaining to conformant of proprietary rights upon the tenants other than the occupancy tenants and sub sections 3, 8 and 9 of Section 104 which are relevant for the purpose of determination of the issue in question read thus:-

> *"104.*
>
> *(3), All rights, title and interest (including a contingent interest, if any) of a landowner other than a landowner entitled to resume land under sub-section (1), shall be extinguished and all such rights, title and interest shall with effect from the date to be notified by the State Government in the Official Gazette vest in the tenant free from all encumbrances:*
>
> *Provided that if a tenancy is created after the commencement of this Act, the provision of this sub-section shall apply immediately after the creation of such tenancy.*
>
> *(8) Save as otherwise provided in sub-section (9) nothing contained in sub-section (1) to (6) shall apply to a tenancy of a landowner during the period mentioned for each category of such landowners in sub-section (9) who,-*
>
> *(a) is a minor or unmarried woman, or if married, divorced or separated from husband or widow; or*
>
> *(b) is permanently incapable of cultivating land by reason of any physical or mental infirmity; or*
>
> *(c) is a serving member of the Armed Forces; or*
>
> *(d) is the father of the person who is serving in the Armed Forces, upto the extent of inheritable share of such a member of the Armed Forces on the date of his joining the Armed Forces, to be declared by his father in the prescribed manner.*
>
> *(9) In the case of landowners mentioned in clauses (a) to (d) of sub-section (8), the provisions of sub-sections (l) to (6) shall not apply,-*
>
> *(a) in case of a minor during his minority and in case of other persons mentioned in clauses (a) and (b) of sub-section (8) during their life time;*
>
> *(b) in case of persons mentioned in clauses (c) and (d) of sub-sector (8), during the period of their service in the Armed Forces subject to resumption of land by such persons to the extent mentioned in first proviso to clauses (d) and (dd) of sub-section (1) of section 34.*
>
> *Provided that nothing contained in this section shall apply to such land which is either owned by or is vested in the Government under any law, whether before or after the commencement of this Act, and is leased out to any person."*

22. At the outset, it may be observed that by virtue of Section 104 of the Act all the tenants other than occupancy tenants were conferred proprietary rights by extending the benefit of this Act to the actual tillers of the soil, save and except for the limited protection offered under Section 104 (8) itself. The owners were divested of their lands which then

vested in the non-occupancy tenants by conformant of proprietary rights, which was automatic under the Act.

23. The legislature obviously contemplated that there would be some hardship and therefore, it postponed/suspended the effect of conferment of proprietary rights in favour of the tenants by carving out exceptions in sub section 8 of Section 104 supra in favour of the tenants of the special categories mentioned therein "during the period mentioned for each of the category of such land owners." Therefore, the widow of the owner, who falls in the special category cannot be placed at a higher pedestal or conferred a better or greater right, than her late husband, the erstwhile landlord by introducing the concept of succession which is totally ill-founded. The question is not with regard to succession to the land by the legal heirs/representatives of the landlord, but of conferment of proprietary rights in favour of the non-occupancy tenants by virtue of Section 104 of the Act, thereby divesting the original owner of its ownership and vesting it in the non-occupancy tenant.

24. In view of the aforesaid discussion, it can conveniently be said that the widow, who succeeds her husband as a land owner cannot have a higher or greater right than the land owner himself had in the property and is entitled to retain the property only for a period as mentioned in sub-section 8 of Section 104 during her life time and thereafter the same shall automatically vest in the non-occupancy tenant. Even during this period the widow will have no right to alienate, encumber, transfer or create charge etc. over the property and will enjoy the restricted right conferred under the aforesaid provisions. The widow has been given no right of resumption as this right is only available to land owners as mentioned in clause (c) and (d) of sub-section (8) of Section 104 of to the extent mentioned in first proviso to clause (d) and (dd) of sub-section (1) of Section 34. The question of law is accordingly answered against the appellants and accordingly these appeals are dismissed, leaving the parties to bear their costs.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Sh. Anil Khan, son of Sh. Manir Khan. ....Petitioner.

Versus

State of H.P. ....Non-Petitioner.

Cr.MPM No. 1834 of 2015
Decided on: 16.12.2015.

Code of Criminal Procedure, 1973- Section 439- Petition dismissed as withdrawn with a direction to complete the trial within four months, keeping in view the fact that accused is in judicial custody since 27.9.2015.

For the Petitioner : Mr. Anoop Chitkara, Advocate.
For Non-Petitioner : Mr. J.S. Rana, Assistant Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge (Oral)

Learned Advocate appearing on behalf of the petitioner submitted that present petition be disposed with the direction to learned trial Court to dispose of the case

within four months. Present petition is dismissed as withdrawn with the direction to learned trial Court to complete trial within four months. Directions issued to learned trial Court due to compelling exigencies of circumstances because accused person is in judicial custody since 27.9.2015 and in view of the fact that every accused has a legal right for expeditious disposal of the case. Certified copy of order be sent to learned trial Court for compliance. Petition filed under Section 439 Cr.P.C. is disposed of. Dasti copy.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Dhani Ram .....Petitioner

Versus

State of H.P and others ...Respondents

CWP No. 4724 of 2015.

Date of decision: 16th December, 2015.

Constitution of India, 1950- Article 226- Petitioner filed a writ petition seeking mandamus directing the respondent to include his name in the electronic roll and to accept the nomination of the petitioner for Member Block Development committee- Rule 23 of the Himachal Pradesh Panchayati Raj (Election) Rules, 1994 provides that petitioner has to seek his remedy, not later than nine days, before the last date fixed for filing of nomination papers- since, petitioner had failed to do so- hence, Writ Petition dismissed. (Para-2 to 4)

For the petitioner: Mr. Subhash Sharma, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr.V.S. Chauhan Addl. Advocate General, Mr. J.K. Verma,and Mr. Vikram Thakur, Deputy Advocate Generals, for respondents/State.

Ms. Nishi Goel, Advocate, for respondent No.4-State Election Commission.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

The petitioner, by the medium of this writ petition, has sought the following reliefs.

> *"(i) That Writ in the nature of the mandamus, directing the respondents to include the name of the petitioner in the electoral roll of the Gram Panchayat Daseran, Ward Thach Ganana, Tehsil Arki, District Solan, H.P.*
>
> *(ii) That writ of mandamus directing the respondent to accept the nomination of the petitioner for Member Block Development committee after including his name in the electoral roll of the Gram Panchayat Daseran, Ward Thach Ganana, village Ganana Tehsil Arki District Solan."*

2. The learned Advocate General has drawn our attention to Rule 23 of the Himachal Pradesh Panchayati Raj (Election) Rules, 1994. It is apposite to reproduce the said rule herein.

> ***"23.Correction of entries in electoral rolls***._ *If the District Election Officer (Panchayats) on an application in Form-4 or Form-16 made to him or on his own motion is satisfied, after such inquiry as he thinks fit, that any entry in the electoral roll of the constituency-*
>
> *(a) is erroneous or defective in any particular;*
>
> *(b) should be deleted on the ground that the person concerned is dead or has ceased to be ordinarily resident or is otherwise not entitled to be registered ion that electoral roll, shall amend or delete the entry:*
>
> *Provided that before taking any action on any ground under clause (a) or clause (b) that the person concerned has ceased to be ordinarily resident or that he is otherwise not entitled to be registered in the electoral roll, the District Election officer (Panchayats) shall give the person concerned a reasonable opportunity of being heard in respect of the action proposed to be taken in relation to him:*
>
> *Provided further that an application under this rule at any time after the publication of the election programme under rule 32 shall be made to the District Election Officer (Panchayats) not later than [nine days] before the last date fixed for the filing of nomination papers."*

3. The Rule reproduced supra does indicate that the petitioner had to seek his remedy, not later than nine days, before the last date fixed for the filing of nomination papers, which the petitioner has failed to do so.

4. Having said so, the writ petition is dismissed in *limine,* alongwith pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

CWP No. 4446 of 2014 along with CWP Nos. 1723, 2047 and 3477 of 2015.
Reserved on: 03.12.2015.
Date of Decision:16th December, 2015.

1. CWP No. 4446 of 2014.	
Govind Ram and others	.....Petitioners.
Versus	
Union of India and others	.....Respondents.
2. CWP No. 1723 of 2015.	
Dr. Harsimrat Kaur	.....Petitioner.
Versus	
Union of India and others	.....Respondents.

3. CWP No. 2047 of 2015.

Joginder Kumar and others .....Petitioners.

Versus

Union of India and others .....Respondents.

4. CWP No. 3477 of 2015.

Dr. Amit Sharma .....Petitioner.

Versus

Union of India and others .....Respondents.

Constitution of India, 1950- Article 226- Respondent conveyed its sanction for the introduction of a scheme for the health care of all ex-servicemen and their dependants in receipt of pension including disability and family pension –Scheme was made effective from 1.4.2003- an advertisement was issued for recruitment of staff in various capacities for the manning of polyclinics- petitioner applied for being considered for selection and appointment in the respective capacities- a clarification was issued stating that employees who have completed five years on contractual employment should not be considered for the polyclinic again and ESM should be considered in the reserve category quota of 60%- the services of the petitioner were dispensed with in accordance with notification- a fresh advertisement was issued inviting applications from all eligible aspirants for being considered for selection and appointment on a contractual basis- respondent pleaded that posts against which they stood appointed on a contractual basis no longer subsisted – Clause-2 of the agreement specifically debarred staking of claim beyond the period of two years at the maximum- subsequently, another communication was issued stating that contractual staff appointed on yearly basis with a clear gap of two days between each successive employment be appointed- further, a letter dated May, 2011 was issued which provided in Clause-4 that polyclinics in and around large cities and military stations, where adequate number of retired officers are available, normal tenure of three years is extendable up to five years maximum- there was no restriction on tenure in OIC polyclinics at locations away from large cities/military stations- no restriction was provided regarding medical specialists, gynecologists and dental surgeons- held, that various sub clauses of clause 4 carve out arbitrary and discriminatory classifications regarding the appointments of staff made at polyclinics located away from large cities/military stations- there is discrimination regarding medical specialists, gynecologists and dental officers- writ petition allowed- the orders set aside- respondent directed to execute a fresh contract of services in accordance with Clause 2 of letter dated May, 2011. (Para-2 to 12)

For the Petitioners: Mr. K.D. Sood, Senior Advocate with Ms. Mahika Verma, Advocate in CWP No.4446 of 2014 and Mr. T.S. Chauhan, Advocate in CWP Nos. 1723 and 2047 and Mr. Mohit Thakur, Advocate in CWP No. 3477 of 2015.

For the Respondents: Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Angrez Kapoor, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

All these petitions pertain to a common subject matter, hence, are being disposed of by a common order.

2. The respondents with a view to cater to the medical care of all ex-servicemen in receipt of pension including disability pension and family pension besides of dependents

including wife/husband, children and their wholly dependent parents, conveyed its sanction for the introduction of a scheme for the health care of the aforesaid nomenclatured as Ex-servicemen Contributory Health Scheme (ECHS). The aforesaid scheme was made effective w.e.f. 01.04.2003. For recruitment of staff in various capacities for the manning of polyclinics for carrying forward the spirit and mandate of ECHS, the respondents issued an advertisement (Annexure P-9 in CWP No. 4446 of 2014, Annexure P-7 in CWP No. 1723 of 2014). The petitioners standing empowered with the qualifications ordained therein qua the respective posts as stood advertised for being filled, respectively applied for theirs being considered for selection and appointment in the respective capacities against which they aspired for theirs being considered for selection and appointment. The petitioners successfully withstood the rigor of a written test besides of a viva voce whereupon appointment letters comprised in Annexure P-10 to Annexure P-12 in CWP No.4446/2014, Annexure P-8 in CWP No. 1723/2015, Annexure P-2 in CWP No. 2047/2015 and Annexure P-3 in CWP No.3477 of 2015 stood issued to them by the competent appointing authority. In pursuance to the petitioners herein standing appointed against the posts for which they had respectively applied for in pursuance to the advertisements standing published by the respondents herein, they respectively in terms of their appointment letters comprised in the aforesaid annexures whereunder they stood enjoined to execute a contract of service with the designated/authorized officer of the respondents executed with the latter contracts comprised in Annexures P-13, P-14 and P-15 in CWP No. 4446/2014. The apt portion of the contracts of service respectively entered inter se the petitioner herein with the authorised officer of the respondents herein is extracted hereinafter:-

> "2. The engagement of the engaged person for rendering his professional service shall be entirely contractual in nature and will be for a period of 12 months initially and thereafter renewable for 12 months at a time up to and subject to attaining the maximum age prescribed/indicated in appendix A to Govt. of India Ministry of Defence letter NO.24(6)/03/US(WE)/D(Res) dated 22 Sep. 2003, or as amended from time to time. The renewal of contract will be subject to continued good conduct and performance of the engaged person during the preceding 12 months and existence of the requirement for services of the engaged person at the ECHS Polyclinic. A fresh contract will be executed for each renewal."

It is imminent from a perusal of the afore extracted relevant portion of the contract of service executed inter se the petitioners and the competent/authorized officer of the respondents, of the appointments of the petitioners against their respective posts being entirely contractual in nature whose longevity was initially surviveable upto 12 months yet was successively thereafter renewable for 12 months each for a period upto and subject to theirs attaining the maximum age prescribed/indicated in appendix A to Govt. of India Ministry of Defence letter NO.24(6)/03/US(WE)/D(Res) dated 22 Sep. 2003, or as amended from time to time. The respondents though revered the mandate of the afore extracted clause embedded in the contract of service executed inter se its authorized officer and the petitioners herein upto 2014, yet thereafter omitted to mete compliance thereof besides have concerted to derogate from besides infract its mandate on the anvil of Annexure P-7 of 11th October, 2013, the relevant portion whereof stands extracted hereinafter:-

> "2. In this regard, the following clarification to be ensured:-
>
> (a) Employee who has completed five yrs of contractual employment should not be considered for the same polyclinic again.

(b) The ESM should be considered in the reserve category quota of 60%, however, the board of officers should be convinced of the efficiency of EXM in case his selection is made."

3. Given the uncontroverted factum of the petitioners herein having completed more than five years of contractual appointment against various capacities whereon they stood appointed at polyclinics established under ECHS, hence, with the embargo aforesaid enshrined in Annexure P-7 against the petitioners herein being barred to stake a claim for the affording of an extension in their contractual appointments by the respondents herein besides, hence theirs being not amenable for consideration for affording to them any further extension in their contractual appointment by execution of a contract of service inter se them and the authorised officer of the respondents constrained the respondents to not extantly accord any extension to the contractual service of the petitioners under the respondents besides constrained them to not execute with them a contract of service in terms of clause-2 as stand extracted hereinabove which clause stands embedded in the respective contracts of service executed inter se the petitioners and the authorized officer of the respondents whereunder the respondents were rather obliged to successively after expiry of the initial contract of service of 12 months successively execute renewed or fresh contracts of service with the petitioners upto theirs attaining the maximum age prescribed/indicated in appendix A to Govt. of India Ministry of Defence letter NO.24(6)/03/US(WE)/D(Res) dated 22 Sep. 2003, or as amended from time to time. Contrarily, the respondents proceeded to issue advertisement(s) comprised in Annexures P-1 & P-2 in CWP No. 4446 of 2014, Annexure P-5 in CWP No.2047 of 2015 and Annexure P-10 in CWP No.1723 of 2015 inviting applications from all eligible aspirants for theirs being considered for selection and appointment on a contractual basis against various posts existing at polyclinics against which the petitioners herein stood previously appointed on a contractual basis by the respondents herein.

4. As above stated, the defensibility on the part of the respondents herein to not execute a further contract of service with the petitioners herein stands anchored upon the afore extracted letter/communication comprised in Annexure P-7 in CWP No.4446 of 2015. However, the succor as concerted to be lent to the aforesaid defensibility to the act of the respondents herein to not revere the mandate of clause-2 of the contract of service executed by an authorized officer of the respondents herein with the petitioners herein would acquire vigour only in the event of there being demonstrable material on record of the petitioners herein having committed misdemeanors or their performance against the various posts against which they stood appointed on a contractual basis being abysmally poor besides with a palpable graphic disclosure by apposite material, of the posts against which they stood appointed on a contractual basis no longer subsisting, rendering dispensable the services of the petitioner besides concomitantly disobliging the respondents herein to hence execute a contract of service with the petitioners. However, a close and incisive rummaging of the record omits to make any disclosure of (a) the petitioners herein having committed any misdemeanors or theirs having under performed or abysmally performed the callings of their respective avocations and (b) work of the posts against which they stood appointed on a contractual basis no longer subsisting rather as stands manifested by the respondents herein taking to advertise the posts against which the petitioners herein hitherto served or are serving bolsters an inference of the services of the petitioners herein being not amenable for dispensation. Contrarily with the inhibitions aforesaid cast in clause-2 of the contract of service executed by the authorised officer of the respondents herein with the petitioners herein not obviously warranting their attraction against the petitioners herein rather enjoined the respondents herein to in consonance therewith execute successive renewed contracts of service with the petitioners herein. Dehors the aforesaid inhibitions existing in

cluase-2 of the contract of service executed inter se the authorised officer of the respondents herein and the petitioners herein being unavailable for dependence by the respondents herein for validating their omission to execute a fresh contract of service with the petitioners herein, rather the existence of a mandate therein of the services of the petitioners herein being liable for retention by the respondents upto theirs attaining the maximum age prescribed/indicated in appendix A to Govt. of India Ministry of Defence letter NO.24(6)/03/US(WE)/D(Res) dated 22 Sep. 2003, or as amended from time to time contrarily inhibited the respondents herein to issue the aforesaid communication besides inhibited the attraction of its rigor qua the petitioners herein especially when for reiteration the prescription in Clause-2 therein qua the entitlement of the petitioners herein for their retention in service upto theirs attaining the maximum age prescribed/indicated in appendix A to Govt. of India Ministry of Defence letter NO.24(6)/03/US(WE)/D(Res) dated 22 Sep. 2003, or as amended from time to time would suffer abrogation or dwindlement only a proven amendment therein standing carried out by the respondents herein. As a corollary, no infraction of the mandate of Clause-2 of the contract of service qua the facet aforesaid was vindicable unless a proven amendment thereto stood effectuated by the competent authority. Though the learned Assistant Solicitor General of India relies upon a letter No. 24(6)/03/US(WE)/D (res) of Government of India, Ministry of Defence of 22nd September, 2003 (hereinafter referred to in short "letter of 22nd September, 2003), clause (d) whereof stands extracted hereinafter, for succoring his contention qua given its embodiment in Clause-2 of the contract of service executed inter se the petitioners herein and the authorised officer of the respondents herein, the former standing debarred besides being baulked for staking any claim from the respondents of the latter being obliged to execute with them any renewed successive contracts of service beyond two years.

> "(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 eleven months."

However, the aforesaid espousal before this Court by the learned Assistant Solicitor General of India for disentitiling the petitioners claiming from the respondents of the latter renewing their contracts of service with them, is of no avail to him rather its vigour get sapped given the existence on record of a letter No.B/49760/AG/ECHS(R) of May, 2011(hereinafter referred to in short "letter of May, 2011) wherein a mandate stands enjoined upon the Government of India to permit extension in the contractual employment of the petitioners herein inconsonance therewith. Preeminently, given the occurrence of a reference therein to letter of 22nd September, 2003 which stands incorporated in the contract of service executed inter se the petitioners and the authorized officer of the respondents herein, the rigour of a prescription therein comprised in clause (d) extracted herein above would stand relaxed besides abrogated in the event of a valid amendment thereto standing effectuated by the competent authority. Necessarily, when the issuance of letter of May, 2011 is rendered encompassable within the domain of clause 2 permitting amendments to letter of 22nd September, 2003, in sequel, with its issuance standing validation as a corollary it attains empowerment to hold the field qua the entitlement of the petitioners to inconsonance therewith seek extension in their contractual appointments under the respondents upto theirs attaining the age of superannuation unless their performance is wanting or their conduct is reproachable especially when on an incisive reading of the words "as amended from time to time" succeeding the reference of letter 22nd September, 2003 in clause-2 of the contract of service entered inter se the petitioners and the authorised officer of the respondents disinters besides unfolds an empowerment standing foisted in the employer to relax by its carrying an amendment thereto the rigidity of the tenure of two years of

contractual appointment manifested in the afore referred letter of 22nd September, 2003. With an empowerment vested in the employer to relax the rigidity of the prescriptions constituted in clause (d) relied upon by the learned Assistant Solicitor General of India, which stands extracted hereinabove, qua the limited tenure of contractual appointment of the petitioners under the respondents, the respondents herein hence proceeding to in tandem thereto issue letter of May, 2011 with an explicit prescription therein of the Government of India purveying permission to the department concerned to accord extensions in the contractual employment of employees upto theirs attaining the age of superannuation subject to review of conduct and performance, obviously, benumbs the contention of the learned Assistant Solicitor General of India of the rigidity of a prescription in clause(d) of the tenure or duration of the contractual appointments of the petitioners when standing constituted in a contract of service executed by them with the petitioners herein, its force and vigour is unabrogable. On the contrary, with the existence of words "as amended from time to time" in succession to a reference of letter of 22nd September, 2003 in clause 2 of the contract of service executed inter se the petitioners herein and the authorised officer of the respondents herein rather tenably by an valid amendment thereto standing effectuated erases the rigidity of the prescription in clause 2 of the duration and tenure of the contractual appointment of the petitioners herein under the respondents being restricted upto a maximum of two years. The relevant portion of letter of May, 2011, whereunder the prescription in clause (d) extracted hereinabove of the duration of the contractual appointment of the petitioners under the respondents being restricted stood amended or relaxed is extracted hereinafter:-

> "2. The Govt orders on the subject initially stipulated that the employment will be normally for a period of two years at the maximum. Subsequently owing to limited availability of candidates and consequent expenditure on advertisements etc., the Govt permitted extension of contractual employment upto age of superannuation subject to review of conduct and performance."

The effect thereof is with the letter of May, 2011 holding leverage in making a loud communication in the afore extracted portion thereof of a tenable amendment standing effectuated or carried out to the limit or duration of contractual appointment of the petitioners herein under the respondents prescribed under clause-2 of letter of 22nd September, 2003 whereunder in abrogation thereof by an amendment thereto standing effectuated in the manner aforesaid, the department concerned was permitted to extend the contractual appointment of the petitioners herein upto theirs attaining the age of superannuation naturally for reiteration nullifies the effect of clause(d) of letter of 22nd September, 2003. In sequel the main plank of the submission of the learned Assistant Solicitor General of India anchored upon clause (d) of letter of 22nd September, 2003, for restricting the contractual engagement of the petitioners herein under the respondents upto two years gets shaken. In nut shell, the respondents herein though adducing apposite material comprised in clause (d) which stands extracted hereinabove of the contractual appointment of the petitioners herein not surviving beyond two years yet with the respondents having, for reasons aforestated, effectuated a tenable amendment thereto comprised in a prescription in clause (2) of letter of May, 2011, of the petitioners herein standing entitled for retention by the respondents as contractual employees upto the age of superannuation subject to review of conduct and performance which however has not been portrayed by the respondents to be warranting reproach in any regard. Consequently, the mandate of clause-2 of the letter of May, 2011 was enjoined to be adhered to by the respondents herein. Moreover, it dis-empowered them from (a) omitting to execute renewed successive contracts of service with the petitioners herein and (b) issue advertisements eliciting applications from eligible aspirants for their consideration for selection and

appointment on contractual basis against posts which stand manned by the petitioners herein under a validly executed contract of service inter se them and the authorised officer of the respondents herein. Obviously, the communication comprised in Annexure P-7, the relevant portion whereof stands extracted hereinabove carries no force or tenacity to dilute the rigor of Clause-2 of the contract of service executed inter se the petitioners herein and the authorised officer of the respondents herein read with clause 2 of letter of May, 2011 which letter/communication embeds therein a tenable amendment thereto standing embodied therein nor facilitates them to espouse for vindication besides for rendering defensible its act of not renewing the contractual appointments of the petitioners herein.

5. Preponderantly, the tenacity which the aforesaid communication may carry suffers emaciation in the face of the aforesaid communication borne in Annexure P-7 standing rescission under Annexure P-22 in CWP No.4446 of 2014, the relevant portion whereof is extracted hereinafter:-

> "2. This HQ letter No. B/49760/AG/ECHS(CC) dt 11 Oct 2013 be treated as canceled. The contractual staff is emp on yearly basis with a clear gap of two days between each successive employment."

In aftermath, the concert of the respondents herein to render defensible their act of not revering the mandate of Clause-2 of the contract of service executed by its authorised officer with the petitioners herein read with clause 2 of letter of May, 2011 is wholly rudderless.

6. However, the learned Assistant Solicitor General of India has also made a vigorous attempt before this Court to protect the act of the respondents herein in not affording extension to the petitioners herein in their contractual appointments under them by theirs omitting to execute with them renewed contracts of service, on the ground of a manifestation in clause-4 of letter of May, 2011 which stands extracted hereinafter limiting upto three years, extendable upto five years the tenure of engagement on contractual basis of employees standing engaged at polyclinics located in and around large cities and military stations besides with a prescription therein at clause (e) thereof of engagement of dental officers on a contractual basis at polyclinics being limited upto five years, concomitantly enfeebling the claim of the petitioners to beyond five years claim renewal in their contractual appointments from the respondents especially when sub-clause (a) of clause 4 given the appointments of the petitioners herein at Bilaspur, a large city, at Jutogh Cantt besides at Bakloh Cantt attracts qua them the afore referred inhibitory prescriptions comprised in sub clause (a) of clause 4 inasmuch as of their contractual appointment when made at polyclinics in and around large cities/military stations being limited to a maximum five years whereafter their services being terminable besides disengage-able. He with vigour hence espoused qua given its attraction qua the petitioners herein given their appointments at polyclinics located at Bilaspur, Jutogh Cantt besides at Bakloh Cantt renders emaciated in its entirety their claim thereto for extension in their contractual appointments by the respondents upto theirs attaining the age of superannuation. Clause 4 of the letter of May, 2011 reads as under:-

> "4. Apropos above, following are the instructions on employment and tenure of the ECHS contractual staff;-
>
> (a) OIC polyclinics in and around large cities/military stations where adequate number of retired officers are available: normal tenure of three years, extendable upto a maximum of five years.
>
> (b) OIC polyclinics at locations away from large cities/military stations-no restriction on tenure.
>
> (c) Medical Specialists/Gyanaeocolgists- No restrictions.

(d) Medical officers- for polyclinics in a around large cities/military stations-three years, extendable upto five years.

(e) Dental Officers- There is good availability of dental officers. Hence tenures in all stations would be of three years extendable to five years. The dental officer is the only one who carries out surgery at polyclinic level. Hence his /her competence in surgery would acquire be scrutinizing, examining and clearing by the concerned senior Dental Officer of nominated service Dental Centre. Reservation criteria for ex-servicemen may be relaxed to ensure that better candidates are employed.

(f) Paramedics and non medics- No restrictions."

However, the submission of the learned Assistant Solicitor General of India anchored upon sub clauses (a) and (e) of clause 4 imperatively falters on the anchor of the various sub clauses of clause 4 carving an arbitrary besides discriminatory classifications vis-a-vis appointments of staff made at polyclinics located away from large cities/military stations vis-a-vis appointments thereto made elsewhere. Apart therefrom there is an inherent palpable discrimination vis-a-vis medical specialists, gynecologists and dental officers especially when qua the latter there occurs a prescription therein of a limited duration in their contractual appointments vis-a-vis gynecologists and medical specialists qua whom it embodies a prescription of an unlimited besides an unrestricted prescription therein qua their tenure or duration in the longevity of their contractual appointments. Moreover, qua paramedics and non medics no restriction has been prescribed therein qua the duration or longevity qua their contractual appointments. To save the classifications borne in the various sub-clauses of clause 4 carved out in the manner as referred to hereinabove from any malady of theirs infracting any of the constitutional tenets of equality arousable from theirs being ridden with a vice of arbitrariness or discriminatoriness, it was incumbent upon the respondents to portray qua the classifications carved out therein standing anvilled upon an intelligible deferentia having a nexus with the objectives sought to be achieved. Moreover, imperatively the classifications constituted therein are obviously enjoined to be reasonable. The test of reasonableness of a classification is of it withstanding the rigour of logic. The classifications constituted therein would be construable to withstand the rigour of logic only when logic of their invention or their embodiment therein is ensuable therefrom with facility besides is self speaking. However, when logic qua its embodiment therein gets stretched or gets exacted, necessarily then its energy gets enervated as a corollary with logic getting weakened, the spurrable inference therefrom is of the embodiment therein being unreasonable besides obviously arbitrary as well as discriminatory.

7. While applying the aforesaid test for gauging the tenacity of the classifications borne therein, the prescriptions therein of an unrestricted tenure in the contractual appointments qua Medical Specialists/Gynaecologists, Paramedics and Non medics vis-a-vis man power of any other category whatsoever deployed at polyclinics located at large cities and in the vicinity of the Military stations qua whom and qua dental officers a prescription stands mandated therein of only a limited tenure in their respective contractual appointments being available to them rendered them per se discriminatory not anvilled upon any intelligible deferentia having any nexus with the objective sought to be achieved. Apart therefrom, it is per se unreasonable and exacts logic wherefrom an ensuable inference emanates of both reason and logic getting enervated, leaving the classifications constituted therein qua various categories of staff embodied therein being plain speakingly arbitrary as well as unreasonable. The appointments on contractual basis of staff of any category and Medical Officers of any category manning polyclinics at any station are enjoined to stand on an equal pedestal especially when the salutary purpose of

appointments of staff at polyclinics irrespective of their location in and around large cities or military stations or beyond them besides irrespective of categorisation of staff, is of purveying of optimum medical care to the stakeholders. The segregation meted in various sub clauses of clause 4 qua appointments of staff made at polyclinics in and around large cities or military stations or beyond them with a concomitant limit in the duration of their contractual appointments, contrarily, with no restrictions in the duration of contractual appointments of staff made at polyclinics located away from large cities or military stations besides compatibly qua appointments of Gynaecologists/Medical Specialists, apart therefrom with no restriction qua the tenure of contractual appointment of paramedics and non medics palpably suffers from a thorough non application of mind smacking of arbitrariness besides of a stench of palpable discrimination arising from the segregations aforesaid not purveying any palpable intelligible deferentia whereupon they stand anvilled nor obviously hence having any demonstrable nexus with the objective sought to be achieved inasmuch as of each of the categories of staff purveying at each of the polyclinics optimum medical care to the stakeholders. No sound reason or prudence appears to germinate in the respondents proceeding to even qua medical officers carve out classifications inasmuch as qua Medical Specialists/Gynaecologists vis-a-vis dental officers. Even though, the reasons assigned in clause (a) for limiting the duration or tenure of contractual appointments of dental officers at any polyclinic is of there being availability of dental officers in abundance. Nonetheless when in sub clause (c) of Clause 4 qua Medical Specialists and Gynaecologists there occurs no prescription limiting the duration in the longevity of their contractual appointments rather there is no articulation therein of any reason devolving upon non availability/scarcity of Medical Specialists and Gynaecologists for hence a prescription standing embodied therein qua the tenure of their contractual appointments being unrestricted. Obviously, when no statistical data qua availability in abundance of Dental Officers and qua there being dearth of Medical Specialists and Gyanaecologists exists on record, whereas when qua the latter being bestowed with an unlimited duration in the longevity of their contractual appointments, appears to purportedly stand founded upon theirs being scantily available engenders an inference of the respondents herein in, carving out a distinction qua Medical Specialists and Gynaecologists vis-a-vis Dental Officers for bestowing upon the former a unlimited tenure in the longevity of their contractual appointments whereas limiting the tenure of the contractual appointments of the latter, being prodded by an oblique motive hence leaving the classifications infected. Apart therefrom with the classification aforesaid standing permeated with a stench of absurdity and perversity, even the embodiment or a prescription therein qua the longevity in the contractual appointments of staff of various categories stands to be discountenanced by this Court. In sequel, any reliance thereon by the respondents in limiting the tenure or duration of contractual appointments of Medical Officers/Dental Officer or of staff of any category deployed in large cities or in proximity to military stations is unvindicable. Even qua paramedics and non medics no duration qua the longevity of their contractual appointments stand meted in sub clause (f) to clause 4. The unrestricted tenure in the contractual appointment of paramedics and non medics strains logic being astray from any sagacity emanable from any statistical data portraying theirs being scantily available hence amenable to grant of an unrestricted tenure in their contractual appointments. In the absence of the aforesaid statistical data guiding the classifications carved in favour of paramedics and non-medics renders the prescription of an unlimited tenure in the duration of their contractual appointment to be vitiated being not founded upon any tangible reason. Moreso, especially when in clause (a) tenure of contractual appointments of staff made at polyclinics located in and around large cities and at military stations stands restricted to three years extendable upto a maximum of five years, necessarily hence the unrestricted tenure in the contractual appointments of

paramedics or non-medics appears to stand spurred by creating a classification in their favour for untenably bestowing upon them the benefit of an unrestricted tenure in the duration of their contractual appointments especially when benefit thereof stands unbestowed on other staff deployed in and around large cities and military stations even when each category of staff at each of the aforesaid places performs same, similar or uniform functions. Apart therefrom when staff of any category deployed at any polyclinic irrespective of their location in and around large cities or military stations performs similar and uniform work concomitantly disobliged the respondents to by an insagacious segregation emanating from a thorough non application of mind invent a divisive classification intra staff deployed at polyclinics, naturally the said divisive unreasonable classification intra se staff deployed at polyclinics, is a sequel to the respondents herein standing guided lesser by reason than by oblique motive to bestow upon certain categories of staff/officers an unrestricted duration in the longevity of their contractual appointment and qua others for non demonstrable reasons deprive its benefit though every category of staff deployed at polyclinics performs therein same and similar duties.

8. For reiteration, even when qua various categories of staff manning polyclinics at different locations stood discriminatorily and arbitrarily bestowed an unrestricted tenure in the duration of their contractual appointments vis-a-vis other categories, the respondents have hence openly irrevered the principle of reasonableness, obviously the tinge of arbitrariness and discrimination ingraining the divisive classification intra se staff manning polyclinics at various locations gains momentum from the factum of the respondents herein having vacillated and dithered without any tangible reason from the earlier stand projected in clause-2 of letter of May, 2011 the relevant portion whereof stand extracted hereinabove wherein the tenure of all categories of staff on a contractual basis at various polyclinics stands uniformly ordained therein to be upto theirs attaining the age of superannuation. The paramount consideration which was enjoined to be weighing with the respondents to derogate from the spirit of the letter of May, 2011 was of the under performance of the petitioners herein while manning polyclinics in various capacities or theirs having committed misdemeanors rather than theirs taking to vacillate therefrom or dither therefrom besides belittle its spirit, of benefits thereunder standing bestowed uniformly qua all categories of staff/medical officers manning polyclinics, by taking to make an unreasonable classification qua various categories of employees manning polyclinics for hence bestowing in respect of some an unrestricted tenure in the duration of their contractual appointments whereas unreasonably denying to others the benefit thereof. Obviously, vacillations and ditherings bespeak of arbitrariness qua various categories of staff besides officers manning polyclinics. The vacillations aforesaid stand concomitantly engendered by an oblique motive to benefit only a few categories of employees and medical officers manning polyclinics operating throughout the State. Given theirs performing similar and uniform work, an alike tenure in their contractual appointments was enjoined to be prescribed by the respondents herein necessarily for ensuring the carrying forward of the salutary object for which the polyclinics stand established inasmuch as for the purveying to the stakeholders optimum medical care which would stand begotten only when they stand manned by efficient and skilled man power. In sequel, the said predominant fact of skilled besides experienced man power manning polyclinics stands denuded by an untenable segregation intra staff and intra medical officers manning polyclinics standing carved out in clause 4. In aftermath the segregation carved out in clause 4 of letter of May, 2011 necessitates its being irrevered.

9. Furthermore, the inhibition cast by Clause-2 of the contract of service entered inter se the petitioners herein with the authorised officer of the respondents herein, the relevant portion whereof stand extracted hereinabove when for reasons afore-stated

stands unattracted qua the petitioners herein obviously generated in the petitioners herein legitimate expectations on whose spurring the respondents herein stood concomitantly obliged to renew the contractual appointments of the petitioners herein by theirs executing contracts of service with each of the the petitioners herein as a corollary with the arousal of legitimate expectations in the petitioners herein qua their entitlement for renewal of their respective contracts of service by the respondents herein especially when its arousal stands for reasons aforesaid anchored upon the uneroded mandate of Clause-2 of the contract of service executed inter se the petitioners herein and the authorised officer of the respondents herein read with Clause-2 of letter of May, 2011 besides with its enjoying legal efficacy naturally it also then rears or nurses the sprouting therefrom of the principle of promissory estoppel with a legal effect thereof of the respondents herein being interdicted to contravene in the manner they concert the mandate enshrined in Clause-2 of the contract of service entered by its authorised officer with the petitioners herein.

10. Apart therefrom the unfoldment in the hereinabove discussion of Clause-2 of the contract of service executed inter se the authorised officer of the respondents and the petitioners herein enjoying legal solemnity, yet its effect has been concerted to be untenably ripped apart merely on the strength of the afore extracted communication of 11.10.2013 comprised in Annexure P-7 and on the strength of Clause-4 of letter of May, 2011 which otherwise too are per se militative of the mandate enshrined in Articles 14 and 16 of the Constitution of India inasmuch as its conjuring an inhibitory classification qua the petitioners herein for debarring them to on the anvil of Clause-2 of the contract of service executed inter se them and the authorised officer of the respondents herein read with Clause-2 of letter of May, 2011 seek any renewal from the respondents herein of their contractual appointment. Significantly when the inhibitory classifications therein qua the petitioners herein is neither reasonable nor has any nexus with the objectives sought to be achieved embedded in the petitioners securing the services of experienced man power to man various posts at polyclinics established under ECHS, rather contrarily, when the width of the intensive besides extensive experience gained by the petitioners herein in various capacities while theirs manning various posts whereon they stood appointed on a contractual basis rather when hence infuses in them a formidable vigour of efficiency besides proficiency to perform the callings of their respective avocations sequelly whittles down the legal efficacy of the aforesaid inhibitory classification cast therein qua the petitioners herein under Annexure P-7 and Clause-4 of letter of May, 2011. Moreover, when the letter aforesaid benumbs the aforesaid objectives. Consequently it has cast an arbitrary inhibitory classification against the petitioners herein harboured upon a principle which erodes besides defeats the salutary objective of the polyclinics established under the ECHS scheme inasmuch as of theirs being manned by efficient, skilled and experienced man power for purveying to the stakeholders optimum medical care rendering hence it to be unreasonable not anchored upon any intelligible diferentia having any nexus with the objective sought to be achieved.

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 petitioners 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 posts on a contractual basis which hitherto on an alike contractual basis were or stand manned by the petitioners herein. The said endeavour warrants its being baulked especially when its being permitted to be carried forward would overwhelm the experience gained by the petitioners herein on the posts whereon they 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.

12. For the foregoing reasons these petitions are allowed, in sequel, Annexure P-1 and P-2 in CWP No. 4446 of 2014, Annexure P-10 in CWP No.1723 of 2015 and Annexure P-5 in CWP No. 2047 are quashed and set aside. The respondents herein are directed to within one month from today and successively thereafter execute with the petitioners herein fresh contracts of service in consonance with Clause-2 comprised in Annexure P-15 in CWP No.4446 of 2014 read with Clause 2 of letter No. B/49760/AG/ECHS(R) of May, 2011, unless the inhibitions cast therein against the renewal of their contract of service by the respondents stand attracted against the petitioners herein. All pending applications stand disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J

Sita Ram ...Petitioner.

VERSUS

State of H.P. and others ...Respondents.

Ex.Pet. No.575 of 2015.
Decided on: December 16, 2015.

Code of Civil Procedure, 1908- Order 21 Rule 11- Petitioner sought direction to the respondent to comply with the judgment- respondent had passed an order which shows that respondents have complied with the directions passed by the Court and had granted the work charge status to the petitioner since 1.1.1997- it was further mentioned in the order that services of the petitioner were regularized against the post of Forest Worker on and w.e.f. 14.7.1999- petitioner approached the Court for the first time in the year 2013 - the arrears can be restricted for three years prior to filing of the writ petition- thus, respondents have complied with the direction passed by the Court- petition dismissed. (Para-2 to 5)

Cases referred:

Jai Dev Gupta vs. State of Himachal Pradesh and another, AIR 1998 SC 2819
Union of India and others vs. Tarsem Singh, (2008) 8 SCC 648
Asger Ibrahm Amin vs. Life Insurance Corporation of India, JT 2015 (9) SC 329
Suresh Chander Chauhan vs. Himachal Pradesh State Electricity Board, ILR 2015 (VI) HP 559 D.B.

For the petitioner: Mr.Devender Sharma, Advocate, vice Mr.C.N. Singh, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General, with Mr.V.S. Chauhan, Addl.A.G and Mr.J.K. Verma, Dy.A.G.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

By the medium of the present petition, the petitioner has invoked the jurisdiction of this Court under Order 21 Rule 11 of the Code of Civil Procedure, read with Rule 16 of the Original Side Writ Rules, for directions to the respondents to comply with the judgment, dated 2nd July, 2013, passed by this Court in CWP No.2230 of 2013, titled Sita Ram vs. State of H.P. and others. Respondents have not filed the reply as yet, though have passed the consideration order Annexure P-2 with the execution petition in terms of the judgment supra, a perusal of which does disclose that that the respondents have complied with the directions passed by this Court and granted the work charge status to the petitioner w.e.f. 1st January, 1997.

2. It has been mentioned in paragraph 3 of the consideration order (annexure P-2) that the services of the petitioner were regularized against the post of Forest Worker on and w.e.f. 14th July, 1999

3. Thus, the only dispute is – whether the petitioner is entitled for arrears from 1st January, 1997 upto 13th July, 1999.

4. The petitioner approached the Court, for the first time, in the year 2013. Thus, the arrears can be restricted for three years prior to filing of the writ petition, as has been held by the Apex Court in **Jai Dev Gupta vs. State of Himachal Pradesh and another,** reported in **AIR 1998 SC 2819, Union of India and others vs. Tarsem Singh** reported in **(2008) 8 SCC 648** and in **Asger Ibrahm Amin vs. Life Insurance Corporation of India,** reported in **JT 2015 (9) SC 329,** which decisions of the Apex Court have been followed by this Court in **LPA No.132 of 2009, titled Suresh Chander Chauhan vs. Himachal Pradesh State Electricity Board**, **decided on 1st December, 2015**.

5. Having said so, we are of the considered view that the respondents have complied with the directions passed by this Court. Accordingly, the contempt petition is dismissed. However, in case the petitioner is still aggrieved, he is at liberty to challenge the order (Annexure P-2).

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P .....Appellant.

Versus

Dalip Kumar .....Respondent.

Cr. Appeal No. 556 of 2015

Date of decision: 16.12.2015

N.D.P.S. Act, 1985- Section 20- Accused was intercepted while transporting 1kg 400gms cannabis in a bag while travelling in a bus- after investigation challan filed and the trial court acquitted the accused- in appeal held that, independent witnesses have not supported the case and official witnesses have contradicted each other on material particular- Pw5 claims the accused to be sitting on seat No. 42; whereas PW6 claims the accused to be sitting in seat No. 43- further, PW6 states that the police party departed from the Police Station at 9.05 a.m, whereas, PW6 refers the departure time as 9.55 a.m- thus the genesis of the prosecution case not established- accused rightly acquitted. (Para 7 to 9)

For the Appellant: Mr. M.A Khan, Additional Advocate General with Mr. P.M Negi, Deputy Advocate General and Mr. Ramesh Thakur, Assistant Advocate General.

For the Respondent: Nemo.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge (oral)

This appeal is directed against the judgment rendered on 6.6.2015 by the learned Special Judge (II), Mandi, District Mandi, H.P., in Sessions trial No. 6 of 2014, whereby the latter Court acquitted the accused/respondent herein (hereinafter referred to as "accused") for his having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act").

2. The brief facts of the case are that on 6.1.2014, HC Chint Ram, HC Dharmender Kumar, HC Ram Lal, C Devender Kumar and LC Rekha Devi had laid a Nakka at place Nagchala. A HRTC Bus bearing registration No.HP-65-3458 came there from Manali Side. The bus was stopped and checked. While checking the bus the accused was found occupying seat No. 43 carrying a bag placed between his legs. The bag was checked by the police in presence of Naresh Kumar and Kuldeep Kumar, the driver and conductor of the bus respectively. Inside the bag there was a newspaper containing stick type cannabis which was wrapped with a green and blue in coloured polythene. Some of the sticks were not wrapped. The cannabis was weighed at the spot and its weight was found 1 Kg 400 grams. The case property was put in the same bag and it was sealed at the spot. The seal after use was given to the witness Kuldeep Kumar. NCB form in triplicate was filled. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court.

3. The trial Court charged the accused for his having committed an offence punishable under Section 20 of the Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 11 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused was given an opportunity to adduce evidence in defence which he refused to avail.

5. The appellant-State is aggrieved by the judgment of acquittal recorded by the learned trial Court. Mr. M.A Khan, learned Additional Advocate General has concerted to vigorously contend before this Court qua the findings of acquittal recorded by the learned trial Court, being not based on a proper appreciation of evidence on record, rather, theirs being sequelled by gross mis-appreciation of material on record. Hence, he contends qua findings of acquittal being reversed by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

6. Recovery of cannabis Ex. P-5 weighing 1 Kg. 400 grams was effected under memo Ex. PW-2/A from a rucksack kept by the accused between his legs while his occupying seat No. 43 in the bus aforesaid. Even though the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and unsevered links, in the

entire chain of the circumstances, hence it stands argued that given the factum of the prosecution case hence standing established, it would be legally unwise for this Court to acquit the accused.

7. Besides when the testimonies of the official witnesses, unravel the factum of theirs being bereft of any inter-se or intra-se contradictions hence, consequently they too enjoy credibility for sustaining thereupon findings of conviction recorded against the accused by the learned trial Court. Apparently, proof of the prosecution case is endeavored to be sustained on the strength of the unblemished testimonies of police witnesses. A close and studied perusal of the depositions of the police witnesses underscores the factum of theirs having neither given a version qua the factum of recovery of contraband from the exclusive and conscious possession of the accused inconsistent with the manner thereof as recited in the F.I.R. for begetting a conclusion of hence their testimonies comprised in their respective examinations in chief being ridden with a vice of inter se contradictions vis-à-vis their testimonies comprised in their respective cross-examinations, rather lack of inconsistencies aforesaid render their respective testimonies on oath to be both unimproved as well as unblemished for hence implicit reliance being placed thereupon, nor when their depositions stood afflicted with any vice of intra se contradictions rather when they have deposed qua the manner of recovery of contraband aforesaid from the alleged conscious and exclusive possession of the accused bereft of any disharmony or inconsistency gives leverage to an inference of hence the prosecution succeeding in sustaining its charge against the accused of cannabis weighing 1 Kg. 400 grams under recovery memo Ex. PW-2/A standing recovered from his conscious and exclusive possession while his carrying it in a rucksack kept by him between his legs while his occupying seat No. 43 in a bus bearing registration No. HP-65-3458**.**

8. In the instant case, independent witnesses PW-2 Kuldeep Kumar and PW-3 Naresh Kumar have not lent support to the prosecution case qua the factum of recovery of cannabis Ex. P-5 weighing 1 Kg. 400 grams standing effectuated in their respective presence. Omission of support by the independent witnesses to the genesis of the prosecution case of the aforesaid item of contraband standing recovered under Memo PW-2/A from the conscious and exclusive possession of the accused in their respective presence vitiates the testimony of the official witnesses qua the factum aforesaid besides belittles the creditworthiness of the genesis of the prosecution case. Apart from the factum of independent witnesses not lending sustenance to the genesis of the prosecution version there exist material contradictions in the depositions of official witnesses which rip apart the tenacity of their depositions embodying therein the genesis of the prosecution case. The rife contradictions qua the genesis of the prosecution case occurring in the testimonies of official witnesses stand unraveled in the deposition comprised in the cross-examination of PW-5 C. Devender Kumar vis-à-vis the unfoldments thereto comprised in the deposition of PW-6 in as much the former disclosing therein of the accused at the relevant time occupying seat No. 42 whereas in dire contradiction thereto the latter divulging therein the factum of the accused occupying seat No. 43. Even though, PW-6 has in his deposition made a disclosure therein in tandem with the prosecution version of the accused at the relevant time occupying seat No. 43, nonetheless with PW-5 deposing in stark opposition to him paves way for an inference of unavailability of PW-5 at the site of occurrence whereat the apposite proceedings stood initiated and concluded. Given the aforesaid inference of unavailability of PW-5 at the apposite stage at the site of occurrence renders discardable his testimony qua the occurrence, hence an inference is drawable of the investigating Officer having conjured the presence of PW-5 at the site of occurrence with an oblique motive to smother the truth qua its initiation and conclusion thereat. Besides PW-9 HC Chint Ram has deposed of the police party having departed from Police Station at about 9.05 a.m. whereas PW-6 has

deposed qua the police personnel having departed from the police station at about 9.55 a.m. Given the variance in the depositions of PW-9 and PW-6 qua the departure of police personnel from the police station concerned begets an inference of the Investigating Officer having departed from the police station unaccompanied by PW-6. In sequel a deduction is ensuable of even PW-6 being unavailable at the site of occurrence contemporaneously alongwith the Investigating Officer. Hence his testimony too is discardable besides can be construed to be not lending any support to the genesis of the prosecution case.

9. The crux of the above discussion is of the prosecution having not adduced cogent and emphatic evidence in proving the guilt of the accused. The appreciation of the evidence as done by the learned trial Court does not suffer from any infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of acquittal recorded by the learned trial Court do not merit interference.

10. In view of the above discussion, the instant appeal is dismissed and the judgment of the learned trial Court is maintained and affirmed.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

State of H.P. and another .....Appellants.
Versus
Gagan Singh .....Respondent.

LPA No. 207 of 2015
Decided on: December 16, 2015.

Industrial Disputes Act, 1947- Section 25- Services of one 'J' were terminated- he raised a dispute which was referred to the Labour Court- Labour Court held that workman was entitled to the relief and passed the award- award passed by Labour Court is based on the facts- Writ Court cannot sit as an Appellate Court and set aside the award made by the Labour Court, which is based on evidence and facts- the findings can only be questioned, if it is shown that the Tribunal/Court had erroneously refused to admit admissible and material evidence or had erroneously admitted inadmissible evidence which had influenced the findings- writ petitioner had not pleaded that inadmissible evidence was recorded which was made the foundation of the award or the award was passed without any evidence- petition dismissed. (Para-6 to 12)

Cases referred:

Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157

M/s. Delux Enterprises vs H.P. State Electricity Board Ltd. & others, ILR 2014 (V) HP 970

For the Appellants: Mr.Shrawan Dogra, Advocate General, with Mr.V.S. Chauhan, Addl.A.G., and J.K. Verma, Dy.A.G.

For the Respondent: Mr.Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

CMP(M) No.1194 of 2015:

This application has been moved for condoning the delay of 260 days crept-in, in filing the appeal, on the grounds taken in the memo of application.

2. We have gone through the application. For the reasons mentioned in the application, the same is allowed and the delay in filing the appeal is condoned. The Registry is directed to diarize the appeal. The application stands disposed of accordingly.

LPA No. 207 of 2015:

3. Taken on board. Issue notice to the respondent. Mr.Naresh Kaul, Advocate, waives notice for the said respondent.

4. This appeal is directed against the judgment and order, dated 11th August, 2014, passed by a learned Single Judge of this Court in CWP No.4662 of 2014, titled State of Himachal Pradesh and another vs. Gagan Singh, whereby the writ petition filed by the writ petitioners (appellants herein) came to be dismissed, (for short, the impugned judgment).

5. We have gone through the impugned judgment, which is legally correct for the following reasons.

6. Services of the respondent Gagan Singh were terminated, dispute was raised under the Industrial Disputes Act, 1947, (hereinafter referred to as the Act), the matter was referred by the competent Authority to the Labour Court-cum-Industrial Tribunal, (for short, the Labour Court).

7. The Tribunal entered into the reference and issues were framed. Parties led their evidence and the Tribunal after examining the pleadings and the evidence led by the parties, held vide award dated 12th August, 2013 that the workman was entitled to the relief and made the award.

8. The award passed by the Labour Court is based on the facts and the evidence led by the parties. It is well settled principle of law that the Writ Court cannot sit as an Appellate Court and set aside the award made by the Labour Court, which is based on evidence and facts.

9. The Apex Court in case titled as **Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** held that the findings of fact recorded by Tribunal as a result of the appreciation of evidence cannot be questioned in writ proceedings and the Writ Court cannot act as an Appellate Court. It is profitable to reproduce para 18 of the judgment herein:

> *"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."*

10. This Court has also laid down the same principle in a batch of writ petitions, **CWP No. 4622 of 2013,** titled as **M/s Himachal Futuristic Communications Ltd. versus State of HP and another,** being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:

> *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*

11. This Court in a series of cases, being **CWP No. 4622 of 2013 (supra)**; **LPA No. 485 of 2012,** titled as **Arpana Kumari versus State of H.P. and others,** decided on 11th August, 2014; **LPA No. 23 of 2006,** titled as **Ajmer Singh versus State of H.P. and others,** decided on 21st August, 2014; **LPA No. 125 of 2014,** titled as **M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others,** decided on 21st October, 2014; and **LPA No.143 of 2015, titled Gurcharan Singh (deceaed) through his LRs vs. State of H.P. and others, decided on 15th December, 2015,** while relying upon the latest decision of the Apex Court in **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. 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.

12. It is not the case of the writ petitioner that inadmissible evidence was recorded and that was made the foundation of the award or the award was passed without any evidence. The learned Single Judge has rightly made the discussion and conclusions.

13. Having glance of the above discussion, we hold that the impugned judgment is speaking one, requires no interference. Consequently, the appeal is dismissed, alongwith pending CMPs, if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

State of Himachal Pradesh ....Petitioner/Appellant

Versus

Kamaljeet son of Shri Jai Pal Singh ....Non-petitioner/ Respondent

Cr.MP(M) No. 1229 of 2015
Order Reserved on 8th December 2015
Date of Order 16th December 2015

Code of Criminal Procedure, 1973- Section 378- **N.D.P.S. Act, 1985-** Section 20- Police party conducted the search of the accused who was travelling in the bus- 1.150 kg. of charas was recovered from the bag being carried by him- he was acquitted on the ground that independent witnesses had not supported the prosecution version- two views had emerged relating to the recovery and when two views are available on record, the trial Court had rightly acquitted the accused- hence, leave to appeal refused. (Para-9 to 11)

Cases referred:

Shashi Pal and others vs. State of H.P., 1998(2) SLJ 1408
State of H.P. vs. Sudarshan Singh, 1993(1) SLJ 405
Mulak Raj vs. State of Haryana, SLJ 1996(2) 890 Apex Court
State of H.P. vs. Hanchoo alias Stewar, Latest HLJ 2004 HP 642 (DB)
Karan Singh and another vs. State of H.P. Latest HLJ 2007 (HP) 547
Ritesh Chakarvati vs. State of Madhya Pradesh 2006(4) Recent Criminal Reports (Criminal) 480
Deepak Kumar vs. State of H.P. 2015(1) Him.L.R.(DB) 381

For the Petitioner: Mr. J.S. Guleria, Assistant Advocate General.
For the Non-petitioner: None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Order under Section 378(3) of Code of Criminal Procedure 1973:-

Present petition is filed under Section 378 of Code of Criminal Procedure 1973 for grant of leave to appeal against judgment of acquittal dated 23.5.2015 passed by learned Special Judge-II (Additional Sessions Judge) Kullu District Kullu in Sessions trial No. 103 of 2014 titled State of H.P. vs. Kamaljeet under Section 20 of Narcotic Drugs and Psychotropic Substances Act 1985.

Brief facts of the case

2. It is alleged by prosecution that on the evening of 26.10.2013 at about 7.50 PM HC Alam Gir Investigator was on checking duty due to Dussehra festival at Bajaura Check Post along with other police officials consisting of HHC Amar Chand, HHC Balbir Singh and HC Rakesh Kumar with dog squad. It is alleged by prosecution that a CTU bus bearing registration No. CH-01G-7538 came from Manali side and intercepted for checking. It is alleged by prosecution that Investigating Officer PW10 HC Alam Gir along with other police officials boarded the bus from rear window for checking and PW5 Anup Sharma driver and PW6 Ashok Kumar conductor of bus were also associated and while checking the passengers and their luggage Investigating Officer PW10 HC Alam Gir reached near seat No. 39 where accused was found sitting and when he saw the police officials he got perplexed and thereafter police officials asked his name and accused disclosed his name as Kamaljit. It is alleged by prosecution that accused was carrying one red and grey coloured bag with strips on his lap. It is alleged by prosecution that on suspicion the bag of accused was searched in presence of PW5 Anup Kumar driver and PW6 Ashok Kumar conductor of bus as well as in presence of PW2 HHC Amar Chand and 1 Kg. 150 grams charas was found. It is alleged by prosecution that codal formalities of sealing and seizure completed and separate seal was obtained upon piece of cloth Ext.PW5/A and NCB form was filled and seal after use was handed over to PW5 Anup Kumar driver. It is alleged by prosecution that thereafter ruka Ext.PW2/C was prepared and sent to police station for registration of FIR. It is alleged by prosecution that spot map Ext.PW10/A was prepared and statements of witnesses recorded. It is further alleged by prosecution that SHO/SI Lal Chand resealed the case property after filling relevant columns of NCB form and thereafter case property was deposited in malkhana register and thereafter case property along with specimen seal, NCB form and other relevant documents were deposited in the office of FSL Junga. It is also alleged by prosecution that special report Ext.PW3/B was sent to Additional S.P. who after making endorsement Ext.PW3/C upon special report handed over the same to his Reader. It is alleged by prosecution that statements of witnesses recorded and after receipt of FSL report Ext.PX the case file was handed over to the then SHO who prepared challan under Section 173 of Code of Criminal Procedure 1973 and filed the same in criminal Court for trial.

3. Charge was framed against the accused under Section 20 of Narcotic Drugs and Psychotropic Substances Act 1985. Accused person did not plead guilty and claimed trial.

4. Prosecution examined eleven witnesses namely PW1 HC Gian Chand, PW2 HHC Amar Chand, PW3 HC Nirat Singh, PW4 ASI Rajesh Kumar, PW5 Anup Sharma, PW6

Ashok Kumar, PW7 ASI Ram Nath, PW8 HC Tarun Kumar, PW9 HHC Ishwari Ram, PW10 HC Alam Gir and PW11 SI Lal Chand as mentioned in annexed Form list of witnesses with judgment and also tendered documentary evidence as mentioned in annexed Form list of exhibits with judgment. Statement of accused under Section 313 Cr.P.C. recorded. Accused did not lead any defence evidence.

5. Learned Special Judge-II Kullu acquitted the accused person qua offence under Section 20 of NDPS Act 1985 after giving him benefit of doubt.

6. Feeling aggrieved against the judgment passed by learned trial Court State of H.P. filed present appeal against acquittal and sought permission for grant of leave to appeal.

7. We have heard learned Assistant Advocate General appearing on behalf of the petitioner and also perused the record.

8. Following points arise for determination in present petition:-

1. Whether it is expedient in the ends of justice to grant leave to appeal under Section 378(3) of Code of Criminal Procedure 1973 against judgment of acquittal dated 23.5.2015 passed by learned Special Judge-II Kullu in Sessions trial No. 103 of 2014 titled State of H.P. vs. Kamaljeet as alleged in memorandum of grounds of petition?
2. Final Order.

Findings on Point No.1 with reasons

9. Learned Special Judge-II Kullu acquitted the accused by way of giving him benefit of doubt on the ground that seizure memo of contraband is substantial piece of evidence and three witnesses namely PW5 Anup Sharma driver, PW6 Ashok Kumar conductor and PW2 HHC Amar Chand have signed the substantial document i.e. seizure memo of contraband and PW5 Anup Sharma, PW6 Ashok Kumar and PW2 HHC Amar Chand are marginal witnesses of seizure memo of contraband. We are of the opinion that testimonies of PW2 HHC Amar Chand, PW5 Anup Sharma and PW6 Ashok Kumar who are marginal witnesses of seizure memo of contraband are material for just decision of case.

10. PW5 Anup Sharma driver, PW6 Ashok Kumar conductor who are marginal witnesses of seizure memo have specifically stated in positive manner when they appeared in witness box before learned trial Court that no contraband was recovered from conscious and exclusive possession of accused in their presence. On the contrary PW2 HHC Amar Chand official witness has stated that contraband was recovered from conscious and exclusive possession of accused. There is material contradiction between testimonies of marginal witnesses of seizure memo. PWs 5 and 6 independent witnesses did not support the prosecution story and PW2 HHC Amar Chand has supported the prosecution story as alleged by prosecution. We are of the opinion that two views have emerged in present case relating to recovery of contraband from exclusive and conscious possession of accused. It is well settled law that when two contradictory views are possible as per testimonies of eye witnesses then view favourable to accused should be adopted by Court. Learned trial Court has specifically held in judgment that there is material improvement and contradiction in testimonies of police officials. It is well settled law that if two views have emerged in the prosecution case then view favourable to the accused has to be taken into consideration. ***See: 1998(2) SLJ 1408, titled Shashi Pal and others vs. State of H.P. See: 1993(1) SLJ 405, titled State of H.P. vs. Sudarshan Singh. Also see SLJ 1996(2) 890 Apex Court titled Mulak Raj vs. State of Haryana.*** It was held in case reported in ***Latest HLJ 2004 HP 642 (DB) titled State of H.P. vs. Hanchoo alias Stewart*** that if in NDPS case

independent witness did not support prosecution then benefit of doubt should be given to accused.

11. In view of the fact that learned Special Judge-II Kullu has acquitted the accused person on the concept of two views theory and in view of the fact that two independent witnesses of seizure memo PW5 Anup Sharma driver and PW6 Ashok Kumar conductor of bus did not support the prosecution and did not incriminate the accused person and in view of the fact that learned Special Judge has relied upon rulings reported in ***Karan Singh and another vs. State of H.P. Latest HLJ 2007 (HP) 547, Ritesh Chakarvati vs. State of Madhya Pradesh 2006(4) Recent Criminal Reports (Criminal) 480 and Deepak Kumar vs. State of H.P. 2015(1) Him.L.R.(DB) 381*** and in view of the fact that there are material improvements and contradictions in testimonies of official witness we are of the opinion that it is not expedient in the ends of justice to grant leave to appeal against judgment of acquittal passed by learned Special Judge-II Kullu. Point No.1 is answered in negative.

Point No.2 (Final Order)

12. In view of our findings on point No.1 petition filed under Section 378 (3) of Code of Criminal Procedure 1973 against the judgment of acquittal is dismissed and it is held that there are no sufficient grounds for grant of leave to appeal against judgment of acquittal. Cr.MP(M) No. 1229 of 2015 is disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

State of Himachal Pradesh ....Petitioner/Appellant

Versus

Mohammad Babu son of Shri Mohammad Sharif and another

....Non-petitioners/ Respondents

Cr.MP(M) No. 1224 of 2015
Order Reserved on 8th December 2015
Date of Order 16th December 2015

Code of Criminal Procedure, 1973- Section 378- **N.D.P.S. Act, 1985-** Sections 20 and 29- Police party intercepted a car- a search was conducted during which 1.5 kg. of charas was recovered- accused were acquitted after trial- independent witnesses were not examined- however, there was no evidence that police officials had hostile animus against accused- criminals dealing with NDPS are spoiling the career of youths for personal commercial benefit - meticulous examination of oral as well as documentary evidence is essential- hence, leave to appeal granted and notice issued to the accused. (Para-9 to 11)

Cases referred:

Nanha vs. State of H.P. Latest HLJ (HP) 1195
Duni Chand vs. State Latest HLJ 2015 HC 118
State of Rajasthan vs. Parmanand and another 2014 SAR (Criminal) 432
Saukat Ali vs. State of Haryana 1996 Cri.LJ 3685 P&H.
Bhe Ram Vs. State of Haryana, AIR 1980 S.C.957
Rai Singh Vs. The State of Haryana, AIR 1971 S.C. 2505
Hari Chand vs. State of Delhi AIR 1996 SC 1477.

Uppari Venkataswamy vs. Public Prosecutor High Court A.P. AIR 1996 SCW 9
State of Punjab vs. Ajaib Singh AIR 1995 SC 975
Hari Ram vs. State of Rajasthan 2000 Cr.LJ 2312 (SC).
Narinder Singh vs. State of Punjab AIR 2000 SC 2212
Anil Kumar vs. State of U.P. 2005 SCC (Cri) 178
State of Punjab vs. Karnail Singh AIR 2003 SC 3609
State of U.P. vs. Babu AIR 2003 SC 3408
State of Madhya Pradesh vs. Bacchudas 2007 Cri.LJ 1661 (SC)
Nathu Singh vs. State of M.P, AIR 1972 SC 2783
State of Gujarat vs. Raghunath Vamanrao Baxi, AIR 1985 SC 1092

For the Petitioner: Mr. J.S. Guleria, Assistant Advocate General.
For the Non-petitioner: None.

The following order of the Court was delivered:

P.S. Rana, Judge.

Order under Section 378(3) of Code of Criminal Procedure 1973:-

Present petition is filed under Section 378 of Code of Criminal Procedure for grant of leave to appeal against judgment of acquittal dated 1.4.2015 passed by learned Special Judge-III Mandi District Mandi in Sessions trial No. 272 of 2013 (ST 27 of 2010) titled State of H.P. vs. Mohammad Babu and another under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act 1985.

Brief facts of the case

2. It is alleged by prosecution that on 7.1.2010 at about 11 AM the police party of P.S. Aut headed by ASI Amar Nath along with ASI Ramesh Lal, HC Hari Singh, Subhash and C. Bhavdev as per rapat No. 14(A) Ext.PW1/A went for traffic checking towards tunnel point Thalot/Jhalogi. It is alleged by prosecution that at about 12.20 PM one car blue in colour came from Kullu side towards Mandi and ASI Amar Nath gave signal to stop the car. It is alleged by prosecution that driver stopped the vehicle and shown the documents. It is alleged by prosecution that on inquiry driver disclosed his name as Mohammad Akhtar son of Shri Mohammad Suleman resident of Kila Rahamgarh Tube-Well colony Malerkotla District Sangrur (Punjab). It is alleged by prosecution that adjoining to driver seat one person was sitting having bag upon his lap and when he saw the police party he tried to conceal the bag under his seat and it is further alleged by prosecution that he was also scared. It is alleged by prosecution that on inquiry he disclosed his name as Mohammad Babu son of Shri Mohammad Sharif resident of Pyushi Muhalla Malerkotla District Sangrur (Pb.) It is alleged by prosecution that bag was picked out from seat and after checking it was found of yellow colour. It is alleged by prosecution that charas measuring 1 Kg. 500 grams was kept in bag. It is further alleged by prosecution that charas was again placed in bag and was sealed with seal impression 'R' at six places and it is also alleged by prosecution that specimen of seal impression obtained on piece of cloth and NCB form in triplicate was filled. It is alleged by prosecution that seal after use was handed over to witness HC Hari Singh and recovery memo Ext.PW2/B was prepared. It is alleged by prosecution that vehicle bearing No. MH-01-22-4798 along with key, specimen seal impression and NCB-1 form in triplicate took into possession in presence of ASI Ramesh Prashar and HC Hari Singh and thereafter ruka Ext.PW10/E was sent to police station Aut on the basis of which FIR Ext.PW7/A was registered. It is alleged by prosecution that spot map was prepared and statements of prosecution witnesses recorded as per their version. It is alleged by

prosecution that case property was produced before PW7 SI Shreshtha Thakur for the purpose of resealing and case property after resealing was deposited in malkhana and thereafter case property was sent for chemical examination to FSL Junga. It is alleged by prosecution that PW10 ASI Amar Nath sent special report Ext.PW9/A to Additional S.P. Mandi. It is alleged by prosecution that as per chemical examiner opinion Ext.PA the contraband was found to be charas. After completion of investigation case file was handed over to SHO P.S. Aut and he forwarded the accused persons for trial under Sections 20 and 29 of ND&PS Act.

3. Charge was framed against accused persons under Sections 20 and 29 of Narcotic Drugs and Psychotropic Substances Act. Accused persons did not plead guilty and claimed trial.

4. Prosecution examined ten witnesses namely HC Hans Raj, PW2 HC Hari Singh, PW3 C. Subhash Chand, PW4 C. Narinder Kumar, PW5 C. Bhav Dev, PW6 C. Sudeep, PW7 Inspector Surestha Thakur, PW8 HC Kashmir Singh, PW9 HC Lachhman Dass and PW10 ASI Amar Nath as mentioned in list of witnesses annexed with judgment and also tendered documentary evidence as mentioned in list of exhibits annexed with judgment passed by learned Special Judge. Statements of accused persons under Section 313 Cr.P.C. recorded in which they refuted the evidence led by prosecution against them. Accused did not produce any defence evidence.

5. Learned Special Judge-III Mandi acquitted the accused persons qua offences under Sections 20 and 29 of NDPS Act 1985.

6. Feeling aggrieved against the judgment of acquittal passed by learned trial Court State of H.P. sought permission for grant of leave to appeal under Section 378 (3) of Code of Criminal Procedure against judgment of acquittal.

7. We have heard learned Assistant Advocate General appearing on behalf of the petitioner and also perused the judgment of learned trial Court carefully.

8. Following points arise for determination in present petition:-

1. Whether petition filed under Section 378(3) of Code of Criminal Procedure 1973 against judgment of acquittal dated 1.4.2015 passed by learned Special Judge-III Mandi in Sessions trial No. 272 of 2013 (ST No. 27 of 2010) is liable to be accepted as mentioned in memorandum of grounds of petition?
2. Final Order.

Findings on Point No.1 with reasons

9. Learned Special Judge acquitted both accused as per reasons mentioned in para No. 24 of judgment and learned trial Court has also relied upon rulings reported in ***Nanha vs. State of H.P. Latest HLJ (HP) 1195, Duni Chand vs. State Latest HLJ 2015 HC 118, State of Rajasthan vs. Parmanand and another 2014 SAR (Criminal) 432 and Saukat Ali vs. State of Haryana 1996 Cri.LJ 3685 P&H.***

10. In present case no independent witness was examined by prosecution and only official witnesses are examined. Concept *falsus in uno falsus in omnibus* is not applicable in criminal law. ***See: AIR 1980 S.C.957 Bhe Ram Vs. State of Haryana. See: AIR 1971 S.C. 2505 Rai Singh Vs. The State of Haryana.*** In an appeal against acquittal High Court is entitled to re-appreciate the evidence if it is found that view taken by acquitting Court was not a possible view or that it has a perverse or infirm or erroneous view

and where admissible evidence is ignored by learned trial Court then duty is imposed upon appellate Court to re-appreciate evidence when accused has been acquitted by learned trial Court. ***See Hari Chand vs. State of Delhi AIR 1996 SC 1477. See Uppari Venkataswamy vs. Public Prosecutor High Court A.P. AIR 1996 SCW 98. See State of Punjab vs. Ajaib Singh AIR 1995 SC 975. See Hari Ram vs. State of Rajasthan 2000 Cr.LJ 2312 (SC). See Narinder Singh vs. State of Punjab AIR 2000 SC 2212. See Anil Kumar vs. State of U.P. 2005 SCC (Cri) 178. See State of Punjab vs. Karnail Singh AIR 2003 SC 3609. See State of U.P. vs. Babu AIR 2003 SC 3408. See State of Madhya Pradesh vs. Bacchudas 2007 Cri.LJ 1661 (SC).***

11. There is no evidence on record that police officials have hostile animus against accused at any point of time prior to the incident. It was held in case reported in ***AIR 1972 SC 2783 titled Nathu Singh vs. State of M.P.*** that mere fact that witnesses examined in support of prosecution are police officials is not enough to discard their testimonies. It was held that police officials cannot be treated as interested witnesses. It was held that testimonies of police officials can be relied if testimony of police official is trustworthy reliable and inspires confidence of Court. ***See AIR 1985 SC 1092 titled State of Gujarat vs. Raghunath Vamanrao Baxi.*** It is well settled law that offences under NDPS Act are offences against the society and it is well settled law that criminals dealing in NDPS are spoiling the career of young youths who are wealth of Nation for personal commercial benefit. It is well settled law that Court should be very conscious while dealing criminal offences relating to public at large. NDPS cases are criminal cases against society at large. In view of above stated facts it is held that meticulous examination of oral as well as documentary evidence is essential in present case in the ends of justice and for the betterment of public at large. Point No. 1 is answered accordingly in affirmative.

Point No.2 (Final Order)

12. In view of my findings upon point No.1 petition filed under Section 378(3) of Code of Criminal Procedure 1973 is allowed and pre-admission notice of appeal be issued to non-petitioners returnable within four weeks. In the meanwhile original record of learned trial Court be also called for. Observations made in this order will not effect the merits of case in any manner. Be listed after four weeks. Cr.MP(M) No. 1224 of 2015 is disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P .....Appellant.

Versus

Mohan Singh .....Respondent.

Cr. Appeal No. 557 of 2015
Date of decision: 16.12.2015

Code of Criminal Procedure, 1973- Section 378- Accused was apprehended by the police party while carrying a bag on his left shoulder -1.300 kilgrams of cannabis was found in the bag on search – accused was acquitted by the trial Court- in appeal held, that although official witnesses have spoken consistently yet PWs have failed to connect the case property with the case as the abstract of malkhana register regarding retrieval of case property from malkhana to Court and back was not proved and witnesses had also not stated categorically

about this fact – appreciation of evidence by trial Court does not suffer from any infirmity- appeal dismissed. (Para-6 to 12)

For the Appellant: Mr. M.A Khan, Additional Advocate General with Mr. P.M Negi, Deputy Advocate General and Mr. Ramesh Thakur, Assistant Advocate General.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge (oral)

This appeal is directed against the judgment rendered on 3.6.2015 by the learned Special Judge (II), Mandi, District Mandi, H.P., in Sessions trial No. 58/2014/2013, whereby the latter Court acquitted the accused/respondent herein (hereinafter referred to as "accused") for his having committed an offence punishable under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act").

2. The brief facts of the case are that on 14.4.2013, SI Naveen Jhalta alongwith PSI Nirmal, HC Deep Chand, C Ajay Kumar and HHC Chet Ram driver was on patrolling duty at Lehgala. At about 11.50 a.m. the accused on seeing the police party started running fast. The accused was apprehended by the police on suspicion and he was asked about the rucksack carried by him on his left shoulder. The consent of the accused was taken and his rucksack was searched. Inside the rucksack there was white coloured gunny bag and inside that gunny bag there was round type cannabis. The cannabis on weighing was found to be 1 Kg. 300 grams. Thereafter the cannabis was put in the gunny bag and it was further put in the same rucksack which was sealed at the spot with seal impression A at 9 places. NCB form in triplicate was filled. The cannabis was taken into possession by the police. After completion of the investigation, challan, under Section 173 of the Cr.P.C. was prepared and filed in the Court.

3. The trial Court charged the accused for his having committed an offence punishable under Section 20 of the Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined as many as 11 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 Cr.P.C. was recorded, in which he pleaded innocence. On closure of proceedings under Section 313 Cr.P.C the accused was given an opportunity to adduce evidence in defence which he refused to avail.

5. The appellant-State is aggrieved by the judgment of acquittal recorded by the learned trial Court. Mr. P.M Negi, learned Deputy Advocate General has concerted to vigorously contend before this Court qua the findings of acquittal recorded by the learned trial Court, being not based on a proper appreciation of evidence on record, rather, theirs being sequelled by gross mis-appreciation of material on record. Hence, he contends qua findings of acquittal being reversed by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

6. Recovery of cannabis Ex. P-4 weighing 1 Kg. 300 grams stood effected under recovery memo Ex. PW-1/D from a rucksack slung on left shoulder of the accused. Even though the prosecution witnesses have deposed in tandem and in harmony qua each of the links in the chain of circumstances commencing from the proceedings relating to search, seizure and recovery till the consummate link comprised in the rendition of an opinion by the FSL on the specimen parcels sent to it for analysis, portraying proof of unbroken and

unsevered links, in the entire chain of the circumstances, hence it stands argued that given the prosecution case hence standing established, it would be legally unwise for this Court to acquit the accused.

7. Besides when the testimonies of the official witnesses, unravel the fact of theirs being bereft of any inter-se or intra-se contradictions hence, consequently they too enjoy credibility for sustaining thereupon findings of conviction recorded against the accused by the learned trial Court. Apparently, proof of the prosecution case is endeavored to be sustained on the strength of the unblemished testimonies of police witnesses. A close and studied perusal of the deposition of the police witnesses underscores the factum of theirs having neither given a version qua the factum of recovery of contraband from the exclusive and conscious possession of the accused inconsistent with the manner thereof as recited in the F.I.R. for begetting a conclusion of hence their testimonies comprised in their respective examinations in chief being ridden with a vice of inter se contradictions vis-à-vis their testimonies comprised in their respective cross-examinations, rather lack of inconsistencies aforesaid render their respective testimonies on oath to be both unimproved as well as unblemished for hence implicit reliance being placed thereupon, nor when their depositions are afflicted with any vice of intra se contradictions rather when they have deposed qua the manner of recovery of contraband from the alleged conscious and exclusive possession of the accused bereft of any disharmony or inconsistency gives leverage to an inference of hence the prosecution succeeding in sustaining its charge against the accused of cannabis weighing 1 Kg. 300 grams having stood recovered under recovery memo (PW-1/D) from his conscious and exclusive possession while his carrying it in a rucksack slung by him on his left shoulder.

8. However, even though the testimonies of the official witnesses who have hence proven the factum of recovery of Cannabis from the alleged conscious and exclusive possession of the accused while his carrying it in a rucksack slung by him on his left shoulder stand on a solemn legal pedestal especially when their testimonies comprised in their respective examinations in chief are bereft of any taint of either inter se contradictions vis-à-vis their depositions comprised in their respective cross-examinations nor also when their testimonies stand un-ingrained with any vice of intra se contradictions necessarily then when their testimonies inspire confidence reinforcingly render their testimonies being amenable to implicit reliance being placed thereupon for concluding qua the guilt of the accused, nonetheless before proceeding to place implicit reliance upon their testimonies, it is also imperative for this Court to gauge or discern from the available evidence on record whether independent witnesses were available in the immediate vicinity of the locality where the proceedings relating to search, seizure and recovery of contraband from the alleged conscious and exclusive possession of the accused in the manner as deposed by the official witnesses stood launched and concluded. The Investigating Officer, is not obliged to associate independent witnesses in his holding proceedings for carrying out search and recovery of contraband from the alleged conscious and exclusive possession of the accused nor also the non- association of independent witnesses by the investigating officer in the proceedings relating to search and recovery of contraband from the alleged conscious and exclusive possession of the accused would oust or discount the probative worth of the testimonies of the official witnesses. However, when independent witnesses despite proven evidence of their availability in close proximity to the location where the proceedings relating to search and recovery of contraband from the conscious and exclusive possession of the accused stood launched or were concluded, stand not associated, such non association of independent witnesses by the Investigating Officer despite their proven availability would nurse an inference of their non association in the apposite proceedings by the Investigating Officer being both deliberate or intentional. Concomitantly also it would

give succor to an inference of the Investigating Officer having omitted to join independent witnesses despite their availability in the vicinity of the location where the proceedings relating to search and recovery of contraband from the conscious and exclusive possession of the accused were launched or concluded, as he intended to smother the truth qua the genesis of the prosecution version. The genesis of the prosecution version would gain credence with this Court only when it is free from a taint of it being reared by a partisan or a slanted investigation standing conducted by the investigating officer. The investigation carried out by the Investigating Officer would garner an element of slantedness or distortion when the investigating officer despite availability of independent witnesses in proximity to the site of occurrence deliberately omits to join them in the proceedings relating to search and recovery of contraband from the purported exclusive and conscious possession of the accused. Consequently, a slanted or a distorted investigation by the Investigating Officer would erode the genesis of the prosecution story. Now the apt evidence for discerning the factum of availability of independent witnesses in the immediate vicinity or in close proximity to the location or the site of search and recovery of contraband from the conscious and exclusive possession of the accused besides concomitantly of an omission to join them being deliberate as well as intentional, for sprouting a further inference of hence the investigation carried out by the Investigating Officer being both slanted and tainted besides distorted whereupon no reliance can be placed by this Court, stands comprised in the testimony constituted in the cross-examination of PW-3**.** In the cross-examination of PW-3 there exists a palpable disclosure of the house of the local pradhan standing located in close vicinity to the spot where the apposite proceedings were held by the Investigating Officer. Moreover, the Investigating Officer in his deposition has therein made a disclosure qua the existence of village Katindhi about 100 meters away from the site of occurrence and of the house of Pradhan of the Gram Panchayat of the village standing located on the road**.** However, despite availability of independent witnesses in close proximity to the site of occurrence the Investigating Officer omitted to solicit their participation in the apposite proceedings. The omission on the part of the Investigating Officer, despite availability of independent witnesses in close proximity to the site of occurrence, to associate them in the apposite proceedings, is obviously construable to be both intentional and deliberate for camouflaging the truth qua the occurrence. Furthermore, the inference which is available to be drawn by this Court is of the Investigating Officer having carried out a slanted besides a contorted as well as a contrived investigation whereupon no reliance can be placed by this Court. In sequel, the genesis of the prosecution version founded upon a skewed, faulty and partisan investigation cannot be lent credence by this Court**.**

9. Be that as it may, it was also incumbent upon the prosecution to fortifyingly establish the factum probandum in as much as of the case property produced before the trial Court being linkable to its recovery standing effectuation from the alleged conscious and exclusive possession of the accused in the manner espoused by the prosecution. The germane besides apt material for forming a conclusion qua the case property as produced in Court being linkable to the apposite stage of its recovery from the alleged conscious and exclusive possession of the accused in the manner propagated by the prosecution, stood embedded in the apposite descriptive entries qua it, recorded in the Malkhana register of the police station concerned. Imperatively at the stage contemporaneous to its production in Court by the learned PP for its being shown to the PW (a) the former was enjoined to produce in Court either the abstract of the malkhana register personificatory of narrations or descriptions borne thereon being compatible or congruous to the one borne on seizure memo as shown to the prosecution witnesses (b) or he was obliged to elicit from the PW to whom the case property stood shown in Court by him communications portraying the factum of it being carried by them on its being handed over to them by an authorized official after its retrieval by the latter from the Malkhana concerned whereupon it stood handed over

by them to the learned PP for facilitating on its production by him in Court emanation of apposite elicitations from them unveiling the factum of it being the case property as attributed by the prosecution to the accused (c) even in the face of the aforesaid omission the learned PP at the time of production of case property in Court, for its being shown to the PWs for theirs deposing qua it being the very same property as was recovered from the alleged conscious and exclusive possession of the accused in the manner as propagated by the prosecution to yet gain muscle was obliged to on its production in Court by him besides prior to its being shown to the PWs communicate before it the factum of his having received it from an empowered official after its retrieval by the latter from the Malkhana concerned.

10. However, a close and circumspect reading of the testimonies of PW-10 to whom the case property on its production in Court by the learned PP was shown omits to unfold (a) the factum of either at the stage contemporaneous to its production in Court by the learned PP for its being shown to the PWs aforesaid he divulged to the trial Court the factum of his having received it from an authorized officer on its retrieval by the latter from the Malkhana concerned (b) nor is there any emanation in the deposition of PW aforesaid of his having received it from an authorized official on its retrieval by the latter from the malkhana concerned, (c) besides there is no communication by him in his recorded deposition on oath of his carrying with him at the time of recording of his deposition in Court during course whereof the learned PP showed him the case property, the relevant abstract of the malkhana register wherefrom compatibility intra-se descriptions or narrations borne thereon on its comparison with the abstract of the malkhana register could stand either disinterred or fathomed, for as a corollary rendering a conclusion of the case property as produced in Court being the one as stood recovered from the conscious and exclusive possession of the accused.

11. The summom bonum of the above discussion is of the omissions aforesaid countervailing the propagation of the prosecution of case property produced in Court by the learned PP for its being shown to PW aforesaid being relatable to the contraband recovered from the alleged conscious and exclusive possession of the accused under memo PW-1/D.

12. The crux of the above discussion is of the prosecution having not adduced cogent and emphatic evidence in proving the guilt of the accused. The appreciation of evidence by the learned trial Court does not suffer from any infirmity as well as perversity. Consequently, reinforcingly, it can be formidably concluded, that, the findings of the learned trial Court do not merit interference.

13. In view of the above discussion, the instant appeal is accordingly dismissed, and, the judgment of the learned trial Court is maintained and affirmed.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of Himachal Pradesh. .....Appellant.

Versus

Vinod Kumar and another. .....Respondents.

Cr. Appeal No.804 of 2008.
Reserved on: 4th December, 2015.
Date of Decision : 16th December, 2015.

Indian Penal Code, 1860- Section 323, 115, 324 and 307- Complainant and his brother were stabbed by the accused with a knife- accused were acquitted by the trial Court- complainant died subsequently and did not appear in the witness box- eye witness resiled from his previous statement- he admitted that his shop is located at the place from where the place of incident was not visible- hence, his testimony is not reliable- shopkeepers were not cited as witnesses- recovery was also not established- held, that in these circumstances, prosecution case was not proved and the accused was rightly acquitted by the trial Court.

(Para-8 to 12)

For the Appellant: Mr. P.M. Negi, Deputy Advocate General.
For the Respondents: Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the judgment of the learned Sessions Judge, Una, District Una, Himachal Pradesh, rendered on 15.09.2008, in Session Trial No.3 of 2007, whereby the learned trial Court acquitted the accused/respondent No.1, Vinod Kumar for his having committed offences punishable under Sections 323 and 115 of the Indian Penal Code, besides also acquitted accused/respondent No.2, Rajan Kumar for his having committed offences punishable under Sections 324 and 307 of the Indian Penal Code.

2. The facts relevant to adjudicate the instant appeal are that on 7.10.2003, Ajay Kalia informed the Police Post, Chintpurni on telephone at about 8.30 AM that he and his brother Anil Kalia have been stabbed by accused Vinod Kumar and at present they are under treatment at CHC, Chintpurni. On this S.I. Gopal Dass along with HC Mohinder Singh and other police officials went to CHC, Chintpurni, where he recorded the statement of injured Anil Kalia under Section 154 Cr.P.C, wherein he reported that he is priest in Chintpurni Mata Mandir and on that day it was his and that of accused Vinod Kumar's turn to perform Puja at the Mandir. In the morning at 8 AM on the relevant day when he was taking tea in the Lakkar Bazar, accused Vinod Kumar came there and asked that he indulges in cheating at his turn in the Mandir and accused Vinod Kumar slapped him and after snatching the glass from his hands, accused Vinod Kumar inflicted injury on his head with the said glass and called his son Rajan (accused No.2). Anil Kalia also called his brother Ajay so that the matter could be compromised, but on his arrival Rajan (accused No.2) inflicted knife blows on both of them. Anil Kalia stated that the accused Rajan inflicted knife blow on his abdomen and the material from the abdomen protruded. He stated that they were rescued by Vinod @ Guddu and his servant Ranjit. Thereafter accused Rajan fled away from the scene along with dagger and Anil Kalia was brought to the hospital by his brother Ajay. On this report FIR Ext.PW-10/B was registered at Police Station, Amb. Both the injured were got medically examined and their MLCs were obtained. Both the accused were arrested, who confessed their guilt vide their disclosure statements. On demarcation of accused Rajan, weapon of offence was recovered and was sealed in a parcel and taken into possession vide memo Ext.PW-5/B. Site plan of the occurrence was prepared and scooter in question was also taken into possession. Treatment summary in respect of injured Anil Kalia was obtained from PGI, Chandigarh. Statements of witnesses were recorded. On conclusion of investigation, the challan was prepared and presented in the Court and accused were produced to face trial.

3. Accused/respondent No.1, Vinod Kumar stood charged by the learned trial Court for his having committed offences punishable under Section 323 and 115 of the

Indian Penal Code, whereas accused/respondent No.2, Rajan Kumar stood charged by the learned trial Court for his having committed offences punishable under Sections 324 and 307 of the Indian Penal Code. In proof of the prosecution case, the prosecution examined 15 witnesses. On conclusion of the recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the learned trial Court, wherein both the accused claimed innocence and pleaded false implication. On opportunity standing afforded by the learned trial Court to both the accused to adduce defence evidence, only accused/ respondent No.1, Vinod Kumar chose to avail it. Accused/respondent No.1, Vinod Kumar examined two witnesses in his defence.

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

5. The appellant/State stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Deputy Advocate General has concerted to vigorously contend qua the findings of acquittal recorded by the learned trial Court being not based on a proper appreciation of evidence on record, rather, theirs being 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.

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

7. 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.

8. The accused Rajan Kumar is alleged to with dagger recovered under memo Ext.PW-5/B delivered/administered a blow on the head of Anil Kalia. Accused Vinod Kumar is alleged to have abetted accused Rajan Kumar in the latter's act of delivering a blow with dagger on the head of Anil Kalia. Accused Vinod Kumar is also alleged to have slapped Anil Kalia, hence is alleged to have committed an offence punishable under Section 323 of the Indian Penal Code.

9. The victim of the offence Anil Kalia was subjected to medical examination by PW-1, Dr. Indu Bhardwaj, who during the course of her deposition has proved Ext.PW-1/B, which constitutes the MLC prepared by her in sequel to her subjecting Anil Kalia to medical examination. PW-1 in her deposition on oath has been unequivocal besides categorical qua the injuries recorded in Ext.PW-1/B being dangerous to life. The opinion formed by PW-1 qua the injuries occurring on the person of victim Anil Kalia as stands recorded in Ext.PW-1/B, being dangerous to life finds its existence in Ext.PW-1/A. However, on the mere strength of the deposition of PW-1 with the afore-referred unfoldments therein, the prosecution cannot succeed in its endeavour to prove the allegations constituted against the accused in the charges framed by the learned trial Court against each. The best besides potent evidence to prove the charge against the accused was constituted in the deposition of the victim Anil Kalia. However, the victim of the offence died on 2nd June, 2006, hence was unavailable for being led into the witness box for proving the genesis of the prosecution case embedded in the FIR Ext.PW-10/B. With the victim of the offence having died subsequent to the ill-fated occurrence, the prosecution was deprived of adducing the best evidence for sustaining its charge against the accused. In the face of demise of the victim of the offence subsequent to the ill-fated occurrence obviously also has rendered unavailable for adduction

the best evidence in proof of the contents of the FIR Ext.PW-10/B lodged qua the occurrence by the deceased victim. Given the unavailability of the victim of offence for proving the contents of FIR Ext.PW-10/B lodged qua the occurrence by him obviously a conclusion is formable by this Court of its contents standing not proved. However, the prosecution relies upon the deposition of the younger brother of the victim of the offence i.e. PW-3 for proving the genesis of the occurrence. The younger brother of the deceased complainant Anil Kalia though in his recorded deposition on oath has rendered therein a version in consonance with the version thereof constituted in the FIR Ext.PW-10/B, nonetheless his testimony is neither sound nor of any probative worth, besides is legally inefficacious, arising from the factum of: (a) his being an interested witness. Even though the factum of his interestedness may not be a sufficient ground for discarding his testimony, nonetheless his interestedness may throw overboard the prosecution version, especially in the face of his deposing in his deposition comprised in his cross examination of his shop standing located at a place wherefrom the ill-fated occurrence was not visible. Given the aforesaid emanation in his deposition comprised in his cross examination qua the site of occurrence being not visible from his shop, renders the factum of his having witnessed it to be a conjuration besides an invention on his part. Necessarily then with his having not witnessed the occurrence his narration in his examination in chief purveying therein an ocular version qua the occurrence stands belittled besides loses its creditworthiness. In sequel his testimony is discardable. In aftermath, no dependence can be made by this Court qua his version qua the ill-fated occurrence comprised in his examination in chief; (b) the occurrence in his deposition comprised in his examination in chief of it having stood witnessed by Vinod Kumar @ Guddu. However, the factum of the aforesaid eye witness to the occurrence having resiled from his previous statement recorded under Section 161 Cr.P.C. erodes the genesis of the prosecution version; (c) PW-3 in his cross examination has also made a disclosure therein of the ill-fated occurrence standing witnessed by shopkeepers owning shops in the vicinity of the site of occurrence, yet the shopkeepers owning shops adjoining the site of occurrence stood not cited as prosecution witnesses for facilitating theirs unfolding during their depositions the true genesis of the prosecution case. In sequel, the omissions aforesaid on the part of the prosecution appear to germinate from its endeavour to suppress the truth qua the occurrence which otherwise would have stood unraveled on the shopkeepers owning shops adjoining the site of occurrence and who witnessed it stepping into the witness box. In aftermath, it appears that the prosecution has concerted to by relying upon the interested testimony of PW-3 project a twisted or contorted version qua the genesis of the prosecution occurrence, which cannot be imputed credence by this Court. Moreover, the ill-fated occurrence took place in the tea shop of one Ashwani Kumar, nonetheless, he was neither cited as a prosecution witness nor was led into the witness box. The factum of his neither standing cited as a witness nor hence standing examined as a prosecution witness, precluded him to render a truthful version qua the ill-fated occurrence wherefrom an inference stands galvanized of the prosecution benumbing the upsurging of best evidence qua the occurrence. Cumulatively, hence the inference aforesaid of the prosecution benumbing as well as suppressing the unveiling of truth qua the occurrence dismantles the entire edifice of the prosecution version rendering it to be incredible besides its being not amenable to implicit sanctity being imputed thereto by this Court.

10. The user of weapon of offence i.e. dagger by co-accused Rajan Kumar, who with its purported user inflicted injuries on the head of victim Anil Kalia stands not efficaciously proven vis-à-vis co-accused Rajan Kumar nor he stands connected with his either wielding it or using it especially in the face of witnesses PW-5 and PW-14 to recovery memo Ext.PW-5/B whereunder it stood recovered, not supporting the prosecution case qua its recovery standing effected in their respective presence at the instance of the accused by the Investigating Officer. Consequently, with the witnesses to

recovery memo Ext.PW-5/B not proving the factum of effectuation of recovery of dagger in their respective presence at the instance of the accused by the Investigating Officer engenders an inference of its recovery at the purported instance of the accused by the Investigating Officer being in its entirety a well engineered contrivance besides an invention on the part of the Investigating Officer. Necessarily then no reliance is to be imputed to the factum of recovery of dagger under memo Ext.PW-5/B. Cumulatively, with the prosecution, hence not succeeding in connecting co-accused Rajan Kumar with dagger recovered under memo Ext.PW-5/B, besides obviously not succeeding in connecting him with his wielding it or his delivering a blow with it on the head of the victim renders suspect the prosecution version of co-accused Rajan Kumar with his purportedly wielding it his delivering its blow on the head of the victim.

11. The summom bonum of the above discussion is of the aforesaid discrepant evidence qua the guilt of the accused making pervasive and deep in roads qua the veracity of the prosecution version rendering it to be suspect. Consequently, the benefit of doubt ought to go to the accused.

12. For the reasons which have been recorded hereinabove, this Court holds that the learned trial Court below 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.

13. In view of the above, we 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.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Sushant Kumar ...Petitioner.

VERSUS

State Election Commission, Himachal Pradesh and others ...Respondents.

CWP No.4446 of 2015.
Decided on: December 16, 2015.

Constitution of India, 1950- Article 226- Petitioner submitted that Writ Petition was disposed of with the direction to the respondent not to impose the Model Code of Conduct in the area(s) where Panchayat Elections will not be held- respondents submitted that Model Code of Conduct is operative only in those areas where the Panchayat Elections are notified from the date of the notification till the elections are held- hence, petition disposed of in view of statement of respondents. (Para-1 to 3)

For the petitioner: Mr.Arvind Sharma, Advocate.

For the Respondents: Ms.Nishi Goel, Advocate, for respondent No.1.
Mr.Shrawan Dogra, Advocate General, with Mr.V.S. Chauhan, Addl.A.G., and J.K. Verma, Dy.A.G., for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Learned counsel for the petitioner stated that the writ petition may be disposed of with a direction to the respondents not to impose Model Code of Conduct in the area(s) where Panchayat Elections would not be held. His statement is taken on record.

2. Mr.V.S. Chauhan, learned Additional Advocate General, stated that the Model Code of Conduct is operative only in those areas where the Panchayat Elections are notified, from the date of the notification till the elections are held.

3. In view of the above, nothing survives in the writ petition and the same is disposed of as such, alongwith pending CMPs, if any.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Union of India & others .....Petitioners
Versus
Shri Roshan Lal ....Respondent

CWP No. 503 of 2012
Date of decision: 16.12.2015

Constitution of India, 1950- Article 226- Central Administrative Tribunal had directed the Examiner to re-look into the attempted Question No. 2(b)- the examiner to examine the matter independently and take whatever view he wanted in the contest of the grievance raised by the applicant- Tribunal had refused to quantify the marks awardable for the attempted answer- held, that order is legal and speaking order and does not suffer from any infirmity- petition dismissed. (Para-1 and 2)

For the petitioners : Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Angrej Kapoor, Advocate.
For the respondent: Mr. Lalit Kumar Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this writ petition, the writ petitioners have questioned the order dated 09.09.2011, (Annexure P-3), made by the Central Administrative Tribunal, for short 'the Tribunal', in Original Application No. 606/HP/10, titled **Roshan Lal versus Union of India & others**, whereby the concerned examiner has been asked to re-look into the attempted Question No. 2(b), hereinafter referred to as 'the impugned order'. The prayer of applicant-Roshan Lal, writ respondent herein, to send the matter to another examiner, stands rejected. It is apt to record para-4 of the impugned order, herein:

> *"We would, accordingly, dispose of this O.A. with a direction to the competent authority to refer the matter to the concerned examined who*

may have a relook at the attempted Question No. 2 (b). (The relevant question to be attempted and the answer attempted by the applicant appear at page 18 and 44 respectively of the OA). It will be the entire discretion of the examiner to examine the matter independently and take whatever view he wants in the contest of the grievance raised by the applicant. However, we negative the plea raised on behalf of the applicant that the matter should go to another examined. We also do not find merit in the contention that the Tribunal may, on its own, quantify the marks awardable for the attempted answer.

2. While going through the impugned order, we are of the considered view that the impugned order is legal and speaking one; is not suffering from any infirmity and the writ petition deserves to be dismissed. Accordingly, the impugned order is upheld and the writ petition is dismissed.

3. Interim order dated 24.1.2012 is vacated.

****

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

Hydro Project Workers Union ...Appellant.

Versus

Punjab State Electricity Board & Ors. ...Respondents.

LPA No.18 of 2008.
Reserved on: 10.12.2015.
Decided on: December 17, 2015.

Industrial Disputes Act, 1947- Section 25- Workmen claimed that they were working as Turbine Operators and were entitled to be designated as such- Tribunal answered the reference in favour of the workmen and this decision was set aside in writ – held, that Tribunal had visited the plant of the employer and had found that workmen were working as Turbine operators which corroborated the evidence led by workmen- further, Writ Court cannot set aside the decision arrived at on facts and cannot substitute an opinion for the opinion of the Industrial Tribunal- Writ Court had wrongly set aside the award of the Tribunal- appeal allowed and the award of the Tribunal affirmed. (Para-5 to 17)

Cases referred:

Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157
M/s. Delux Enterprises vs H.P. State Electricity Board Ltd. & others, I L R 2014 (V) HP 970
Iswarlal Mohanlal Thakkar vs Paschim Gujarat Vij Company Ltd. & Anr,2014 AIR SCW 3298

For the Appellant: Mr.Rahul Mahajan, Advocate.
For the respondents: Mr. Anand Sharma, Advocate for respondents No.1 to 4.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant Letters Patent Appeal is directed against the judgment of the learned Single Judge of this Court whereby the impugned award of 4.8.2005 rendered by the

learned Presiding Judge, Labour Court-cum-Industrial Tribunal, Dharamshala (hereinafter referred to as 'the Tribunal') stood partly allowed to the extent of the workmen standing tenably bestowed by the Tribunal the relief of the employer providing them ear defenders and sound proof cabins whereas the findings recorded by the Tribunal qua the entitlement of the appellant/workmen herein for parity of pay with Turbine Operators as also the relief of the workmen standing entitled for designation as Turbine Operators stood both quashed and set aside.

2. The industrial dispute, raised by the workmen through the Union impleaded as appellant/workmen herein stands encapsulated in the demand charter embodied in Annexure A-1, which stands reproduced as under:

> "That S/Shri Sikander Lal Saini (2) Parkash Chand (3) Jogisher Ram (4) Gian Chand (5) Sadhu Ram (6) Omkar Singh (7) Tek Chand (8) Dhobi Chand (9) Gian Singh Bist (10) Naresh Kuar (11) Gurdev Ram and (12) Raj Mal are working as Turbine Operator instead of Machine Attendant, thus all the workmen are entitled designation as Turbine Operator from their engagement as Machine Attendant with you."

3. On the afore-extracted industrial dispute standing raised by the workmen through their representative body impleaded as appellant/workmen herein, sequelled its standing forwarded to the Labour-cum-Conciliation Officer, Zone Mandi, District Mandi, (hereinafter referred to as 'the Conciliation Officer'). The latter initiated conciliatory proceedings for resolving the dispute inter se the respondents herein and the aggrieved workmen. The conciliatory efforts of the Conciliation Officer for amicably putting at rest the industrial dispute inter se the workmen and their employer i.e. the respondents herein proved abortive. Consequently, on failure of conciliatory mechanism for resolving the industrial dispute inter se the appellant/workmen herein and the respondents herein constrained "the Conciliation Officer" concerned to transmit the matter to the competent authority of the "appropriate Government". On the competent authority of the "appropriate Government" hence standing seized of the industrial dispute comprised in Annexure A-1 stood, on its thoroughly applying its mind to the apposite material before it constrained to make a reference of the industrial dispute to the Tribunal concerned. The Tribunal on an appraisal of the evidence adduced before it on the apposite issues struck by it on the pleadings laid before it by the contesting parties, answered the reference in favour of the appellant/workmen herein.

4. The respondents herein standing aggrieved by the award of the Tribunal took to impugn it by preferring a writ petition before this Court. Civil Writ Petition No.1252 of 2005 was adjudicated upon by the learned Single Judge of this Court on 26th December, 2007. In his decision, the learned Single Judge partly accepted the writ petition inasmuch as he set aside the award of the Tribunal whereby the latter on an appraisal of material before it held the appellant/workmen herein to stand entitled for claiming theirs being designated as Turbine Operators besides also set aside the award of the Tribunal affording parity of pay to the workmen with the one prescribed for availment by Turbine Operators whereas the learned Single Judge upheld the findings recorded by the Tribunal of the employers providing ear defenders and sound proof cabins to the appellant/workmen herein.

5. For gauging the tenacity of the findings recorded by the learned Single Judge of this Court while reversing the findings recorded by the Tribunal qua the workmen even when they stand designated as Machine Attendants theirs rather discharging the duties of Turbine Operators, sequelly fastening in them an indefeasible right for entitlement for

parity of pay vis-à-vis the scale prescribed in Annexure A-6/T for availment by Turbine Operators, it is imperative to advert to the reasons which hence prevailed upon the learned Single Judge of this Court. The learned Single Judge in upsetting the findings of the Tribunal to the afore-referred extent had accorded two reasons: (i) the inability of the workmen to prove the factum of theirs performing the callings of Turbine Operators (ii) a disclosure in Annexure P-2 of the appellant/workmen herein standing designated as Power Plant /Machine Attendants which designation as stood officially accorded to them by the respondents herein being undisturbable especially when its ascription qua them being the sole prerogative of the respondents herein. The reasons as stand afforded by the learned single Judge of this Court in dispelling the findings recorded by the Tribunal of the appellant/workmen herein even when standing designated as Machine Attendants theirs rather at the plant of the respondents herein rendering therein work of Turbine Operators sequelly lending empowerment for theirs foisting a claim of theirs standing entitled to parity of pay with the one prescribed in Annexure A-6/T for availment thereof by Turbine Operators, stands emaciated besides is rendered legally frail for the reasons: (1) a perusal of the record of the Tribunal divulging an order standing recorded in the morning of 4.8.2005 with a disclosure therein of/upon a bilateral consent of the counsel for the parties at contest before it, the Presiding Officer of the Tribunal proceeding to inspect the premises of the respondents herein for detecting thereupon the factum of the appellant/workmen herein performing therein their averred work of Turbine Operators. On the Presiding Officer of the Tribunal inspecting the premises/plant of the respondents herein he recorded a graphic disclosure in his award of his thereupon detecting the appellant/workmen herein performing therein work of Turbine Operators. The surfacing of the pre-eminent fact of the appellant/workmen herein on standing detected by the Presiding Officer of the Tribunal on the latter visiting the plant of the respondents herein palpably reflective of theirs performing therein work/duties of Turbine Operators obviously stood purveyed besides reproduced by him in his impugned award moreso with its constituting a grooved besides an entrenched ground for bolstering the affording by him to the appellant/workmen herein the relief of parity of pay with the one prescribed in Annexure A-6/T for availment by the Turbine Operators. The upsurging of the aforesaid factum on the Presiding Officer of the Tribunal visiting the plant of the respondents herein remains un-controverted.

6. The grounds, as elucidated in Civil Writ Petition, instituted by the respondents herein for assailing the award of the Tribunal, though personify therein the propriety of the Presiding Officer of the Tribunal visiting the plant of the respondents herein especially when his visit thereto stood not prodded by any bilateral consent purveyed to him by the contesting parties, obviously stands espoused to hence render unsustainable the detection by him on his visiting the plant of the respondents herein, of the workmen performing therein the work of Turbine Operators. However, the aforesaid ground as espoused by the counsel for the respondents herein to estop this Court from imputing any reliance to the Presiding Officer of the Tribunal visiting/inspecting the plant of the respondents herein whereupon he detected the workmen performing therein work of Turbine Operators stands to be discountenanced for the solitary reason ingrained in the factum of no apposite material existing on record in display of the Presiding Officer of the Tribunal at the stage contemporaneous to his visiting the plant of the respondents herein having commanded the workmen to perform the callings of Turbine Operators. Necessarily when the workmen were detected by the Presiding Officer of the Tribunal on his visiting the plant of the respondents herein to perform therein the callings of Turbine Operators as a corollary the performance by them of the callings of Turbine Operator therein is construable to be neither colourable nor at the behest of the Presiding Officer rather theirs as portrayed by Annexure A-5 wherein they stood also peremptorily enjoined to look after all the power House Turbines/Generators in the plant of the respondents herein, hence they are to be

construable to even when they stood designated as Machine Attendants theirs performing at the plant of the respondents herein the work of Turbine Operators. The colourability, if any, acquired by the Presiding Officer of the Tribunal visiting/inspecting the plant of the respondents herein whereupon he detected the workmen therein performing the callings of Turbine Operators which spurred a conclusion from him of theirs hence standing entitled to draw a pay equal to the one prescribed under Annexure A-6/T for availment by Turbine Operators, would stand surged only on the respondents herein apart from rearing in the writ petition a ground for impeaching the award of the Tribunal on the score of the propriety of Presiding Officer of the Tribunal visiting their plant having concerted to adduce material in displacement of findings recorded by the Tribunal qua the workmen performing at the plant of the respondents herein the callings of Turbine Operators. Adduction of material in displacement of findings recorded in the award of the Tribunal of the workmen standing detected by its Presiding Officer on his visiting the plant of the respondents herein performing therein the callings of Turbine Operators may have constrained this Court to irrever the visit of the Presiding Officer of the Tribunal to the plant of the respondents herein besides would have filliped a concomitant inference from this Court of any rearing of any deduction thereupon by him of the workmen performing therein callings of Turbine Operator being wholly unvindicable, obviously warranting this Court to remand the matter to the Tribunal for receiving evidence thereon besides directing it to adjudicate the reference afresh. In aftermath, the mere espousal by the respondents herein in the grounds of civil writ petition of no bilateral consent by the counsels of the contesting parties standing purveyed to the Presiding Officer of the Tribunal for facilitating his visiting the plant of the respondents herein rendering his visit thereto standing ingrained with impropriety when stands unaccompanied by any relevant material in displacement of/or for repelling the findings recorded in the award of the Tribunal of its Presiding Officer on his inspecting the plant of the respondents herein having thereupon unearthed the workmen performing therein the callings of Turbine Operators constrains this Court to record the inferences of (i) the findings recorded by the Presiding Officer in his award of his on his visiting the plant of the respondents herein having detected the workmen therein to be performing the work of Turbine Operators stand un-eroded (ii) his visit to the plant of the respondents herein being a sequel to a bilateral consent standing purveyed to him by the contesting parties before him especially given a vivid portrayal by an order of 4.8.2005 existing on the file of the Tribunal of the counsels representing the contesting parties before it having purveyed a consent to its Presiding Officer inspecting the plant of the respondents herein significantly with no evidence to repel the factum recorded therein robs the vigour of the contention of the learned counsel for the respondents herein of the counsel representing it before the Tribunal having not purveyed any consent to the Presiding Officer of the Tribunal holding an inspection of their plant. Even otherwise, solemnity is enjoined to be imbued to orders aforesaid recorded on the file of the Tribunal unless an oblique motive stands imputed to its Presiding Officer. However, when no oblique motive stands imputed to the Presiding Officer in his inspecting the plant/premises of the respondents herein nor when obviously proof in sustenance thereof stands adduced, the visit by the Presiding officer of the Tribunal to the plant of the respondents herein does not reek of any oblique motive nor is ingrained with any tinge of impropriety rather appears to stand prodded for unearthing the veracity of the averments of the workmen of theirs therein performing the callings of Turbine Operators, especially when the best evidence in proof thereof stood un-adduced besides camouflaged by the employers with an ulterior motive to not bestow upon them a tenable relief as claimed by them for partity of pay with Turbine Operators. In sequel, in the Presiding Officer of the Tribunal proceeding to uncover or unearth by inspecting or visiting the plant/premises of the employer the apposite evidence in proof of the factum probandum yet throughout camouflaged or hidden from the glance of the Tribunal would never reek of any tinge of

impropriety. (iii) the conclusivity hence standing imbued to the findings recorded in the impugned award of the Tribunal anchored on a visit of its Presiding Officer to the plant of the respondents herein whereupon the pre-eminent fact of the appellant/workmen therein performing therein the callings of Turbine Operators stood gathered or unearthed by him estopped the learned Single Judge of this Court from erroneously concluding qua the workmen not lending by adducing cogent proof sustenance to their espousal of theirs even while standing officially designated as Machine Attendants theirs performing therein the callings of Turbine Operators. Reinforced redoubled vigour to the inferences aforesaid recorded by this Court stand marshallled by the factum of the respondents herein omitting to display by adducing cogent material the names of workmen performing at their plant the callings of Turbine Operators as a corollary omission on the part of the respondents herein to adduce material connotative of workmen other than the appellants herein performing at their plant work of Turbine Operators paves way for an apt conclusion of the workmen herein performing at their plant the callings of Turbine Operators especially when the withholding of the disclosures aforesaid by the respondents herein gives leverage to the drawing of an adverse inference there-from against the respondents herein.

7. Concomitantly, the disaffording by the learned Single Judge of this Court to the workmen herein parity of pay with the Turbine Operators as spelt out in Annexure A-6/T especially when for reasons afore-stated they were performing at the plant of the respondents herein work of Turbine Operators was grossly untenable. Moreover, with potent, unimpeachable afore-referred evidence existing on record in display thereof besides it standing neither proven to be inadmissible nor discardable, its ouster by the learned Single Judge of this Court tantamounted to its sequelling gross mis-carriage of justice. Even when the relevant and apt evidence aforesaid stood untenably discarded by the learned Single Judge of this Court his recording in his decision of the workmen not proving theirs performing at the plant of the respondents herein the callings of Turbine Operators was compatibly an inapt exercise especially when his omitting to dwell upon potent/admissible evidence on the apposite issue in proof whereof onus stood cast upon them in discharge of/or in display whereof the tenable visit for reasons afore-stated thereto by its Presiding Officer whereupon the factum probandum aforesaid stood clinched was rather hence amenable for its standing construed as admissible besides potent evidence in discharge of the onus aforesaid. Sequelly, his rather proceeding to impute sanctity to the mere factum of the workmen omitting to adduce evidence before the Tribunal qua theirs performing the callings of Turbine Operators at the plant of the respondents herein led him to erroneously conclude qua the respondents herein standing disentitled to claim parity of pay to the one available to be drawn by the Turbine Operators.

8. The implanting of the aforesaid ground by the learned Single Judge in dis-affording relief to the workmen qua their entitlement to pay at par with the one prescribed for availment by the Turbine Operators falls squarely within the domain of an inhibition cast upon a writ Court in evaluating besides re-appreciating evidence especially when this Court in its exercise of writ jurisdiction is not an appellate Court, power whereof stands reposed solitarily in the latter Court. In the learned Single Judge of this Court discarding evidence which otherwise is both admissible as well as cogent besides his sidelining it or throwing it overboard merely by his implanting in his decision a rule of procedure of onus on the apposite issue not standing discharged by the workmen whereas for reasons afore-stated it stood discharged at the instance of the workmen herein, obviously led it to deny relief of parity of pay to the workmen at par with the one prescribed for availment by Turbine Operators especially when cogent proof emanated qua theirs though standing designated as Machine Attendants theirs rather performing at the plant of the respondents herein the callings of Turbine Operators.

9. The question is - whether the Writ Court can sit as an Appellate Court and set aside the award made by the Labour Court, which is based on evidence? The answer is in the negative for the following reasons:

10. The Apex Court in the case titled as **Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** held that the findings of fact recorded by Tribunal as a result of the appreciation of evidence cannot be questioned in writ proceedings and the Writ Court cannot act as an Appellate Court. It is profitable to reproduce para 18 of the judgment herein:

> *"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."*

11. This Court has also laid down the same principle in a batch of writ petitions, **CWP No. 4622 of 2013,** titled as **M/s Himachal Futuristic Communications Ltd. versus State of HP and another,** being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:

> *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*

12. This Court in a series of cases, being **CWP No. 4622 of 2013 (supra)**; **LPA No. 485 of 2012,** titled as **Arpana Kumari versus State of H.P. and others,** decided on 11th August, 2014; **LPA No. 23 of 2006,** titled as **Ajmer Singh versus State of H.P. and others,** decided on 21st August, 2014; and **LPA No. 125 of 2014,** titled as **M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others,** decided on 21st October, 2014; while relying upon the latest decision of the Apex Court in **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. 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 rendered by the Apex Court in **Bhuvnesh Kumar Dwivedi's case (supra)** 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. 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 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 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 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:*
> >
> > > *"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]*

13. 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."

14. A co-ordinate Bench of this Court in LPA No.143 of 2015, decided on 15th December, 2015, titled as Gurcharan Singh (deceased) through LRs versus State of Himachal Pradesh & Others, has laid down the same principle.

15. Dehors the above, the revelations in Annexure A-4 of the workmen though standing designated as Machine Attendants theirs operating Turbines installed in the plant of the respondents herein hence the demand of the workmen for their designation as Machine Attendants amenable to alteration to Turbine Operators besides vindicable gives sinew and sanctity to the germane fact recorded in the award of the Tribunal of on its Presiding Officer on a bilateral consent of the counsel for the contesting parties before him, visiting the plant of the respondents herein, his thereupon detecting the appellant/workmen performing therein the callings of Turbine Operators, on anchorage whereof he tenably formed an entrenched conclusion of the appellant/workmen herein standing entitled to parity of pay with Turbine Operators as spelt out in Annexure A-6/T. The aforesaid manifestation in Annexure A-4 enfeebles the vigour of the contention of the respondents herein of the workmen not discharging at the plant of the respondents herein the callings of Turbine Operators. The vigour acquired by the aforesaid formidable conclusion formed by the Presiding Officer of the Tribunal conjunctively construed with the depiction in Annexure A-6/T of posts of Turbine Operators available for deployment of the appellant/workmen thereon renders frail the contention of the learned counsel for the respondents herein qua the unavailability of posts of Turbine Operators at the plant of the respondents herein besides weakens the argument built thereupon by the learned counsel for the respondents herein of the appellant/workmen herein hence standing disentitled to claim parity of pay with Turbine Operators even if they are performing work in congruity thereof. Furthermore, even if the learned Single Judge of this Court concluded of it being a prerogative of the employer to re-designate or change the designation of its employees from the hitherto designation yet the aforesaid findings would not obstruct the appellant/workmen herein for the reasons afore-stated to as tenably concluded in the impugned award of the Tribunal from pressing for their legitimate entitlement of parity of pay with the one prescribed under Annexure A-6/T for availment by Turbine Operators.

16. Having said so, the Writ Court/learned Single Judge has fallen in an error in passing the impugned judgment.

17. For the reasons afore-stated, the instant letters patent appeal so far as the question of entitlement of the appellant/workmen herein for parity of pay with Turbine Operators as also the relief of the workmen standing entitled for designation as Turbine Operators stands allowed and the writ petition stands dismissed. The award of the Tribunal is affirmed and maintained. Pending application(s), if any, also stand disposed of. No costs.

****

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

Shri Kranti Katoch ...Appellant

Versus

Himachal Pradesh State Electricity Board & another ...Respondents

LPA No. 340 of 2010
Decided on : 17.12.2015

Constitution of India, 1950- Article 226- Writ petitioner is a diploma holder in Computer Science Engineering of the batch of the year 1997- respondent No. 2 is a diploma holder in Electrical Engineering of the batch of the year 1990- he had also obtained degree in Computer Science Engineering, in the year 1993- applications were invited for filling up six posts of Junior Engineering in Computer Science- writ petitioner and respondent No. 2 applied for the post and respondent No. 2 was selected- held, that respondent No. 2 had higher qualification and was rightly appointed- writ Court had rightly dismissed the writ.

(Para-2 to 7)

For the Appellant :	Mr. Rajnish Maniktala, Advocate.
For the Respondents:	Mr. Satyen Vaidya, Senior Advocate with Mr. Vivek Sharma, Advocate, for respondent No. 1. Mr. K.S. Kanwar, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This Letters Patent Appeal is directed against the order and judgment dated 25.10.2010, passed by the learned Single Judge in CWP No. 3504 of 2009, titled **Kranti Katoch versus H.P. State Electricity Board and another,** whereby the writ petition came to be dismissed, for short 'the impugned judgment'.

2. The appellant-writ petitioner, by the medium of the writ petition, had questioned the appointment of respondent No. 2, Arun Kumar as Junior Engineer (Computer Science Engineering) made by respondent No. 1.

3. The appellant-writ petitioner is a diploma holder in the Computer Science Engineering of the batch of the year 1997, whereas respondent No. 2 is a diploma holder in Electrical Engineering of the batch of the year 1990, who has also obtained higher qualification, i.e. degree in Computer Science Engineering, in the year 1993.

4. It appears that respondent No. 1 had invited applications for filling up of six posts of Junior Engineer(s) in Computer Science alongwith other posts. The appellant and respondent No. 2 applied for the post of Junior Engineer (Computer Science Engineering) and after the interview, respondent No. 2 came to be appointed.

5. The Writ Court after examining the advertisement notice and record, came to the conclusion that respondent No. 2 was having higher qualification in Computer Science Engineering, was rightly appointed.

6. Learned Counsel for the appellant was asked to carve out a case for interference, who tried, but virtually was not in a position to do so.

7. The Writ Court has rightly made the discussion right from paras 4 to 6 in the impugned judgment, is legally correct and is not suffering from any infirmity, calls for no interference.

8. Accordingly, the impugned judgment is upheld and the appeal is dismissed.

****

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

Naresh Kumar ...Petitioner.

Versus

State of H.P. and others ...Respondents.

CWP No. 4625 of 2015.
Decided on: December 17, 2015.

Constitution of India, 1950- Article 226- Father of the petitioner was working as Junior Engineer in HPPWD- he died while in service- petitioner filed an application for appointment on compassionate ground, which was rejected on the ground that family income of the petitioner exceeds the ceiling fixed by Government- held, that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate grounds- there is no maximum income slab provided in the scheme- therefore, claim for compassionate appointment cannot be rejected on that ground- petition allowed- respondent directed to examine the case of the petitioner and to pass an appropriate order within six weeks. (Para-2 to 4)

Case referred:
Surinder Kumar vs. State of H.P. and others, and other, ILR 2015 (V) HP 842 (D.B.)

For the petitioner: Ms. Shashi Kiran, Advocate.
For the Respondents: Mr.Shrawan Dogra, Advocate General with Mr. V.S. Chauhan, Additional Advocate General, Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Issue notice. Mr.J.K. Verma, learned Deputy Advocate General, waives notice for the respondents.

2. The grievance projected in this writ petition, by the petitioner, is that the father of the petitioner, who was working as Junior Engineer in HPPWD, died on 5.12.2003, while in service, constraining the petitioner to file application for appointment on compassionate ground, which was rejected on the ground that the family income of the petitioner exceeds the ceiling fixed by the Government on 17.1.2013, constraining the petitioner to file this writ petition.

3. This Court in the latest decision, dated 6th October, 2015, passed in **CWP No.9094 of 2013, titled Surinder Kumar vs. State of H.P. and others, and other connected matters**, while dealing with the issue of compassionate appointment, after referring to various decisions of the Apex Court, has held that grant of terminal benefits and income from family pension cannot be equated with the employment assistance on compassionate ground. It has further been held that once there is no maximum income slab provided in the Scheme, the claim of the applicant cannot be rejected on that score. It is apt to reproduce paragraphs 46 to 55 of the said decision hereunder:

"46. Clause 10(c) of the Policy mandates that while making appointment on compassionate ground, the competent Authority has to keep in mind the benefits received by the family on account of ad hoc ex-gratia grant, improved family pension and death gratuity. Therefore, we may place on record at the outset that no maximum income ceiling has been prescribed in the Policy. Only what has been prescribed is that the competent Authority has to keep in mind the benefits received by the family after the death of the employee, as detailed above.

47. The aim and object of granting compassionate appointment is to enable the family of the deceased employee to tide over the sudden financial crisis which the family has met on the death of its breadwinner. Though, appointment on compassionate ground is inimical to the right of equality guaranteed under the Constitution, however, at the same time, we cannot be oblivious to the fact that the concept of granting appointment on compassionate ground is an exception to the general rule, which concept has been evolved in the interest of justice, by way of Policy framed in this regard by the employer. The object sought to be achieved by making such an exception is to provide immediate assistance to the destitute family, which comes to the level of zero after the death of its bread-earner. Thus, we are of the considered view that the amount of family pension and other retiral benefits cannot be equated with the employment assistance on compassionate ground.

48. While reaching at this conclusion, we are supported by the decision of the Apex Court in ***Govind Prakash Verma vs. Life Insurance Corporation of India and others, (2005) 10 Supreme Court Cases 289,*** *wherein it was held that scheme for providing employment assistance on compassionate ground was over and above the service benefits received by the family of an employee after his death. It is apt to reproduce the relevant portion of paragraph 6 of the said decision hereunder:*

> *"6. In our view, it was wholly irrelevant for the departmental authorities and the learned Single Judge to take into consideration the amount which was being paid as family pension to the widow of the deceased (which amount, according to the appellant, has now been reduced to half) and other amounts paid on account of terminal benefits under the Rules. The scheme of compassionate appointment is over and above whatever is admissible to the legal representatives of the deceased employee as benefits of service which one gets on the death of the employee. Therefore, compassionate appointment cannot be refused on the ground that any member of the family received the amounts admissible under the Rules……".*

49. The Apex Court in ***A.P.S.R.T.C., Musheerabad & Ors. vs. Sarvarunnisa Begum, 2008 AIR SCW 1946,*** *while discussing the aim and object of granting compassionate appointment, has held that the widow, who was paid additional monetary benefits for not claiming appointment, was not entitled to compassionate appointment. It is apt to reproduce paragraphs 3 and 4 of the said decision hereunder:*

> *"3. This Court time and again has held that the compassionate appointment would be given to the dependent of the deceased who died in harness to get over the difficulties on the death of the bread- earner. In Umesh Kumar Nagpal vs. State of Haryana and Others, (1994) 4 SCC 138, this Court has held as under:*
>
> > *"The whole object of granting compassionate employment is to enable the family to tide over the sudden crisis. The object is not to give a member of such family a post much less a post for post held by the deceased. What is further, mere death of an employee in harness does*

not entitle his family to such source of livelihood. The Government or the public authority concerned has to examine the financial condition of the family of the deceased, and it is only if it is satisfied, that but for the provision of employment, the family will not be able to meet the crisis that a job is to be offered to the eligible member of the family. The posts in Classes III and IV are the lowest post in non-manual and manual categories and hence they alone can be offered on compassionate grounds, the object being to relieve the family, of the financial destitution and to help it get over the emergency.

Offering compassionate employment as a matter of course irrespective of the financial condition of the family of the deceased and making compassionate appointments in posts above Classes III and IV, is legally impermissible."

4. In the present case, the additional monetary benefit has been given to the widow apart from the benefits available to the widow after the death of her husband to get over the financial constraints on account of sudden death of her husband and, thus, as a matter of right, she was not entitled to claim the compassionate appointment and that too when it had not been brought to the notice of the Court that any vacancy was available where the respondent could have been accommodated by giving her a compassionate appointment. That apart, the Division Bench of the High Court has committed an error in modifying the direction of the Single Judge by directing the Corporation to appoint the respondent when no appeal was preferred by the respondent challenging order of the Single Judge."

50. Coming to the Policy in hand, there is nothing on the record to show that the writ respondents have ever made a provision for additional monetary benefit, as a substitute to the employment assistance on compassionate ground, except the terminal benefits to which the family of the deceased-employee is otherwise entitled to.

51. The Apex Court in its latest decision in ***Canara Bank & Anr. vs. M. Mahesh Kumar, 2015 AIR SCW 3212,*** *while relying upon its earlier decision in Balbir Kaur and another vs. Steel Authority of India Ltd. and others, (supra), has restated the similar position, and held that grant of family pension or payment of terminal benefits, cannot be treated as substitute for providing employment assistance on compassionate ground. It is apt to reproduce paragraphs 15 and 16 of the said decision hereunder:*

"15. Insofar as the contention of the appellant-bank that since the respondent's family is getting family pension and also obtained the terminal benefits, in our view, is of no consequence in considering the application for compassionate appointment. Clause 3.2 of 1993 Scheme says that in case the dependant of deceased employee to be offered appointment is a minor, the bank may keep the offer of appointment open till the minor attains the age of majority. This would indicate that granting of terminal benefits is of no consequence because even if terminal benefit is given, if the applicant is a minor, the bank would keep the appointment open till the minor attains the majority.

16. In ***Balbir Kaur & Anr. vs. Steel Authority of India Ltd. & Ors., 2000 6 SCC 493****, while dealing with the application made by the widow for employment on compassionate ground applicable to the Steel Authority of India, contention raised was that since she is entitled to get the benefit under Family Benefit Scheme assuring monthly payment to the family of the deceased employee, the request for compassionate appointment cannot be*

acceded to. Rejecting that contention in paragraph (13), this Court held as under:-

> *"13. .But in our view this Family Benefit Scheme cannot in any way be equated with the benefit of compassionate appointments. The sudden jerk in the family by reason of the death of the breadearner can only be absorbed by some lump-sum amount being made available to the family this is rather unfortunate but this is a reality. The feeling of security drops to zero on the death of the breadearner and insecurity thereafter reigns and it is at that juncture if some lump-sum amount is made available with a compassionate appointment, the grief-stricken family may find some solace to the mental agony and manage its affairs in the normal course of events. It is not that monetary benefit would be the replacement of the breadearner, but that would undoubtedly bring some solace to the situation."*

Referring to Steel Authority of India Ltd.'s case, High Court has rightly held that the grant of family pension or payment of terminal benefits cannot be treated as a substitute for providing employment assistance. The High Court also observed that it is not the case of the bank that the respondents' family is having any other income to negate their claim for appointment on compassionate ground."

Emphasis applied.

52. The Clauses contained in the Policy in hand are similar to the Scheme, which was the subject matter before the Apex Court in ***Canara Bank's case (supra).*** *Therefore, the mandate of the said judgment of the Apex Court is squarely applicable to the cases in hand.*

53. From the facts of the cases in hand, another moot question, which arises for consideration, is - Whether instructions contained in letters/communications, made by one Department of the Government to another, can be said to be amendment in the Policy? The answer is in the negative for the following reasons.

54. In order to show that the maximum income ceiling was prescribed by the competent Authority, the respondents have relied upon the letter, dated 1st November, 2008, written by the Secretary (PW) to the Government of H.P., to the Engineer-in-Chief, HP PWD, referred to above, wherein it was mentioned that the income ceiling fixed by the Finance Department, for a family of four members, was Rs.1.00 lac. A perusal of this letter shows that it has been mentioned therein that "the Income Criteria fixed by the Finance Department takes into consideration maximum family income ceiling fixed by the finance Deptt. for a family of 4 members as Rs.1.00 lac." It is nowhere mentioned in the said letter that the income ceiling was fixed by the competent Authority by making amendment in the Policy. Moreover, the said amendment, if any, has not been placed on record and has not seen the light of the day. Therefore, the letters/communications issued by a Department to another Department cannot be said to be amendment in the Policy unless the said amendment has got the approval of the competent Authority i.e. the Cabinet.

55. Having regard to the above discussion, we are of the considered view that the action of the respondents of denying employment assistance to the dependant of a deceased employee by taking into account the family pension and other terminal benefits is not tenable in the eyes of law……."

4. Having said so, the writ petition is allowed, impugned order Annexure P3 is quashed and set aside, and the respondents are directed to examine the case of the

petitioner in light of the judgment referred to above and pass appropriate order within a period of six weeks from today.

5. The writ petition stands disposed of accordingly, so also the pending CMPs, if any.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Nirmala Devi widow of Sh. Bhag Singh. ....Petitioner
Versus
State of H.P. ....Non-Petitioner

Cr.MP(M) No. 1741 of 2015
Order Reserved on 11.12.2015
Date of Order 17th December, 2015

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offence punishable under Section 302 read with Section 34 of Indian Penal Code, 1860- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- there is a special provision in case of women, minors and infirm persons even in heinous criminal offences- trial will conclude in due course of time- therefore, petitioner ordered to be released on bail in the sum of Rs.1 lac with two sureties.

(Para-6 to 9)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra vs. Central Bureau of Investigation (Apex Court), 2012 Criminal Law Journal 702
M.T. Choti vs. State , AIR 1957 Rajasthan page 10

For the Petitioner: Mr. Rajesh Mandhotra, Advocate
For the Non-petitioner: Mr. Rupinder Singh Thakur, Additional Advocate General with Mr. J.S. Rana, Assistant Advocate General

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 Code of Criminal Procedure 1973 for grant of bail in connection with case FIR No. 135 of 2014 dated 24.10.2014 under Sections 302 and 34 IPC registered at Police Station Lambagaon District Kangra H.P.

2. It is pleaded that investigation in the case is completed and no fruitful purpose will be serviced by keeping petitioner in jail. It is further pleaded that petitioner is

falsely implicated in the present case. It is further pleaded that petitioner filed application before the SDM Office Jaisinghpur in the year 2009 wherein it was pleaded by the present petitioner that her son namely Sanjeev Kumar and her daughter-in-law Reena Devi since deceased were treating petitioner with cruelty and because of ill treatment petitioner disinherited both of them from her property. It is further pleaded that petitioner is widow and she has been falsely implicated in the present matter. It is further pleaded that petitioner shall not threat or induce any prosecution witnesses and will abide all the conditions imposed by the Court. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report FIR No. 135 of 2014 dated 24.10.2014 under Sections 302 and 34 IPC is registered in Police Station Lambagaon District Kangra H.P. against the petitioner. There is recital in police report that statement of deceased Reena Devi was recorded in the Hospital. There is further recital in police report that deceased Reena Devi informed that on 24.10.2014 Ramesh Kumar came and broken the electric meter and thereafter broken the door of room and thereafter pushed deceased Reena Devi. There is further recital in police report that co-accused Nirmala Devi told to throw the entire household articles of deceased outside their residential house. There is further recital in police report that co-accused Nirmala Devi caught the deceased in the room and co-accused Ramesh Kumar @ Rangil Singh came with kerosene oil in his hand and spread the kerosene oil upon the body of deceased and thereafter lit fire upon body of deceased. There is further recital in police report that two children of deceased Reena Devi were present and the husband of deceased was working in a field when deceased was burnt with fire. There is further recital in police report that children of deceased called their father and thereafter water was thrown upon the body of deceased and fire was extinguished. During the investigation Investigating Officer took photographs and inspected the place of incident and prepared site plan and also prepared seizure memos. As per MLC No. 306 of 2014 deceased had sustained grievous burnt injuries to the extent of 40-50 percent. Thereafter deceased was referred to RPGMC Tanda. Statements of minor children of deceased namely Rishu and Sameer recorded under Section 164 Cr.P.C. There is further recital in police report that during medical treatment deceased died on 2.11.2014. Viscera of deceased was sent for chemical examination. As per chemical examination report deceased died due to septicaemic shock and ante-mortem burn injuries. There is further recital in police report that investigation already stood completed and challan stood filed in the Court for trial. There is further recital in police report that if petitioner is released on bail at this stage then petitioner will threat and induce prosecution witnesses. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of the petitioner and learned Additional Advocate General appearing on behalf of the State and also perused entire record carefully.

5. Following points arise for determination in this bail application:-

Point No. 1

Whether bail application filed under Section 439 Cr.P.C. is liable to be accepted after completion of investigation as mentioned in memorandum of grounds of bail application in view of special provision of bail mentioned under proviso of Section 437 Cr.P.C. 1973 relating to minors or women or sick or infirm persons relating to criminal offences punishable with death or imprisonment for life?

Point No. 2

Final Order.

Findings upon Point No.1 with reasons:

6. Submission of learned Advocate appearing on behalf of petitioner that petitioner is innocent and petitioner did not commit any offence cannot be decided at this stage. Same facts will be decided by learned trial Court after giving due opportunity to both the parties to adduce evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that petitioner is female widow and investigation is completed in the present case and petitioner be released on bail as per special provision of bail provided for women is accepted for reasons hereinafter mentioned. At the time of granting bail following factors are considered. (i) Nature and seriousness of offence (ii) The character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) The larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh. It was held in case reported in 2012 Criminal Law Journal 702 titled Sanjay Chandra vs. Central Bureau of Investigation*** **(Apex Court)** that object of bail is to secure the appearance of the accused person at his trial. It was held that grant of bail is the rule and committal to jail is exceptional. It was held that refusal of bail is a restriction on personal liberty of individual guaranteed under Article 21 of the Constitution. It was further held that accused should not be kept in jail for an indefinite period. It is well settled law that accused is presumed to be innocent till convicted by a competent court of law. Court is of the opinion that there is special provision for bail to women, minors and infirm persons as per proviso of Section 437 Cr.P.C. even in heinous criminal offence punishable with death or imprisonment for life. In view of the fact that trial in present case will be concluded in due course of time and in view of the fact that there is special provision of bail for women relating to heinous criminal offence punishable with death or imprisonment for life Court is of the opinion that it is expedient in the ends of justice to release the petitioner on bail at this stage. Court is also of opinion that if the petitioner is released on bail at this stage then interest of State and general public will not be adversely affected in view of special provision of bail for women relating to heinous criminal offence. It was held in case reported in ***AIR 1957 Rajasthan page 10 titled M.T. Choti vs. State*** that special treatment of women and children in bail matter is not inconsistent with Article 15 of Constitution of India.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if petitioner is released on bail at this stage then petitioner will induce and threat prosecution witnesses and on this ground bail application filed by the petitioner be rejected is devoid any force for the reasons hereinafter mentioned. Court is of the opinion that conditional bail will be granted to the female petitioner and if petitioner will flout the terms and conditions of conditional bail order then prosecution will be at liberty to file application for cancellation of the bail as provided under Section 439 (2) Code of Criminal Procedure 1973. In view of the above stated facts point No.1 is answered in affirmative.

Point No. 2 (Final order):

9. In view of findings upon point No.1 bail application filed by female petitioner under Section 439 Cr.P.C. is allowed and female petitioner is ordered to be released on bail subject to furnishing personal bond to the tune of Rs. 1 lac with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner shall make herself available for interrogation whenever and wherever directed to do so in accordance with law. (ii) That 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 Court or to any police officer. (iii) That the petitioner shall not leave India without the prior permission of the Court. (iv) That petitioner will not commit similar offence qua which she is accused. (v) That petitioner will give her residential address in written manner to the Investigating Officer and Court where female petitioner could be located within short time notice. (vi) That petitioner will join proceedings of learned trial Court regularly till conclusion of trial. Petitioner will be released on bail only if she is not required in any other criminal case. Observations will not affect the merits of case in any manner and will strictly confine for the disposal of present bail application filed under Section 439 of Code of Criminal Procedure 1973. Cr.MP(M) No. 1741 of 2915 is disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Sanjay Chauhan .....Petitioner

Versus

Union of India and others .....Respondents

CWP No. 3943/2015
Reserved on: 3.12.2015
Decided on December 17, 2015

Constitution of India, 1950- Article 226- Petitioner is a duly elected Mayor of M.C. Shimla- he has a locus standi to assail the order ignoring Shimla City and including Dharamshala City in the list of potential Smart Cities- he was also not invited in the meeting which finalized the list of Smart City- therefore, he has a personal interest as well- he had highlighted the question of great public interest and has filed the petition for the welfare of the people - the petition is genuine and is maintainable. (Para-34 to 47)

Constitution of India, 1950- Article 226- Petitioner, an elected Mayor of Municipal Corporation, Shimla has filed the petition assailing the decision whereby town of Dharamshala was included and city of Shimla was excluded from the list of potential Smart Cities- State of Himachal Pradesh has been allocated one city to be developed as a Smart City- M.C. Shimla had claimed 85 points out of a total of 100 points – petitioner alleged that respondent No. 4 acted under the influence of Minister and had wrongly included Dharamshala- respondent claimed that Dharmshala had qualified as a Smart City according to proper procedure- State Level High Power Committee consisting of eight members was constituted by the State Government- State Mission Director had not evaluated the proposal sent by Urban Local Body- the meeting of high power committee was convened on 29.7.2015 in which three members had participated- earlier a note was prepared that it was not possible to convene meeting due to the shortage of time- quoram was not complete - Court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is arbitrary - where the Government action runs counter to good faith, is not supported by reason and law, the same is to be set aside- Members of High Power Committee had not applied their mind as per the letter and spirit of the guidelines- State Mission Director had acted mechanically without satisfying himself, whether criteria laid down under Rule had been followed or not- decision was taken in non-transparent, opaque and tainted manner - there was procedural impropriety- writ petition allowed and the decision taken by High Power Committee set aside with the direction to redo the exercise for selecting the Smart City. (Para-9 to 33 and 48 to 82)

Cases referred:

Guruvayoor Devaswom Managing Committee v. C.K. Rajan, (2003) 7 SCC 546
Nandkishore Ganesh Joshi v. Commr. Municipal Corpn. of Kalyan & Dombivali, (2004) 11 SCC 417
Dattaraj Nathuji Thaware v. State of Maharashtra (2005)1 SCC 590
Kansingh Kalusingh Thakore v. Rabari Maganbhai Vashrambhai (2006) 12 SCC 360
State of Uttaranchal v. Balwant Singh Chaufal (2010) 3 SCC 402
Manohar Joshi v. State of Maharashtra (2012) 3 SCC 619
S.R. Tewari v. Union of India (2013) 6 SCC 602
Jaipur Shahar Hindu Vikas Samiti v. State of Rajasthan (2014) 5 SCC 530
Tandon Brothers v. State of W.B. (2001) 5 SCC 664
Tarlochan Dev Sharma v. State of Punjab (2001) 6 SCC 260
Haryana Financial Corpn. V. Jagdamba Oil Mills (2002) 3 SCC 496
Anil Ratan Sarkar v. Hirak Ghosh (2002) 4 SCC 21
State of NCT of Delhi v. Sanjeev (2005) 5 SCC 181
Punjab SEB Ltd. v. Zora Singh (2005) 6 SCC 776
Jayrajbhai Jayantibhai Patel v. Anilbhai Nathubhai Patel (2006) 8 SCC 200
Ganesh Bank of Kurundwad Ltd. v. Union of India (2006) 10 SCC 645
All India Railway Recruitment Board v. K. Shyam Kumar (2010) 6 SCC 614
East Coast Railway v. Mahadev Appa Rao (2010) 7 SCC 678
Kranti Associates (P) Ltd. v. Masood Ahmed Khan (2010) 9 SCC 496
Vijaya Devi Naval Kishore Bhartia and another vrs. Land Acquisition Officer and another, (2003) 5 SCC 83
Ashok Kumar Sahu vrs. Union of India and others, (2006) 6 SCC 704
Sant Lal Gupta and others vrs. Modern Cooperative Group Housing Society Limited and others, (2010) 13 SCC 336
Commissioner of Police, Bombay versus Gordhandas Bhanji AIR 1952 SC 16,
Chandrika Jha versus State of Bihar and others (1984) 2 SCC 41
State of U.P. and others versus Maharaja Dharmander Prasad Singh and others (1989) 2 SCC 505
State of Bihar v. Subhash Singh (1997) 4 SCC 430
Jagdish Prasad v. State of Rajasthan (2011) 7 SCC 789
Delhi Airtech Services (P) Ltd. v. State of U.P. (2011) 9 SCC 354
Maharashtra Land Development Corpn. v. State of Maharashtra (2011) 15 SCC 616
Sanchit Bansal v. Joint Admission Board (2012) 1 SCC 157
Dipak Babaria v. State of Gujarat (2014) 3 SCC 502
Common Cause v. Union of India (2014) 6 SCC 552

For the Petitioner :	Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha Kaundal, Advocate.
For the Respondents :	Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Nipun Sharma, Advocate, for respondents No. 1 and 2.
	Mr. Shrawan Dogra, Advocate General with Mr. Romesh Verma and Mr. Anup Rattan, Additional Advocates General and Mr. J.K. Verma, Deputy Advocate General, for respondents No. 3 and 4.
	Mr. Gagan Pradeep S. Bal and Mr. Amit Singh Chandel, Advocates, for respondent No. 6.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge

The petitioner is an elected Mayor of Municipal Corporation, Shimla. He has filed the present petition assailing the decision whereby town of Dharamshala has been included and city of Shimla has been excluded from the list of potential Smart Cities. The State of Himachal Pradesh has been allocated one city to be developed as a Smart City. The Municipal Corporation, Shimla has presented a fair assessment against each criterion of Form 2 of annexure 3 and claimed 85 points out of a total of 100 points. However, for ulterior motives and political considerations, Dharamshala was included in the list of Smart Cities. It is also alleged that respondent No. 4, Additional Chief Secretary (UD) has acted under political influence. Dharamshala Legislative Assembly is represented by the Minister of Urban Development, therefore, respondent No. 4 has acted under his dictates. Respondent No. 6 Municipal Council, Dharamshala (now, a Corporation), has claimed 87.5 points. Representations were made vide annexure P-3 (collectively). Recommendations made in favour of respondent No. 6 are bad in law. Respondent No. 6 could not get more than 50 points. Shimla city is the only city in the State of Himachal Pradesh identified under Jawahar Lal Nehru National Urban Renewal Mission (in short 'JnNURM'). Shimla is a world famous city with a population of 2,06,000 and a floating population of around 70-75,000. It is thronged by 40 Lakh tourists every year. Budget of Municipal Corporation, Shimla is Rs.224.00 crores. Petitioner, being Mayor, was not included in the decision making process in the meetings held on 15.7.2015 and 29.7.2015.

2. Respondents No.1 and 2 have filed detailed reply. According to them, decision of the respondents to include Dharamshala town was in accordance with law. Shortlisting of potential Smart Cities is to be done by the concerned States/UTs as per the criteria laid down. State Government has sent the proposal for consideration of Dharamshala as a potential smart city from Himachal Pradesh and same was received in the Ministry of Urban Development vide communications dated 30.7.2015 and 31.7.2015 alongwith proposal on the prescribed format. Vide office memorandum No. K-15016/112/2015-SC-1 dated 14th July, 2015, Ministry of Urban Development (in short 'MoUD') conveyed approval of the competent authority for nomination of the officers as representatives of MoUD in the respective State Level High Powered Steering Committees (in short 'HPSC') for Smart Cities Mission in terms of para 13.2 of the Smart City Guidelines. Copy of letter dated 14.7.2015 is annexure R-2. Joint Secretary (UD) was nominated as representative of MoUD in the State Level High Powered Steering Committee (HPSC) for Himachal Pradesh.

3. Respondents No. 3 and 4 have also filed a detailed reply. According to the averments made in the reply, one city has been allocated for State of Himachal Pradesh for inclusion in the list of Smart Cities by the Government of India. Criteria laid down are to be met by the potential Smart Cities to succeed in the first round of competition. Information sent by the Urban Local Bodies (in short 'ULBs') in the prescribed Form was to be evaluated by the State Mission Director and evaluation was to be placed before the HPSC. State Government was required to send the names of selected cities after first stage of competition. Government of Himachal Pradesh has notified the constitution of HPSC vide Notification dated 25.6.2015. First meeting of the Committee was held on 15.7.2015. It was decided to invite proposals from all the Urban Local Bodies (in short 'ULBs') of the State on the format prescribed by the Government of India for inter-State City level competition. Thereafter, 14 ULBs submitted their score cards on the Form prescribed by the Government of India. It was received by the Government of Himachal Pradesh from the Director, Urban

Development Department. Score cards were prepared. It was a self-assessment on the basis of the criteria laid down by the MoUD. The HPSC was constituted for implementation of Smart Cities Mission, which held its meeting on 29.7.2015. It examined the proposals received from ULBs and scores claimed by each of the ULB, and agreed that Dharamshala, having highest score of 87.5 points, may be selected to be covered under the Smart Cities Mission. Major reasons for non-selection of Shimla are non-completion of the projects sanctioned under JnNURM for the period 2007-2012 and also that Shimla town has been sanctioned Atal Mission for Rejuvenation and Urban Transformation (in short 'AMRUT') scheme. It is an umbrella scheme having four components, two for mission city i.e. Urban Infrastructure and Governance (UIG) and Basic Services for Urban Poor (BSUP), and two components for other cities i.e. Urban Infrastructure Development Scheme for Small & Medium Towns (UIDSSMT) and Integrated Housing and Slum Development Programme (IHSDP). Under UIDSSMT, Dharamshala utilized Rs.1.91 Crores against 1.90 Crores. In Shimla, Water Supply Schemes, Sewerage Schemes, e-Governance Schemes, Solid Waste Management, Sanitary Land Fill Projects and Ashiana I and II for urban poor housing were not completed under JnNURM scheme by Municipal Corporation, Shimla. The details are given in para-8 of the reply at page 89 of the paper-book.

4. Department has placed score cards before the meeting of the HPSC held on 29.7.2015 convened under the Chairmanship of the Chief Secretary. Minutes of the second meeting of HPSC are annexed as **Annexure** R-4/2. Smart City was recommended by the HPSC after exhausting all the channels, strictly following guidelines and as per self-assessment report submitted by the ULBs including respondent No. 5 and respondent No. 6. It is denied that data was fudged. Recommendations were sent to the Government of India as per record. Codal formalities were completed before sending case to the Government of India on 30.7.2015. Wild allegations have been made since petitioner is a sitting Mayor of Municipal Corporation, Shimla. Shimla town has already been included in the AMRUT scheme. Proper transparency was maintained by the Department while placing recommendations before the HPSC. It is admitted that the population of Shimla town is 2.00 Lakh excluding floating population. Score card in respect of Dharamshala and Shimla have been placed on record as **Annexure** R-4/4 and **Annexure** R-4/5, respectively.

5. Respondent No.5 has also filed its reply. It is admitted that the respondent-Corporation has participated in the said process for inclusion of Shimla in the list of Smart Cities by sending prescribed format.

6 Respondent No. 6 has filed a detailed reply to the petition. According to the averments made in the reply, petitioner has no locus standi to file the petition. It is a 'political interest litigation' rather than a 'Public Interest Litigation'. It has been filed only to gain political mileage. Respondent No. 6 has scored 87.5 points. There was no concern of Minister of Urban Development in the decision making process. As far as self-assessment is concerned, Dharamshala is the seat of His Holiness Dalai Lama. Points have been claimed on the basis of criteria laid down. Thus, it can not be termed as 'fudged' data. Respondent No. 6 has been included in the scheme i.e. UIDSSMT. It was denied that respondent No. 6 did not have its monthly e-newsletter whereas the e-newsletter was published by the answering respondent before the commencement of selection of Smart City i.e. 1.7.2015. Respondent No. 6 was entitled to 5 points as per clause 7 of the scheme instead of zero point. According to Sr. No. 11 of the scheme, Municipal Corporation, Shimla could not get more than 7.5 points but it has been claimed 10 points wrongly. About 30.00 Lakh tourists visit Dharamshala every year, out of which 30% are foreign tourists. Important offices are situated at Dharamshala.

7. Mr. Sanjeev Bhushan, learned Senior Advocate with Ms. Abhilasha Kaundal, Advocate has vehemently argued that the decision to include Dharamshala in the list of potential Smart Cities is contrary to the letter and spirit of Mission Statement and Guidelines issued for selection of Smart Cities. He then contended that the petitioner being Mayor of the Municipal Corporation, Shimla was also not called in the meetings held on 15.7.2015 and 29.7.2015. He further contended that Shimla is having all the infrastructure and wherewithal to be included in the list of potential Smart Cities vis-à-vis Dharamshala. He has also contended that the decision is arbitrary, capricious, unfair and it lacks bonafide. Moreover, No reasons have been assigned in the proceedings of the meeting held on 29.7.2015.

8. Mr. Shrawan Dogra, learned Advocate General, appearing for the respondents-State and Mr. Gagan Pradeep S. Bal Advocate, appearing on behalf of respondent No. 6, have supported the decision dated 29.7.2015.

9. Government of India has issued the Mission Statement and Guidelines for 'Smart Cities'. The objective is to promote cities that provide core infrastructure and give a decent quality of life to its citizens, a clean and sustainable environment and application of smart solutions. The focus is on sustainable and inclusive development and the idea is to look at compact areas, create a replicable model which will act like a light house to other aspiring cities. The Smart Cities Mission of the Government is a bold, new initiative. It is meant to set examples that can be replicated both within and outside the Smart City, catalyzing the creation of similar Smart Cities in various regions and parts of the Country. The core infrastructure elements in a Smart City would include: i) adequate water supply, ii) assured electricity supply, iii) sanitation, including solid waste management, iv) efficient urban mobility and public transport, v) affordable housing, especially for the poor, vi) robust IT connectivity and digitalization, vii) good governance, especially e-Governance and citizen participation, viii) sustainable environment, ix) safety and security of citizens, particularly women, children and the elderly, and, x) health and education. Mission would cover 100 cities and its duration will be 5 years (FY 2015-16 to FY 2019-20). Selection process of Smart Cities is visualized under Para-7 of the scheme, Annexure P-1. According to this para, letter is required to be addressed to all the State Governments to shortlist potential Smart Cities based on Stage 1 criteria according to number of smart cities distributed across the States/ UTs by the MoUD. Thereafter, on the basis of the responses from States/ UTs, list of potential 100 smart cities is to be announced. Each potential Smart City prepares its proposal assisted by a consultant and, thereafter, evaluation by a panel of experts is to be carried out and selected cities are declared.

10. According to para-8 of the Scheme, total number of 100 smart cities has been distributed among the States/UTs on the basis of equitable criteria. The formula gives equitable weightage of 50:50 to urban population of the State/ UT and the number of statutory towns in the State/ UT. Based on this formula, each State/ UT will, therefore, have a certain number of potential Smart Cities, with each State/UT having at least one.

11. Para-9 of the Scheme provides the mechanism for the process of selection of smart cities. According to para-9.1, each aspiring city competes for selection as a smart city in what is called a 'City Challenge'. After the number has been indicated to the respective Chief Secretaries, as outlined in para 8, the State/ UT will undertake the required process as visualized in para 9.1.1 onwards. Para 9.1.1 provides that the State/UT begins with shortlisting of potential Smart Cities on the basis of conditions precedent and scoring criteria and in accordance with the total number allocated to it. First stage of the competition is intra-State, in which cities in the State complete on the conditions precedent and the scoring criteria laid out. These conditions precedent have to be met by the potential

cities to succeed in the first round of competition and the highest scoring potential Smart Cities will be shortlisted and recommended to participate in Stage 2 of the Challenge. The conditions precedent and the Forms are given in Annexure 3. The information sent by the ULBs in the Forms has to be evaluated by the State Mission Director and the evaluation is to be placed before the HPSC for approval. The composition of the State HPSC is given in para 13. Cities emerging successful in the first round of competition are required to be sent by the State/UT as the recommended shortlist of Smart Cities to MoUD by the stipulated date.

12. In the second stage of the competition, each of the potential 100 Smart Cities prepare their proposals for participation in the 'City Challenge'. According to para 9.1.3, by the stipulated date to be indicated by MoUD to the States/ UTs, proposals will be submitted to MoUD for all these 100 cities. These will be evaluated by a Committee involving a panel of national and international experts, organizations and institutions. The winners of the first round of Challenge are to be announced by MoUD.

13. Para 13 deals with 'Mission Monitoring'. Para 13.2 of annexure P-1 reads as under:

> 13.2 State Level
>
> There shall be a State Level High Powered Steering Committee (HPSC) chaired by the Chief Secretary, which would steer the Mission Programme in its entirety. The HPSC will have representatives of State Government departments. The Mayor and Municipal Commissioner of the ULB relating to the Smart City would be represented in the HPSC. There would also be a State Mission Director who will be an officer not below the rank of Secretary to the State Government, nominated by the State Government. The State Mission Director will function as the Member-Secretary of the State HPSC. The indicative composition of HPSC is given below:
>
> i. Principal Secretary, Finance,
>
> ii. Principal Secretary, Planning,
>
> iii. Principal Secretary/Director, Town & Country Planning Department, State/UT Governments
>
> iv. Representative of MoUD,
>
> v. Select CEO of SPV in the State,*
>
> vi. Select Mayors and Municipal Commissioners/Chie Executive of the ULBs, and Heads of the concerned State Line Departments,
>
> vii. Secretary/ Engineer-in-Chief or equivalent, Public Health Engineering Department,
>
> viii. Principal Secretary, Urban Development-Member Secretary.
>
> The key responsibilities of the HPSC are given below.
>
> i. Provide guidance to the Mission and provide State level platform for exchange of ideas pertaining to development of Smart Cities.
>
> ii. Oversee the process of first stage intra-State competition on the basis of State 1 criteria.
>
> iii. Review the SCPs and send to the MoUD for participation in the Challenge.

14. One city has been allocated to the State of Himachal Pradesh as per annexure P-1. Scoring criteria has been provided in annexure 3 (page 40 of paper book), which reads as under:

Scoring criteria

Below are given the scoring criteria to be used by the States/UTs to score the potential Smart Cities and send the names of cities with the highest scores to MoUD for their selection to participate in the Stage 2 of the Challenge.

1. Existing Service Levels
   - i. Percentage of increase over Census 2011 or Swachh Bharat baseline on number of household sanitary latrines, whichever is less (Form 2, Part-I)- 10 points,
   - ii. Making operable Online Grievance Redressal System with response being sent back to complainant (Form 2, Part-2) –(Y/N)- 5 points.
   - iii. At-least first monthly e-newsletter published (Form 2, Part-3) –(Y/N) - 5 points, and
   - iv. Electronically place project-wise municipal budget expenditure information for the last two financial years on the website (Form 2, Part-4) – (Y/N) -5 points.
2. Institutional Systems/ Capacities
   - i. Started to levy compensatory penalty for delays in service delivery (Form 2, Part 7) –(Y/N) – 5 points, and
   - ii. Has the total collection of internally generated revenue (e.g. taxes, fees, charges) shown an increasing trend during the last three FYs (2012-15)-(Form 2, Part 8) (Y/N) – 10 points.
3. Self financing
   - i. Payment of salaries by ULB up-to last month (Form 2, Part -9) -5 points,
   - ii. Audit of accounts up-to FY 12-13 (Form 2, Part-10) – points.
   - iii. Percentage contribution of tax revenue, fees and user charges, rents and other internal revenue sources to the ULB Budget (actuals in 2014-15)-(Form 2, Part 11) -10 points, and
   - iv. Percentage of operation and maintenance cost of water supply, which is met by collected user charges for supply of water during last FY (2014-15) – (Form 2, Part 12) – 10 points.
4. Past track record and reforms.
   - i. Percentage of internal revenue sources (self-generated) budget funds used for capital works during FY (2014-15)- (Form 2, Part 13)-10 points.
   - ii. Percentage of City-level JnNURM Reforms achieved (Form 2, Part 14) – 10 points for six (6) ULB level Reforms, and
   - iii. Percentage of JNNURM projects completed, which were sanctioned during the original Mission period (upto 2012) (Form 2, Part 15) – 10 points.

Documents

The forms in which the States have to get proposal from the ULBs and in which they have to send to the MoUD are given below.

1. The list of cities shortlisted by each state (Form 1, Part-1).
2. Declaration of shortlisting criteria met by each shortlisted city (Form 1, Part-2). This form needs to be submitted to each shortlisted city.

3. Undertaking of the State Government to make the city smart (Form 1, Part-3)

4. Order of constitution of Inter-departmental Task Force (Form 1, Part-4).

Additional documents in support of Form 1, will be submitted by each shortlisted city under the signature of Municipal Commissioner/ Head of the ULB to the State Mission Director (Form 2).

15. Tabular details of the scoring obtained by each shortlisted city is provided in Form 1. It reads as under:

FORM 1

(To be sent by State to MoUD)

Name of State: .....

Number of cities allotted: .....

Part 1: List of cities shortlisted by each State.

S.No.	Name of city	Population of city	Conditions precedent Satisfied			
			1 Y/N	2 Y/N	3 Y/N	4 Y/N

Part 2: Details of score obtained by each shortlisted city*

Name of Shortlisted City:

S.No.	Criteria	Total Score	Score obtained
1	Increase over Census 2011 or Swachh Bharat baseline on number of household sanitary latrines (whichever is less)	10	
2	Making operable Online Grievance Redressal System with response being sent back to complainant	5	
3	At-least first monthly e-newsletter published	5	
4	Electronically place project-wise municipal budget expenditure information for the last two financial years on the website	5	
5	Levy of compensatory penalty for delays in service delivery	5	
6	Collection of internally generated revenue (e.g. taxes, fees, charges) during the last three FYs (2012-15)	10	
7	Payment of salaries by ULB up-to last month	5	
8	Audit of accounts for FY 12-13	5	
9	Percentage contribution of tax	10	

	revenue, fees and user charges, rents and other internal revenue sources		
10	Percentage of establishment and maintenance cost of water supply	10	
11	Percentage contribution of internal revenue sources (self-generated) used for capital works during FY 2014-15	10	
12	Percentage of City-level JNNURM Reforms achieved	10	
13	Percentage of completion of Projects sanctioned upto March, 2012 under JNNURM	10	
Total		100	

*__This form needs to be filled for each shortlisted city.__

16. Form 1 is to be sent by the State to the MoUD and the Form to be sent by ULB to the State is as under:

Form 2- Score Card

(to be sent by ULBs to State)

Name of ULB: .....

Name of State: .....

Existing Service Levels

Part 1: Increase in sanitary latrines built under Swachh Bharat Mission

	Achievement > 10%	Achievement between 7.5 to 10%	Achievement between 5 to 7.5%	Achievement <5%
	10 marks	7.5 marks	5 marks	0 marks
Percentage of increase over Census 2011 or Swachh Bharat baseline on number of household sanitary latrines (whichever is less)				

Part 2: Operable Online Grievance Redressal System

	Yes (5 points)	No (0 points)
Making operable Online grievance redressal system with response being sent back to the complainant		

Part 3: Monthly e-newsletter

	Yes (5 points)	No (0 points)
At-least first monthly e-newsletter published		

Part 4: Electronically place project-wise municipal budget expenditure information

	Yes (5 points)	No (0 points)
Electronically placed project-wise municipal budget expenditure information for the last two financial years		

on the website		

Part 5: Resolution of elected city council

A copy of the Resolution No. _____ dated _____ (English/Hindi/Other version) is attached.

Part 6: Table with dates, specific agenda and number of people in attendance in ward consultations held with residents of the city.

S.No.	Date	Agenda	Ward No.	No. of people attended

Institutional Systems/ Capacities

Part 7: Levy of compensatory penalty for delays in service delivery

	Yes (5 points)	No (0 points)
Started to level compensatory penalty for delays in service delivery		

Part 8: Collection of internally generated revenue (e.g. taxes, fees, charges) during the last three FYs (2012-15).

	Year			Yes (10 points)	No (0 points)
Increasing trend of total collection of internally generated revenue (e.g. taxes, fees, charges) during the last FYs (2012-15)	2012-13	2013-14	2014-15		

Self Financing

Part 9: Payment of salaries

	Yes (5 points)	No (0 points)
Payment of salaries by ULB up-to last month		

Part 10: Audit of accounts

	Yes (5 points)	No (0 points)
Audit of accounts up-to FY 12-13		

Part 11: Percentage contribution of tax revenue, fees and user charges, rents and other internal revenue sources

	> 50% contribution	Between 35% to 50%	Between 20% to 35%	<20% contribution in

	in ULB Budget	contribution in ULB Budget	contribution in ULB Budget	ULB Budget
	10 marks	7.5 marks	5 marks	0 marks
Percentage contribution of tax revenue, fees and user charges, rents and other internal revenue sources to the ULB Budgeted receipts (actuals in 2014-15)				

Part 12: Percentage of operation and maintenance cost of water supply

	>80% O & M cost coming from user charges	Between 60% to 80% O & M cost coming from user charges	Between 40% to 60% O&M cost coming from user charges	<40% O & M cost coming from user charges
	10 marks	7.5 marks	5 marks	0 marks
Percentage of O&M cost met through user charges collection for supply of water during last FY				

Past Track record and reforms

Part 13: Percentage contribution of internal revenue sources (self-generated) used for capital works

	>20% contribution for capital works	Between 10% to 20% contribution for capital works	Between 5% to 10% contribution for capital works	<5% contribution for capital works
	10 marks	7.5 marks	5 marks	0 marks
Percentage contribution of internal revenue sources (self-generated) used for capital works during FY 2014-15				

Part 14: City-level JnNURM Reforms

	100% of the reforms achieved	90% of the reforms achieved	80% of the reforms achieved	<80% of reforms achieved
	10 marks	7.5 marks	5 marks	0 marks
Percentage of City-level JnNURM Reforms* achieved				

*As per cycle V records 31.3.2014

Part 15: Completion of Projects sanctioned upto March, 2012 under JnNURM

	100% of the projects completed	90% of the projects completed	80% of the projects completed	<80% projects completed
	10 marks	7.5 marks	5 marks	0 marks
Percentage of JnNURM projects** completed, which were sanctioned during the original Mission period (upto March, 2012)				

**As per the completion certificate received from State as on 31.3.2014

I hereby confirm that I have verified the information presented in this form which is true and correct to the best of my knowledge.

(Municipal Commissioner/Head of the ULB, Parastatal)

17. The Governor of Himachal Pradesh was pleased to appoint/nominate Additional Chief Secretary/Pr. Secretary /Secretary (UD) to the Government of Himachal Pradesh as State Mission Director for implementing Smart Cities Mission in the State, vide annexure P-6. Annexure P-6 reads under:

Government of Himachal Pradesh

Department of Urban Development

NO. UD-C(10)1/2014 dated: Shimla-171002, the 25-6-2015

In order to implement Smart Cities Mission of Government of India, the Governor, HP is pleased to appoint/nominat Additional Chief Secretary/Pr. Secretary /Secretary (UD) to the Government of Himachal Pradesh as State Mission Director for implementing Smart Cities Mission in the State.

By order

ACS (UD) to the

Endst. No. as above dated Shimla-171002, the 25.6.2015

Copy is forwarded for information and necessary action to: -

1. The Secretary to the Government of India, Ministry of Urban Development, Nirman Bhawan, New Delhi, w.r.t. his DO No. K-15016/10/SC-2015(Pt-II) dated 8/6/2015
2. All the Additional Chief Secretary /Pr. Secretaries/ Administrative Secretaries /FC(Rev & Apple) Govt of HP
3. Mayor, Municipal Corporation, Shimla-1.
4. Director, Urban Development Department, Himachal Pradesh.
5. The Commissioner, Municipal Corporation, Shimla-1
6. Guard file.

Sd/-

Addl. Secretary (UD) to the

Govt. of Himachal Pradesh.

18. Government of Himachal Pradesh, Department of Urban Development issued notification dated 25.6.2015 constituting State Level High Powered Steering Committee (HPSC) in its entirety. It reads as under:

NOTIFICATION

In order to implement Smart Cities Mission of Government of India, the Governor, HP is pleased to constitute State Level High Powered Committee (HPSC) under the chairmanship of the Chief Secretary, GoHP to steer the Smart Cities Mission in its entirety. The Mayor and Municipal Commissioner of the ULB relating to the Smart City would be represented in the HPSC. The members of the Committee are as under: -

i. Principal Secretary, Finance,
ii. Principal Secretary, Planning,
iii. Principal Secretary/Director, Town & Country Planning Department, State/UT Government
iv. Representative of MoUD,
v. Director, Urban Development, HP (SPV)
vi. Mayors and Municipal Commissioners/Chie Executive of the concerned ULBs, and Heads of the concerned State Line Deptt,
vii. Secretary/ Engineer-in-Chief of Irrigation and Public Health Engineering Deptt.
viii. ACS/Principal Secretary, Urban Development, Member Secretary

The key responsibilities of the HPSC are given below.

i. Provide guidance to the Mission and provide State level platform for exchange of ideas pertaining to development of Smart Cities.
ii. Oversee the process of first stage intra-State competition on the basis of State 1 criteria.
iii. Review the SCPs and send to the MoUD for participation in the Challenge.

19. Government of India issued an office memorandum requesting to immediately start the preparation for Stage 2 of the challenge as given under Smart Cities Mission Statement and Guidelines and as per **Annexure** P-2, Dharamshala finds mention at Sr. No. 14 at page-62 of the paper-book.

20. The Governor, Himachal Pradesh was pleased to appoint /nominate Additional Chief Secretary/Principal Secretary/ Secretary, Urban Development, to the Government of Himachal Pradesh as State Mission Director for the implementation of Smart Cities Mission in the State of Himachal Pradesh vide Notification dated 25.6.2015. The State Government in order to implement the Smart Cities Mission of Government of India was pleased to constitute HPSC, as discussed herein above. Mayors and Commissioners and Chief Executive Officers of the concerned ULBs and heads of the State line departments were also included. 14 ULBs have submitted their self-assessment in the prescribed format for consideration to be included in the list of Smart Cities. Annexure 3 in tabular form is given in Form 2. Municipal Corporation, Shimla has claimed 85 points and Municipal Corporation, Dharamshala has claimed 87.5 points in the self-assessment as per annexures R-4/4 and R-4/5. Process for selecting Smart Cities has commenced as per annexure R-4/1 dated 26.6.2015 whereby Chief Secretary, Himachal Pradesh was also requested to take further necessary action so that timeliness is met. Intended date to announce 100 Smart Cities was 3.8.2015.

21. In fact, in the State of Himachal Pradesh HPSC was also constituted as per Notification dated 25.6.2015 vide annexure P-7. City of Shimla has published e-newsletter on the MC website before the selection process commenced. Dharamshala had issued e-newsletter as per its reply before the commencement of Smart City competition i.e. 1.7.2015. There is no date mentioned when this e-newsletter was published but despite that 5 points were claimed against this criterion. e-newsletter was published after the process had commenced. In the column 'electronically place project-wise municipal budget expenditure information for the last two financial years', what has been stated by Municipal Corporation, Dharamshala in annexure R-4/4 is 'Yes scanned copies of budget uploaded on Council's Website'. They have claimed 5 points. Now, as far as Municipal Corporation, Shimla is concerned, as per annexure P-4, Shimla city project wise budget for the year 2014-15 was displayed on its website and Municipal Corporation, Dharamshala has not given the details of budget. What is stated is that the scanned copies of budget were uploaded on the Council's website. When these were uploaded has also not been given. Requirement was to give 'electronically enabled place project-wise municipal budget expenditure information for the last two financial yeas on the website' and not on the basis of 'scanned copies of budget uploaded on the Council's website'. However, despite that Municipal Corporation, Dharamshala has claimed 5 points.

22. Against Para-13, Municipal Corporation, Shimla has claimed 7.5 points and Municipal Corporation, Dharamshala has claimed 10 points as per self-assessment. According to annexure P-4, 'collection of revenue' of Municipal Corporation, Dharamshala is Rs.2.74 Crores and salary disbursement is Rs.22.60 Lakh per month, which means that ULB disburses annual salary of 2.71 Crores, then how can Dharamshala utilize 20% of funds to capital works. But despite that, it has claimed 10 points in the self-assessment. Against item No. 14, i.e. 'City-level JnNURM Reforms achieved', city of Shimla has implemented all the reforms under JnNURM project i.e. double entry accounting, collection of property tax and user charges including basic services to urban poor. The city is the only municipality in State having online water and property tax collection system. Now, as far as Dharamshala town is concerned, it has not yet implemented double entry accounting. It was having only cash accounting. There was no online system for collection of water and property tax. There is no internal earmarking for urban poor. Thus, it could not claim 10 points under this item.

23. According to the reply filed by respondents No. 3 and 4, Municipal Corporation, Shimla is covered under the umbrella scheme known as JnNURM for the years 2007-2012. Points were to be allocated for completion of projects upto March 2012 under JnNURM. Dharamshala has been covered only under UIDSSMT. UIDSSMT is only one of the components of JnNURM. However, despite that 10 points have been claimed by Municipal Corporation, Dharamshala under item No. 15. It shows non-application of mind.

24. We have also gone through the record which was placed before us at the time of hearing of the matter to ascertain whether the guidelines have been followed in their letter and spirit or not. HPSC has convened two meetings i.e. on 15.7.2015 and 29.7.2015. Proceedings of first meeting of the HPSC held on 15.7.2015 at 12.30 pm under the Chairmanship of Additional Chief Secretary (Urban Development), read as under:

> Proceedings of the 1st meeting of State Level High Power Committee (HPSC) to implement 'Smart City Mission' in the State held on 15/7/2015 at 12.30 PM under the Chairpersonship of Additional Chief Secretary (UD) to the govt. of Himachal Pradesh.
>
> Following were present:

1. Shri Narinder Chauhan, Addl. Chief Secretary (PWD) to the Govt.of HP.
2. Shri SKBS Negi, Addl. Chief Secretary (MPP & Power) to the Govt. of HP.
3. Mrs. Nandita Gupta, Spl Secy (E&T, IT and Health) to the Govt. of HP.
4. Shri Sushil Kapta, Spl. Secy. (IPH) to the Govt. of HP.
5. Capt. J.M. Pathania, Director, Urban Development, HP.
6. Mrs. Priyanka Basu, Director, IT, HP
7. Shri K.C. Dhiman, Chief Engineer I & PH Shimla-1.
8. Shri Dinesh Malhotra, Deputy Commissioner, Shimla.
9. Shri Pankaj Rai, Commissioner Municipal Corporation, Shimla-1.
10. Shri Sudesh Kumar Mokhta, SDC Kangra at Dharamshala, HP.
11. Shri Rakesh Kapoor, Addl. Secretary (RPG) to the Govt. of HP.
12. Smt. Urmil Karar, Addl. Secretary (UD) to the Govt. of HP.
13. Shri Sat Pal Dhiman, Deputy Secretary (Forests) to the Govt. of HP.
14. Shri Sandeep Sharma, State Town Planner, TCP Deptt. Shimla-9.

At the out-set Additional Chief Secretary(UD) to the Govt. of HP welcomed all the participants and apprised about the launching of Smart City Mission and gave brief introduction on the Mission and apprised that the State of Himachal Pradesh has been allotted only one Mission City.

Director, UD made a presentation on the Smart City Mission as per the guidelines and statement of the Mission. Copy of the presentation is annexed. After presentation, a detailed discussions took place on all the aspects of the Mission and selection of City in accordance with the guidelines and fulfillment of criteria/suitability of the city. ACS PWD suggested that instead of looking only at Shimla & Dharamshala, lesser developed townships should be considered to be upgraded around a land mark institution like the IIM at Poanta Sahib. ACS (MPP & Power) clarified that 24 7 power supply was already available and the deptt. would be able to fulfill the condition of 10% energy being generated from solar energy Addl. Secy. RPG pointed out that the biggest challenge was in tackling sold waste management. Director IT agreed with ACS (PWD) and suggested that Baddi Barotiwala should be developed.

Chief Engineer, IPH observed that it would be difficult to make infrastructural improvements in the congested areas of Shimla.

Deputy Commissioner, Shimla made a strong argument for Shimla being positioned as a Smart City given its heritage status, attraction for tourism, being the state capital and the city that would be able to fulfil most of the qualifying criteria. Since the short listing/ selection of city would be based on the scoring criteria, as such, the ACS (UD) has re-iterated that selection would be on Intra State Competition basis and let the guidelines be circulated amongst all DCs as well as ULBs so as to enable them to work out their claim on scoring system, as envisaged in the guidelines.

Director, Urban Development, Himachal Pradesh has been asked to circulate the Guidelines of Smart City Mission to all Deputy Commissioners as well as ULBs in the State for seeking proposal in accordance with the guidelines from them and submit proposals to the government immediately.

Meeting ended with a vote of thanks from and to the Chair.

****

25. According to annexure P-6 dated 25.6.2015, the Governor was pleased to appoint/nominate the Additional Chief Secretary /Pr. Secretary / Secretary (UD) to the Government of Himachal Pradesh as State Mission Director for the implementation of Smart Cities Mission in the State. Committee was also constituted on the same date i.e. 25.6.2015 as annexure P-7. Additional Chief Secretary (UD) to the Government of Himachal Pradesh sent a communication to 14 members of the Committee on 9.7.2015. These are at page 238 of the record, whereby members were asked to attend the meeting to be held on 15.7.2015. Letter was never addressed to the Mayor of Municipal Corporation, Shimla though he was also one of the members of the Committee, as per Notification dated 25.6.2015. Additional Chief Secretary (UD) to the Government of Himachal Pradesh sent a communication to the Director, Urban Development Department, all the Deputy Commissioners, Commissioner, Municipal Corporation, Shimla to go through the guidelines and submit proposals in accordance with guidelines to the department through Director, Urban Development immediately. Director, Urban Development sent a communication to the Additional Chief Secretary(UD) on 28.7.2015 informing him that communication was sent on 20.7.2015, to all the ULBs to submit the proposal for their respective cities as per Mission Statement and Guidelines. Score cards were received from 14 ULBs. Proposals were submitted by the ULBs for taking further necessary action. This letter is at page 295 of the record. According to para 9.1.1, information sent by the ULBs in Form was to be evaluated by the State Mission Director and this evaluation was to be placed before HPSC for approval.

26. We have gone through the record carefully. It is not discernible from the record that the State Mission Director has ever evaluated the proposals/information sent by the ULBs as per para 9.1.1. He ought to have evaluated the data placed before him and only thereafter should have placed the same before HPSC for approval. State Mission Director has abdicated his powers and placed the data without evaluation before the HPSC.

27. According to Note No. 83 of the record, Government of India had requested for submission of proposals on 31.7.2015 (page 290-293 of the record). However, due to shortage of time, proposal could not be placed before the State Level Steering Committee constituted vide Notification dated 25.6.2015. City was to be selected on the basis of score card of ULBs as such it was proposed that proposals may be forwarded to the Government of India before 31.7.2015. This proposal was mooted on 29.7.2015. Thereafter, matter was discussed with Additional Chief Secretary (UD) and the meeting was scheduled for 29.7.2015 at 4.00 pm. All the members were to be informed telephonically. Note dated 30.7.2015 makes an interesting reading, it says that proceedings of 2nd meeting of HPSC to implement Smart Cities Mission in the State held on 29.7.2015 under the Chairmanship of worthy Chief Secretary to the Government of Himachal Pradesh have been attempted and placed for the approval of worthy Chief Secretary. Thereafter it was placed before the Chief Secretary for the approval of the minutes. Meeting was attended by three officers i.e. Mrs. Manisha Nanda, ACS (UD, TCP and Housing), Shri Narinder Chauhan, ACS (PWD/Fin. Plg) and Shri P.C. Dhiman, ACS (IPH). There is no contemporaneous record to establish that the other members of the Committee were even informed telephonically. Meeting was convened on 29.7.2015. There is no reason assigned why Dharamshala town has been selected. There is no discussion even why Dharamshala has been given preference over city of Shimla. HPSC has not even insisted for the evaluation by the State Mission Director. Meeting was held in a great hurry and the procedure laid down as per Mission Statement and Guidelines for Smart Cities has not been adhered to. Letter was prepared on 30.7.2015 and sent on 31.7.2015 to the Government of India.

28. We have not understood the expression "attempted" made in Note 85, signed by one Shri Santosh Kumar on 30.7.2015. He has also made proposal on 29.7.2015 that it was not possible to convene meeting. Everything has been done in a hush-hush and non-transparent manner. Procedure laid down has been given a complete go-bye while recommending the case of Dharamshala. The relevant noting portion reads as under:

> "Page 295 In response to decision taken in the meeting held on 15/7/2015 and to this department letter at page 294, Director, UD has submitted the score card of 14 ULBs namely Shimla, Dhararmshala, Solan, Mandi, Hamirpur, Manali, Kullu, Bilaspur, Sri Nainadeviji, Dalhousie, Talai, Bhunter, Narkanda, and Banjar. which may kindly be perused. Here it is submitted that 1st meeting on Smart City Mission was held on 15/7/2015 under the chairmanship of Additional Chief Secretary (UD) in which all stake holder departments have taken part. Director, UD was asked for submission of proposal as per the guidelines of Smart City Mission. The proceedings of the meeting is at F/A and the guidelines of Smart City Mission is at F/B. The Government of India has requested for submission of proposal by 31/7/2015 vide page 290-293/corrs. Due to shortage of time this proposal cannot be placed before the State Level Steering Committee constituted vide this department notification dated 25/6/2015 at F/C. The city is to be selected on the basis of score card of ULB's . As such it is proposed we may forward the proposal to Government of India with in stipulated period i.e. by 31/7/2015.
>
> In view of above matter is submitted for consideration and further orders please.
>
> Sd/-
>
> Santosh Kumar
>
> 29/7/2015
>
> Dispensed with ACS(UD). Meeting of HPSC has been scheduled today at 4.00 PM. All members informed telephonically. Let the meeting of HPSC be held first and then put up.
>
> Sd/-
>
> 29/7/2015
>
> Sh. SK.
>
> Government of Himachal Pradesh,
>
> Department of Urban Development
>
> File No. UD-C/1)1/2014-loose
>
> Subject: Regarding Smart Cities Mission.
>
> (main file is under submission)
>
> Proceedings of the 2nd meeting of State level High Power Steering Committee (HPSC) to implement Smart City Mission in the state held on 29/7/2015 under the Chairmanship of worthy Chief Secretary to the Govt. of Himachal Pradesh have been attempted and placed below for approval of worthy Chief Secretary please.
>
> Santosh Kumar
>
> 30/7/2015
>
> Sd/-
>
> 30/7/2015

AS(UD) leave.
ACS/UD)

May kindly approve, the minutes of the meeting."

29. What transpires from the record is that whatever score cards have been sent by fourteen ULB's, were placed before the meeting held on 29.7.2015. According to Notification annexure P-7 (dated 25.6.2015) whereby HPSC was constituted. Principal Secretary, Finance, Principal Secretary Planning, Principal Secretary/Director UD, representative of MoUD, Mayors and Municipal Commissioners/ Chief Executives of concerned ULBs and Secretary /Engineer-in-Chief of Irrigation & Public Health Engineering Department were members and ACS/Principal Secretary, Urban Development was the Member Secretary. Meeting was convened on 29.7.2015.

30. We have gone through the attendance chart of the participants of 2nd meeting of the HPSC constituted for implementation of Smart Cities Mission held under the Chairmanship of the Chief Secretary to the Government of Himachal Pradesh in his office Chamber on 29.7.2015 at 4.00 pm. The only participants were Mrs. Manisha Nanda, ACS (UD, TCP, Housing), Shri Narinder Chauhan, ACS (Fin. Plg) and Shri P.C.Dhiman, ACS (IPH). Neither the Principal Secretary (Finance) nor the Director UD, Mayor, Municipal Commissioner/Chief Executives and Secretary /Engineer-in-Chief, I&PH has participated in the meeting. The Committee was broad based and all the stake-holders should have been invited to enable them to attend the meeting held on 29.7.2015. Mayor of Municipal Corporation, Shimla had a vital stake in the proceedings. He was not summoned to attend the meetings held on 15.7.2015 and 29.7.2015. Thus, on the basis of the meeting which lacked quorum, decision was taken to recommend and forward case of Dharamshala to the Government of India on 30.7.2015/31.7.2015.

31. We have already quoted above the para 13.2, verbatim. There was supposed to be a representative of MoUD as per para 13.2. The Joint Secretary (UD), as per office memorandum dated 14.7.2015, was required to participate in the deliberations held on 15.7.2015 and 29.7.2015. However, he has not participated in the meeting. It further erodes the credibility of the HPSC, in which Joint Secretary (MoUD) has been made representative of MoUD vide Notification dated 25.6.2015 as well as OM dated 14.7.2015. Presence of Joint Secretary (MoUD), Director, UD, Mayors and Municipal Commissioners/ Chief Executives of the concerned ULBs and Heads of the concerned State Line Departments was necessary to take a conscious decision while shortlisting cities for inclusion in the list of Smart cities.

32. Reasons assigned in the reply of respondents No. 1 and 2, for non-participation of the representative of MoUD are that meeting was convened on a short notice. ACS/Secretary UD, being the Member Secretary, should have ensured that all the members of the committee were informed in advance.

33. Now, we can summaries that neither State Mission Director has evaluated the proposals nor the quorum of meeting dated 29.7.2015 was complete. It was a *coram non judice.* We have already pointed out that in case evaluation had been undertaken, mistakes committed by Municipal Corporation, Dharamshala while allocating marks to itself, which we have noticed above, could be pointed out to HPSC, more particularly points under item Nos. 3, 4, 13, 14 and 15. We are still unable to understand how and why 10 points have been given to Dharamshala city for completion of projects sanctioned under JnNURM without annexing necessary certificate of completion on or before 31.3.2014. Dharamshala was covered only under UIDSSMT. We have gone through the original record whereby information was sent in Form to Director, Urban Development Department. According to

Column No. 15, completion certificate was to be received from the State as on 31.3.2014. It is stated in Form-B that necessary certificate was attached. We have gone through the original record. This certificate is not on record. Thus, respondent No. 6 could not be allocated 10 points under the category of 'percentage of completion of JnNURM projects'. Points allocated to Municipal Corporation, Dharamshala under item Nos. 3, 4, 13, 14 and 15, as per annexure P-4, were to be excluded while compiling score card. In the reply filed by the respondent-State, it is specifically stated, as noticed by us earlier, that the decision not to include Shimla in the list of Smart Cities primarily has been taken since Municipal Corporation, Shimla has failed to complete JnNURM projects. This reason has not at all been discussed in the meeting held on 29.7.2015. Decision should have been taken in the meeting and the same can not be permitted to be explained on the basis of affidavit. Moreover, the other reason assigned for not including Shimla in the list of potential Smart Cities is that it has been sanctioned AMRUT scheme. This ground has not been taken in the proceedings held on 29.7.2015. The project for storm water drainage (Channelization of Nallah in Dharamshala town) was approved and an amount of Rs.190.18 Lakh was approved. The same could not be made a basis for claiming 10 points since it never formed part of the prescribed criteria.

34. **De Smith, Woolf and Jowell**, in "Judicial Review of Administrative Action", Fourth Edition, 1980, have held that all developed legal systems have had to face the problem of resolving the conflict between the two aspects of the public interest; the desirability of encouraging individual citizens to participate actively in the enforcement of the law, and the undesirability of encouraging the professional litigant and the meddlesome interloper invoking the jurisdiction of the courts in matters in which he is not concerned. The conflict has been resolved by developing principles which dete4rmine who is entitled to bring proceedings; that is who has *locus standi* or standing to bring proceedings. If those principles are satisfactory they should only prevent a litigant who has no legitimate reason for bringing proceedings from doing so. When a person has standing to bring proceedings there still remains the question as to the purpose for which he can bring those proceedings, which involves issues of justiciability as to which. The learned author has elucidated the 'locus standi' as under:

> "A number of arguments are traditionally advanced for not allowing totally unrestricted access to the court to any member of the public for the purpose of challenging an administrative action of which he does not approve. First, it would be unwise to assume that the effect of the doctrine of precedent and the power of the courts to award costs, even on an indemnity basis, will sufficiently deter unmeritorious challenges. Secondly, the courts' resources should not be dissipated by the need to provide a forum for frivolous proceedings. Thirdly, the proper function of central and local government and other public bodies should not be disrupted unnecessarily to the disadvantage of other members of the public by having a contest proceedings. Fourthly, there is something to be said for the courts, as a matter of prudence, reserving their power to interfere with the workings of public bodies to those occasions when there is an application before them by someone who has been adversely affected by the unlawful conduct of which complaint is made. Fifthly, particularly in relation to administrative action which can affect sections of the public, it is important that the proceedings should be brought by a person who, because he is sufficiently interested in the outcome of the proceedings or otherwise, is in a position to ensure that full argument is favour of the remedy which is sought is deployed before the court. Sixthly, it is important that the courts confine themselves to their

correct constitutional role, and do not become involved in determining issues which are not justiciable by giving unlimited access to the courts.

There are substantial arguments in favour of adopting a generous approach to standing. This is particularly true in judicial review proceedings since here it is frequently important, in the interests of the public generally, that the law should be enforced. The policy should therefore be to encourage and not discourage public-spirited individuals and groups, even though they are not directly affected by the action which is being taken, to challenge unlawful administrative action. Other safeguards, besides restrictive rules as to standing, exist to protect the courts and administrators from unmeritorious challenges. (In the case of judicial review there is the requirement of leave and in proceedings without that requirement there is the ability to apply to have the proceedings struck out if there is no cause of action or the proceedings are an abuse of the court). Where there are strict rules as to standing there is always the risk that no one will be in a position to bring proceedings to test the lawfulness of administrative action of obvious illegality or questionable legality. It is hardly desirable that a situation should exist where because all the public are equally affected no one is in a position to bring proceedings. The fears that are sometimes voiced of the courts being overwhelmed by a flood of frivolous actions are unsupported by any evidence of this happening in practice. The costs of litigation are now so heavy that it is only the most determined vexatious litigant who will indulge in legal proceedings which are without merit. The arguments in favour of a restrictive approach to standing nearly always confuse the question of the merits of the litigation with the question of who should be entitled to bring the proceedings. If there is a satisfactory mechanism for dealing with unmeritorious or frivolous claims most of the arguments for a restrictive approach fall away."

35. The learned author has made following observations under the "broad and flexible approach":

"As Lord Roskill in the National Federation case pointed out, the phrase "sufficient interest" was selected by the Rules Committee of the Supreme Court in 1977 "as one which could sufficiently embrace all classes of those who might apply and yet permit sufficient flexibility in any particular case to determine whether or not 'sufficient interest' was in fact shown." This is precisely the approach which has been adopted in the vast majority of the cases which have come before the courts since that time. Indeed it is difficult to find any case where an applicant has been refused relief on the grounds that he has no *locus standi* where relief would have been granted but for his lack of *locus standi*. In the National Federation case itself the applicants were entitled to be granted standing to obtain leave to apply for judicial review but failed on the merits.

"Sufficient interest" should therefore be regarded as being an extremely flexible test of standing. The more important the issue and the stronger the merits of the application, the more ready will the courts be to grant leave notwithstanding the limited personal involvement of the applicant; thus a reporter and the National Union of Journalists have been regarded as having sufficient interest to apply for judicial review to quash an order prohibiting the publication of a report of committal proceedings made by magistrates under the Contempt of Court Act, 1981. The prohibition

interfered with the freedom of the press. A person whose telephone was tapped, but not someone who had telephoned him, can seek judicial review of a possible warrant issued by the Secretary of State authorizing the interception of communications. In *R. v. Department of Transport, ex p. Presvac Engineering Ltd.* the Court of Appeal considered that Presvac had *locus standi* to apply for judicial review in relation to the grant by the Department of a certificate to a competitor company of Presvac that valves manufactured by that company were acceptable for the purposes of Merchant Shipping Regulations, 1984. A head of chambers has standing to make an application to challenge the decision of the Bar Council not to proceed with an investigation of a member of chambers for whom he had been responsible."

36. The learned author has summarized the issue of 'standing' as under:

"While there remains a requirement of standing there will still be cases where applicants are refused relief because they are said not to have sufficient interest in the outcome of the proceedings. However if this only occurs where the courts are satisfied that they would not have granted relief in any event then clearly the requirement causes no harm. It is to be hoped that this is now the position on judicial review. It would however be preferable if the position was made clear by legislation or a result of the decisions of the courts. On applications for judicial review, because the requirement of leave in any event acts as a satisfactory filter, the need to have standing should be no more than a convenient general principle to be taken into account by the court when determining the manner in which it should exercise its discretion as to whether to grant leave and, when leave has been granted, as to whether to grant one of the discretionary remedies available on judicial review. The general approach can be summarized as follows:

(1) "Sufficient interest" has to receive a generous interpretation. It has to be treated as a broad and flexible test.

(2) Only issues as to standing where the answer is obvious should be resolved on the application for leave. In other cases lack of standing should not prevent leave being granted.

(3) Issues as to standing at the leave stage do not depend on the remedy which is then being claimed.

(4) If the applicant has a special expertise in the subject matter of the application that will be a factor in establishing sufficient interest. This applies whether the applicant is an individual or some type of association. The fact that the applicant's responsibility in relation to the subject of the application is recognized by statute is a strong indication of sufficient interest.

(5) A great variety of factors are capable of qualifying as sufficient interest. They are not confined to property or financial or other legal interests. They can include civic (or community), environmental and cultural interests. The interests can be future or contingent.

(6) The gravity of the issue which is the subject of the application is a factor taken into account in determining the outcome of questions of standing. The more serious the issue at stake the less significance will be attracted to arguments based on the applicant's alleged lack of standing.

(7) In deciding what, if any, remedy to grant as a matter of discretion, the Court will take into account the extent of the applicant's interest. At this stage different remedies may require a different involvement by the applicant."

37. The learned authors **H.W.R. Wade and C.F. Forsyth** in "Administrative Law" Eighth Edition, have succinctly explained 'locus standi', as under:

> "It has always been an important limitation on the availability of remedies that they are awarded only to litigants who have sufficient *locus standi*, or standing. The law starts from the position that remedies are correlative with rights, and that only those whose own rights are at stake are eligible to be awarded remedies. No one else will have the necessary standing before the court.
>
> In private law that principle can be applied with some strictness. But in public law it is inadequate, for it ignores the dimension of the public interest. Where some particular person is the object of administrative action, that person is naturally entitled to dispute its legality and other persons are not. But public authorities have many powers and duties which affect the public generally rather than particular individuals. If a local authority grants planning permission improperly, or licences indecent films for exhibition, it does a wrong to the public interest but no wrong to any one in particular. If no one has standing to call it to account, it can disregard the law with impunity-a result which would 'make an ass of the law'. An efficient system of administrative law must find some answer to this problem, otherwise the rule of law breaks down.
>
> Having grown to a considerable extent out of private law, administrative law has traditionally contained a number of restrictive rules about standing. But as governmental powers and duties have increased, and as public interest has gained prominence at the expense of private right, more liberal principles have emerged. The prerogative remedies, in particular, have shown their worth, since they exist for public as well as private purposes and provide the nucleus of a system of public law. The Attorney-General also can act in the public interest and will sometimes, though not always, do so. The resources of the legal system are adequate to solve the problems, which are basically problems of judicial policy.
>
> Judges have in the past had an instinctive reluctance to relax the rules about standing. They fear that they may 'open the floodgates' so that the courts will be swamped with litigation. They fear also that cases will not be best argued by parties whose personal rights are not in issue. But recently these instincts have been giving way before the feeling that the law must somehow find a place for the disinterested, or less directly interested, citizen in order to prevent illegalities in government which otherwise no one would be competent to challenge."

38. The petitioner is a duly elected Mayor of Shimla Municipal Corporation and discharging important constitutional /statutory duties as per Part X-A of the Constitution of India under Municipal Corporation Act, 1994. Petitioner has the necessary locus standi to assail impugned orders whereby Shimla city has been ignored and Dharamshala town has been included in the list of potential Smart Cities. Mayor was also one of the members of the Committee duly constituted on 25.6.2015. However, fact of the matter is that he was not even invited to participate in the meetings held on 15.7.2015 and 29.7.2015. He had locus standi to raise the question of vital public importance concerning rights of the citizens of

Shimla town by way of public interest litigation. His personal rights were also infringed since he was not called in the meeting held on 15.7.2015 and 29.7.2015.

39. Mr. Gagan Pradeep S. Bal, Advocate has relied upon (2003) 7 SCC 546. Their Lordships of the Hon'ble Supreme Court in **Guruvayoor Devaswom Managing Committee v. C.K. Rajan**, reported in (2003) 7 SCC 546 have held that petition should be filed by any interested person in the welfare of the people who is in a disadvantaged position and, thus, not in a position to knock the doors of the Court. Issue of public importance, enforcement of fundamental rights of large number of public vis-à-vis the constitutional duties and functions of the State, if raised, the Court can treat a letter or a telegram as a public interest litigation upon relaxing procedural laws as also the law relating to pleadings. The common rule of locus standi is relaxed so as to enable the Court to look into the grievances complained on behalf of the poor, depraved, illiterate and the disabled who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. However, in an appropriate case, although the petitioner might have moved a Court in his private interest and for redressal of the personal grievances, the Court in furtherance of the public interest may treat it necessary to enquire into the state of affairs of the subject of litigation in the interest of justice. Their lordships have held as under:

> [50] The principles evolved by this Court in this behalf may be suitably summarized as under :
>
> (i) The Court in exercise of powers under Art. 32 and Art. 226 of the Constitution of India can entertain a petition filed by any interested person in the welfare of the people who is in a disadvantaged position and, thus, not in a position to knock the doors of the Court.
>
> The Court is constitutionally bound to protect the fundamental rights of such disadvantaged people so as to direct the State to fulfill its constitutional promises. (See S. P. Gupta v. Union of India (1981 (Supp) SCC 87), People's Union for Democratic Rights and others v. Union of India (1982) 2 SCC 494; Bandhua Mukti Morcha v. Union of India and others (1984) 3 SCC 161 and Janata Dal v. H. S. Chowdhary and others (1992) 4 SCC 305).
>
> (ii) Issue of public importance, enforcment of fundamental rights of large number of public vis-a-vis the constitutional duties and functions of the State, if raised, the Court treat a letter or a telegram as a public interest litigation upon relaxing procedural laws as also the law relating to pleadings. (See Charles Sobraj v. Supdt., Central Jail, Tihar, New Delhi (1978) 4 SCC 104 and Hussainara Khatoon and others v. Home Secretary, State of Bihar (1980) 1 SCC 81).
>
> (iii) Whenever injustice is meted out to a large number of people, the Court will not hesitate in stepping in. Articles 14 and 21 of the Constitution of India as well as the International Conventions on Human Rights provide for reasonable and fair trial.
>
> In Mrs. Maneka Sanjay Gandhi and another v. Miss Rani Jethmalani, AIR 1979 SC 468, it was held :
>
> "2. Assurance of a fair trial is the first imperative of the dispensation of justice and the central criterion for the Court to consider when a motion for transfer is made is not the hypersensitivity or relative convenience of a party or easy availability of legal services or like mini-grievances. Something more substantial, more compelling, more imperiling, from the point of view of public justice and its attendant, environment, is necessitous if the Court is to exercise its power of transfer. This is the cardinal principle although the

circumstances may be myriad and vary from case to case. We have to test the petitioner's grounds on this touch-stone bearing in mind the rule that normally the complainant has the right to choose any Court having jurisdiction and the accused cannot dictate where the case against him should be tried. Even so, the process of justice should not harass the parties and from that angle the Court may weigh the circumstances."

(See also Dwarka Prasad Agarwal (D) by L.Rs. and another v. B. D. Agarwal and others, 2003 (6) Scale 138).

(iv) The common rule of locus standi is relaxed so as to enable the Court to look into the grievances complained on behalf of the poor, depraved, illiterate and the disabled who cannot vindicate the legal wrong or legal injury caused to them for any violation of any constitutional or legal right. (See Fertilizer Corporation Kamgar Union v. Union of India, AIR 1981 SC 344; S. P. Gupta (supra); People's Union for Democratic Rights (supra); Dr. D. C. Wadhwa v. State of Bihar (1987) 1 SCC 378 and Balco Employees' Union (Regd.) v. Union of India and others ((2002) 2 SCC 333).

(v) When the Court is prima facie satisfied about variation of any constitutional right of a group of people belonging to the disadvantaged category, it may not allow the State or the Government from raising the question as to the maintainability of the petition. (See Bandhua Mukti Morcha (supra)).

(vi) Although procedural laws apply on PIL cases but the question as to whether the principles of res judicata or principles analogous thereto would apply depend on the nature of the petition as also facts and circumstances of the case. (See Rural Litigation and Entitlement Kendra v. State of U.P., 1989 Supp (1) SCC 504 and Forward Construction Co. and others v. Prabhat Mandal (Regd.), Andheri and others (1986) 1 SCC 100).

(vii) The dispute between two warring groups purely in the realm of private law would not be allowed to be agitated as a public interest litigation. (See Ramsharan Autyanuprasi and another v. Union of India and others, 1989 Supp (1) SCC 251).

(viii) However, in an appropriate case, although the petitioner might have moved a Court in his private interest and for redressal of the personal grievances, the Court in furtherance of the public interest may treat it necessary to enquire into the state of affairs of the subject of litigation in the interest of justice. (See Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi and others (1987) 1 SCC 227).

(ix) The Court in special situations may appoint Commission, or other bodies for the purpose of investigating into the allegations and finding out facts. It may also direct management of a public institution taken over by such Committee. (See Bandhua Mukti Morcha (supra), Rakesh Chandra Narayan v. State of Bihar, 1989 Supp (1) SCC 644 and A. P. Pollution Control Board v. M. V. Nayudu (1999) 2 SCC 718).

In Sachidanand Pandey and another v. State of West Bengal and others ((1987) 2 SCC 295), this Court held:

> "61. It is only when Courts are apprised of gross violation of fundamental rights by a group or a class action or when basic human rights are invaded or when there are complaints of such acts as shock the judicial conscience that the Courts, especially this Court,

> should leave aside procedural shackles and hear such petitions and extend its jurisdiction under all available provisions for remedying the hardships and miseries of the needy, the underdog and the neglected. I will be second to none in extending help when such is required. But this does mean that the doors of this Court are always open for anyone to walk in. It is necessary to have some self-imposed restraint on public interest litigants."

In Janata Dal v. H. S. Chowdhary and others (1992) 4 SCC 305, this Court opined :

> "109. It is thus clear that only a person acting bona fide and having sufficient interest in the proceeding of PIL will alone have a locus standi and can approach the Court to wipe out the tears of the poor and needy, suffering from violation of their fundamental rights but not a person for personal gain or private profit or political motive or any oblique consideration. Similarly, a vexatious petition under the colour of PIL brought before the Court for vindicating any personal grievance, deserves rejection at the threshold."

The Court will not ordinarily transgress into a policy. It shall also take utmost care not to transgress its jurisdiction while purporting to protect the rights of the people from being violated.

In Narmada Bachao Andolan v. Union of India and others ((2000) 10 SCC 664), it was held :

> "229. It is now well settled that the Courts, in the exercise of their jurisdiction, will not transgress into the field of policy-decision. Whether to have an infrastructural project or not and what is the type of project to be undertaken and how it has to be executed, are part of policy-making process and the Courts are ill-equipped to adjudicate on a policy-decision so undertaken. The Court, no doubt, has a duty to see that in the undertaking of a decision, no law is violated and people's fundamental rights are not transgressed upon except to the extent permissible under the Constitution. Even then any challenge to such a policy-decision must be before the execution of the project is undertaken. Any delay in the execution of the project means overrun in costs and the decision to undertake a project, if challenged after its execution has commenced, should be thrown out at the very threshold on the ground of laches if the petitioner had the knowledge of such a decision and could have approached the Court at that time. Just because a petition is termed as a PIL does not mean that ordinary principles applicable to litigation will not apply. Laches is one of them.
>
> 232. While protecting the rights of the people from being violated in any manner utmost care has to be taken that the Court does not transgress its jurisdiction. There is, in our constitutional framework a fairly clear demarcation of powers. The Court has come down heavily whenever the executive has sought to impinge upon the Court's jurisdiction."

(x) The Court would ordinarily not step out of the known areas of judicial review. The High Courts although may pass an order for doing complete justice to the parties, it does not have a power akin to Art. 142 of the Constitution of India.

> (xi) Ordinarily the High Court should not entertain a writ petition by way of Public Interest Litigation questioning constitutionality or validity of a statute or a Statutory Rule.

40. Petitioner has highlighted question of great public importance. He has filed petition for the redressal of the grievance of the citizens of Shimla town. It has been filed for the welfare of the people and it was always open for this Court to convert private interest litigation to public interest litigation as laid down by their Lordships of the Hon'ble Supreme Court in Shivajirao Nilangekar Patil v. Dr. Mahesh Madhav Gosavi and others (1987) 1 SCC 227).

41. Their lordships of the Hon'ble Supreme Court in **Nandkishore Ganesh Joshi v. Commr. Municipal Corpn. of Kalyan & Dombivali**, reported in (2004) 11 SCC 417, have held that submission of Mr Radhakrishnan that the appellant has no locus standi to maintain the writ petition cannot be accepted keeping in view the fact that he was the chairman of the Standing Committee and although the Standing Committee itself was not the writ petitioner. A question involving proper interpretation as regard the statutory provisions conferring a statutory right on a statutory authority vis-à-vis a statutory duty on the part of the commissioner could be gone into by the High Court even in a public interest litigation, while interpreting Mumbai Provincial Municipal Corporation Act. In this case, Chairman of the standing Committee of the second respondent-Municipal Corporation of City Kalyan and Dombivali had filed a writ petition before the Bombay High Court praying for issuance of a writ.

42. Mr. Gagan Pradeep S. Bal, Advocate has also relied upon in (2005)1 SCC 590. Their Lordships of the Hon'ble Supreme Court in **Dattaraj Nathuji Thaware v. State of Maharashtra** reported in (2005)1 SCC 590, have held that PIL in service matters would not be maintainable. Their lordships have held that a writ petitioner who comes to the Court for relief in public interest must come not only with clean hands like any other writ petitioner but also with a clean heart, clean mind and clean objective. Present case is not a service matter and petitioner has approached this Court with clean heart, clean mind and clean objective to espouse the cause of common people.

43. Their Lordships of the Hon'ble Supreme Court in **Kansingh Kalusingh Thakore v. Rabari Maganbhai Vashrambhai** reported in (2006) 12 SCC 360 have held that in a catena of decisions held that only a person acting bonafide and having sufficient interest in the proceeding of PIL will alone have locus standi and can approach the Court to wipe out the tears of the poor and needy suffering from violation of their fundamental rights.

> 24. We have given our careful consideration for the rival submissions made by the respective counsel appearing for the respective parties. The writ petition filed by the respondents herein is an abuse of the process of the Court. By this PIL, the respondents sought to ventilate/redress their personal grievances inasmuch as they are able to holding clout in Village Rasana Nana and were enjoying illegal possession in several lands contained under said survey Nos. 125 and 126. The appellants herein were deliberately not made parties to the writ petition allegedly filed in public interest. It is a matter of record that the writ petitioners are the people who encroached upon the land sought to be granted to the appellants herein and hence having no legal right to continue their illegal occupancy, devised means to approach the High Court in alleged public interest. This would be evident from the affidavit of the Deputy Collector filed on 24.03. 2005. The maintainability of the writ petition at the instance of the respondents was

> specifically raised before the High Court. The maintainability of the PIL which was in issue was unfortunately not decided by the High Court. The High Court, in our opinion, ought to have decided the maintainability of the PIL maintained at the instance of the encroachers and land grabbers and rejected the writ petitions at the threshold. This Court in a catena of decisions held that only a person acting bonafide and having sufficient interest in the proceeding of PIL will alone have locus standi and can approach the Court to wipe out the tears of the poor and needy suffering from violation of their fundamental rights but not a person for personal gain or private profit or political or any oblique consideration. The High Court ought to have rejected the writ petition at the threshold as observed by this court in 1992 (4) SCC 305 Janta Dal vs. H.S. Chaudhary & Ors. In our opinion, the writ petition filed by the respondents was not aimed at redressal of genuine public wrong or public injury but founded on personal vendetta. It is the duty of the High Court not to allow such process to be abused for oblique considerations and the petitions filed by such busy bodies deserves to be thrown out by rejection at the threshold and in appropriate cases with exemplary costs.

44. In the present case, petitioner has acted bonafide and has sufficient interest in the proceedings and manner in which Shimla City has been excluded and Dharamshala town has been included in the list of Smart Cities.

45. Their Lordships of the Hon'ble Supreme Court in **State of Uttaranchal v. Balwant Singh Chaufal** reported in (2010) 3 SCC 402 have held laid down principles relating to PIL. Their lordships have held that The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations. Their lordships have held as under:

> 181. We have carefully considered the facts of the present case. We have also examined the law declared by this court and other courts in a number of judgments. In order to preserve the purity and sanctity of the PIL, it has become imperative to issue the following directions:-
>
> > (1) The courts must encourage genuine and bona fide PIL and effectively discourage and curb the PIL filed for extraneous considerations.
> >
> > (2) Instead of every individual judge devising his own procedure for dealing with the public interest litigation, it would be appropriate for each High Court to properly formulate rules for encouraging the genuine PIL and discouraging the PIL filed with oblique motives. Consequently, we request that the High Courts who have not yet framed the rules, should frame the rules within three months. The Registrar General of each High Court is directed to ensure that a copy of the Rules prepared by the High Court is sent to the Secretary General of this court immediately thereafter.
> >
> > (3) The courts should prima facie verify the credentials of the petitioner before entertaining a P.I.L.
> >
> > (4) The court should be prima facie satisfied regarding the correctness of the contents of the petition before entertaining a PIL.
> >
> > (5) The court should be fully satisfied that substantial public interest is involved before entertaining the petition.

> (6) The court should ensure that the petition which involves larger public interest, gravity and urgency must be given priority over other petitions.
>
> (7) The courts before entertaining the PIL should ensure that the PIL is aimed at redressal of genuine public harm or public injury. The court should also ensure that there is no personal gain, private motive or oblique motive behind filing the public interest litigation.
>
> (8) The court should also ensure that the petitions filed by busybodies for extraneous and ulterior motives must be discouraged by imposing exemplary costs or by adopting similar novel methods to curb frivolous petitions and the petitions filed for extraneous considerations.

46. We are of the considered view that the present petition is genuine. We have also verified the contents of petition. There is substantial public interest involved and petition as filed is for highlighting, protecting and safeguarding the interests of the citizens of the Shimla town as a whole.

47. Their lordships of the Hon'ble Supreme Court in **Manohar Joshi v. State of Maharashtra** reported in (2012) 3 SCC 619 have held that the submissions that the petitions were politically motivated and one of the petitioners did not have clean antecedents, cannot take away the seriousness of the charge, and the Chief Minister must squarely explain and justify his actions. Their lordships have further held that Public Interest Litigation is not in the nature of adversarial litigation. It is further held that when the cause or issue, relates to matters of good governance in the Constitutional sense, and there are no particular individuals or class of persons who can be said to be injured persons, groups of persons who may be drawn from different walks of life, may be granted standing for canvassing the PIL. Their lordships have held as under:

> 165. It was also sought to be contended that the petitions were politically motivated and one of the petitioners did not have clean antecedents. We are concerned in the present case with respect to serious allegations against the then Chief Minister misusing his office for the benefit of his son-in-law and in that process destroying a public amenity in the nature of a primary school. Such submissions cannot take away the seriousness of the charge, and the Chief Minister must squarely explain and justify his actions.
>
> 166. With respect to the Chief Minister calling the file for his perusal, the Division Bench has posed a question as to whether it was an idle curiosity. "Why were the Chief Minister and the Minister of State interested in one particular case? What momentous public policy decision was sought to be taken in this matter?" Shri Murudkar was not someone for whom the administration could have moved so fast. It was very clear that the Chief Minister was very much interested in knowing the progress of the case all throughout. The obvious inference was that the then Chief Minister and the Minister of State took keen interest in the matter only because Shri Murudkar had appointed the son-in-law of the Chief Minister as his developer.
>
> 185. Public Interest Litigation is not in the nature of adversarial litigation, but it is a challenge and an opportunity to the government and its officers to make basic human rights meaningful as observed by this Court in paragraph 9 of Bandhua Mukti Morcha Vs. Union of India, 1984 AIR(SC) 802. By its very nature the PIL is inquisitorial in character. Access to justice being a

> Fundamental Right and citizen's participatory role in the democratic process itself being a constitutional value, accessing the Court will not be readily discouraged. Consequently, when the cause or issue, relates to matters of good governance in the Constitutional sense, and there are no particular individuals or class of persons who can be said to be injured persons, groups of persons who may be drawn from different walks of life, may be granted standing for canvassing the PIL. A Civil Court acts only when the dispute is of a civil nature, and the action is adversarial. The Civil Court is bound by its rules of procedure. As against that the position of a Writ Court when called upon to act in protection of the rights of the citizens can be stated to be distinct.

48. Their Lordships of the Hon'ble Supreme Court in **S.R. Tewari v. Union of India** reported in (2013) 6 SCC 602, have held that court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Their lordships have held as under:

> 19. In Commissioner of Income-tax, Bombay & Ors. v. Mahindra & Mahindra Ltd. & Ors., 1984 AIR(SC) 1182, this Court held that various parameters of the court's power of judicial review of administrative or executive action on which the court can interfere had been well settled and it would be redundant to recapitulate the whole catena of decisions. The Court further held:
>
> "It is a settled position that if the action or decision is perverse or is such that no reasonable body of persons, properly informed, could come to, or has been arrived at by the authority misdirecting itself by adopting a wrong approach, or has been influenced by irrelevant or extraneous matters the court would be justified in interfering with the same."
>
> 20. The court can exercise the power of judicial review if there is a manifest error in the exercise of power or the exercise of power is manifestly arbitrary or if the power is exercised on the basis of facts which do not exist and which are patently erroneous. Such exercise of power would stand vitiated. The court may be justified in exercising the power of judicial review if the impugned order suffers from mala fide, dishonest or corrupt practices, for the reason, that the order had been passed by the authority beyond the limits conferred upon the authority by the legislature. Thus, the court has to be satisfied that the order had been passed by the authority only on the grounds of illegal- ity, irrationality and procedural impropriety before it interferes. The court does not have the expertise to correct the administrative decision. Therefore, the court itself may be fallible and interfering with the order of the authority may impose heavy administrative burden on the State or may lead to unbudgeted expenditure. (Vide: Tata Cellular v. Union of India, 1996 AIR(SC) 11; People s Union for Civil Liberties & Anr. v. Union of India & Ors., 2004 AIR(SC) 456; and State of N.C.T. of Delhi & Anr. v. Sanjeev alias Bittoo, 2005 AIR(SC) 2080).
>
> 31. Hence, where there is evidence of malpractice, gross irregularity or illegality, interference is permissible.

49. Their Lordships of the Hon'ble Supreme Court in **Jaipur Shahar Hindu Vikas Samiti v. State of Rajasthan** reported in (2014) 5 SCC 530, have held that on technical objection, this Court cannot reject to grant relief to the appellant in this Public

Interest Litigation. There is no dispute with regard to the legal proposition that technicalities should not come in the way of the Court in granting relief in a Public Interest Litigation, but application of a legal proposition depends upon the facts and circumstances of each case. Their lordships have held as under:

> 43. We are also not able to appreciate the argument advanced by the learned counsel for the appellant for reason that D.B. (Civil) W.P. No. 6607 of 2004 was filed by the father of Respondent No.4 herein questioning the constitution of the Committee. When the Court directed the parties to appear before the Assistant Commissioner for proper adjudication of the issues as the five-year term of the Committee expired, the 4th respondent sought permission of the Court and withdrew the writ petition, with a liberty to raise all the issues before the authority. The appellant herein who was not a party to D.B. (Civil) W.P. No. 6607 of 2004 has not chosen to implead himself nor objected to the withdrawing of the writ petition when the order was passed in his presence. He is taking such an objection and such plea for the first time before this Court. He relied on Shehla Burney (Dr.) Vs. Syed Ali Moosa Raza & Ors., 2011 6 SCC 529; that on technical objection, this Court cannot reject to grant relief to the appellant in this Public Interest Litigation. There is no dispute with regard to the legal proposition that technicalities should not come in the way of the Court in granting relief in a Public Interest Litigation, but application of a legal proposition depends upon the facts and circumstances of each case.

50. Their Lordships of the Hon'ble Supreme Court in **Tandon Brothers v. State of W.B.** reported in (2001) 5 SCC 664, have held that where government action runs counter to good faith, is not supported by reason and law, it can not but be described as mala fide. Equity, good conscience and justice require that judicial power be used to set aside such action. Existence of justifiable reasons in the matter of formation of opinion is the principle condition and any contra action would have the effect of the same being ascribed as arbitrary exercise of power which is admittedly an antithesis of law. Their lordships have held as under:

> "15. Sub-section (3) on its language, as noticed above permits retention of land as is required for the tea-garden and it is the opinion of the State Government that will decide the issue of requirement. The proviso to the Section has further conferred a power to revise any order made by the State Government specifying the land which is to be retained as being required for the tea-gardens. The power to revise the order thus obviously is conferment of a power in addition to what stands conferred under the main provision viz. sub-section (3). This exercise of review obviously upon formation of opinion of the State Government since the same is a power of determination in addition to the power as conferred by the principal provision. There are decisions galore of this Court as regards the issue of formation of opinion but we need not detain ourselves in this judgment to consider the issue since each case may be decided on the materials available for such formation of opinion - formation of opinion obviously is dependant upon available materials and cannot be a mere ipsedixit of the administrative authority. Existence of justifiable reasons in the matter of formation of opinion is the principle condition and any contra action would have the effect of the same being ascribed as arbitrary exercise of power which is admittedly an antithesis of law. The powers stand conferred on to the State Government, but there is no option left for the State Government but to act in accordance with law and in

order to act in that direction. State Government shall have to have relevant materials pertaining to the requirements of tea gardens. A person sitting in the office in the metropolitan city of Calcutta cannot in fact, decide the issue without taking recourse to actuals on the field or on the garden and that is the precise reason as to why the field study was effected on the first occasion by the Settlement Officer and the subsequent deliberations of the tea garden Advisory Committee wherein 1451.40 acres have been treated as surplus to the requirement of the tea estate. The power of review in terms of the proviso to sub-section (3) obviously shall have to be exercised upon materials on record and not de hors the same. And let us, therefore, analyse the materials on record pertaining to the issuance of the order dated 15-12-1977, relevant extracts of which are reproduced as below:

"And whereas the State Government heard the said Tea Garden on 14th November, 1977, 21st November, 1977 and 28th November, 1977 giving liberty at ample scope of it to make its submission and produce necessary material in support of its case.

And whereas it was made clear to said tea garden during the course of hearing that the area of approximately 2542.29 acres of land in occupation of Military Authorities was required to be held permanently by the Military Authorities.

And whereas representation made by the tea garden during the hearing was duly considered by the State Government having regard to the circumstances and findings of Darjeeling District Tea Estte (Resumption of Lands) Advisory Committee relating to the said tea garden for areas after such consideration the State Government is of the opinion that not more than 1005.40 acres of land are required by the said Tea Garden for its purposes.

Now, therefore, in exercise of powers conferred by sub-section (3) of Section 6 of the said Act, the Governor is pleased to declare that 3990.17 acres of land as mentioned and described in the schedule below are surplus to the requirement of said Rohini Tea Garden and that the said Tea Garden did not entitle to remain in possession of said 3990.17 acres of lands. The Governor is also pleased to declare that 1005.40 acres of land being required for the purpose of said tea garden may be retained by it in accordance with the previous law."

[17] The order admittedly records as per latest survey report but the survey report itself has not seen the light of the day and, in fact, whether there was such a mention as regards area under military occupation or not, nobody could vouch-safe for the same including Mr. Roy since the same is not available on record. Government records ought to have its sanctity undoubtedly and to have a particular state of affairs should also be borne out from the records and if the same is not produced before the Court or withheld from the Court, there is no reason whatsoever as to why the presumption adverse to the contention be not taken unless however cogent reasons are made available to the Courts, which however is not the case in the matter under consideration, since non-availability of governmental records cannot in the normal circumstances be presumed and on the wake of the aforesaid, it is a matter of basic requirement that the Government should have sufficient material in the formation of an opinion that the earlier opinon ought to stand modified by reason of obviously of the change of existing situation. Incidentally, be it noted that the earlier Order dated 6th April,

1973 which contains the materials as enclosure thereto and which form the basis of the earlier order but the same stands quashed by the High Court and no further proceedings were initiated as a challenge to the order or to have it set aside and it is on this score that Mr. Ranjit Kumar contended that the same being an order on the basis of which a subsequent order was passed by a higher authority and in the event the latter order stands negatived, the former order also perishes with the latter. The recital portion of the Order dated 6th April, 1973 contains 8 paragraphs which mainly consist of reiteration of the earlier order and the proceedings initiated under sub-section (3) of Section 6. The 8th paragraph of the recital is of some consequence and as such, the same is set out hereinbelow:

"And whereas the objections raised by the said tea garden against the notice issued upon, was duly considered and the State Government having regard to the circumstances and findings of the Darjeeling District Tea Estate (Resumption of Lands) Advisory Committee given in Annexure "A" appended hereto relating to the said tea garden is of opinion that 1005.40 acres of land are retainable by the said tea garden for its purpose and that the remaining 3990.17 acres of lands are not required for the said tea garden."

51. Their Lordships of the Hon'ble Supreme Court in **Tarlochan Dev Sharma v. State of Punjab** reported in (2001) 6 SCC 260 have held that senior officers occupying key positions such as Secretaries are not supposed to mortgage there own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. Their lordships have held as under:

16. In the system of Indian Democratic Governance as contemplated by the Constitution senior officers occupying key positions such as Secretaries are not supposed to mortgage there own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. The Conduct Rules of Central Government Services command the civil servants to maintain at all times absolute integrity and devotion to duty and do nothing which is unbecoming of a Government servant. No Government servant shall in the performance of his official duties, or in the exercise of power conferred on him, act otherwise than in his best judgment except when he is acting under the direction of his official superior. In Anirudhsinhji Jadeja (1995) 5 SCC 302 : (1995 AIR SCW 3543 : AIR 1995 SC 2390), this Court has held that a statutory authority vested with Jurisdiction must exercise it according to its own discretion; discretion exercised under the direction or instruction of some higher authority is failure to exercise discretion altogether. Observations of this Court in the Purtabpur Company Ltd., AIR 1970 SC 1896, are instructive and apposite. Executive officers may in exercise of their statutory discretions take into account considerations of public policy and in some context policy of Minister or the Government as a whole when it is a relevant factor in weighing the policy but they are not absolved from their duty to exercise their personal Judgment in individual cases unless explicit statutory provision has been made for instructions by a superior to bind them. As already stated we are not recording, for want of adequate material, any positive finding that the impugned order was passed at the behest of or dictated by someone else than its author. Yet we have no hesitation in holding that the impugned order

> betrays utter non-application of mind to the facts of the case and the relevant law. The manner in which the power under S. 22 has been exercised by the competent authority is suggestive of betrayal of the confidence which the State Government reposed in the Principal Secretary in conferring upon him the exercise of drastic power like removal of President of a Municipality under S. 22 of the Act. To say the least what has been done is not what is expected to be done by a senior official like the Principal Secretary of a wing of the State Government. We leave at that and say no more on this issue.

52. In the instant case also State Mission Director was required to evaluate the data and thereafter place the same before the High Powered Steering Committee for approval. He has abdicated his powers and this establishes that he has acted at the behest of superior officers without applying his own mind as is reflected from the minutes of the meeting held on 29.7.2015.

53. Their Lordships of the Hon'ble Supreme Court in **Haryana Financial Corpn. V. Jagdamba Oil Mills** reported in (2002) 3 SCC 496, have held that the Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene. Their lordships have held as under:

> 10. The obligation to act fairly on the part of the administrative authorities was envolved to ensure the rule of law and to prevent failure of justice. This doctrine is complementary to the principles of natural justice which the quasi-judicial authorities are bound to observe. It is true that the distinction between a quasi-judicial and the administrative action has become thin, as pointed out by this Court as far back as 1970 in A. K. Kraipak v. Union of India (1969 (2) SCC 262). Even so the extent of judicial scrutiny/judicial review in the case of administrative action cannot be larger than in the case of quasi-judicial action. If the High Court cannot sit as an appellate authority over the decisions and orders of quasi-judicial authorities, it follows equally that it cannot do so in the case of administrative authorities. In the matter of administrative action, it is well known, more than one choice is available to the administrative authorities; they have a certain amount of discretion available to them. They have "a right to choose between more than one possible course of action upon which there is room for reasonable people to hold differing opinions as to which is to be preferred". [As per Lord Diplock in Secretary of State for Education and Science v. Metropolitan Borough Counsel of Tameside (1977 AC 1014). The Court cannot substitute its judgment for the judgment of administrative authorities in such cases. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the Court intervene. To quote the classic passage from the judgment of Lord Greene M. R. in Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation (1947 (2) All ER 680) :
>
> "It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with the discretion must, so to speak, direct himself

> properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority."

54. Their Lordships of the Hon'ble Supreme Court in **Anil Ratan Sarkar v. Hirak Ghosh** reported in (2002) 4 SCC 21, have held that the most accepted methodology of Government working ought always to be fairness and in the event of its absence, law Courts would be within its jurisdiction to deal with the matter appropriately. Their lordships have held as under:

> [1] The most accepted methodology of Government working ought always to be fairness and in the event of its absence, law Courts would be within its jurisdiction to deal with the matter appropriately. This proposition is so well settled that we need not dilate further on to this. It is this concept of fairness which Mr. Ganguli, appearing in support of the petition for contempt very strongly contended, is totally absent in spite of three final rounds of litigation upto this Court between the parties. Mr. Bhaskar Gupta, learned senior advocate appearing for the alleged contemnors, however, contended that the conduct of the respondents can neither be termed to be unfair or in disregard to the orders of the Court on a true reading of the order - this stand of the respondents, however, stands negated by Mr. Ganguli. The conduct, Mr. Ganguli, contended, is not only deliberate but utterly perverse and in grossest violation of the orders of this Court and by reason therefor the fruit of the litigation has not yet been made available and being decried to the petitioner for one reason or the other for the last about 15 years. Incidently, it would be convenient to note that the principal issue involved in the matter pertains to the entitlement of the petitioners to the scale equivalent to that of Physical Instructors in the scale of Rs. 700-1600 as on 2nd July, 1984 and Rs. 2200-4000 w.e.f. 1986.

55. Their Lordships of the Hon'ble Supreme Court in **State of NCT of Delhi v. Sanjeev** reported in (2005) 5 SCC 181, have held that the administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. The scope of judicial review of administrative orders is rather limited. The consideration is limited to the legality of decision-making process and not legality of the order per se. Mere possibility of another view cannot be ground for interference. It is further held that that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. Their lordships have held as under:

> [14] As regards the period, it was held that it is primarily for the externing authority to decide how best the order can be made effective, so as to subserve its real purpose. How long within the statutory limit of two years fixed by Section 58, the order shall operate and to what territories, within the statutory limitations of Section 58 it should extend are matters which must depend upon his decision on the nature of the data which the authority is able to collect in the externment proceedings. No general formulation can be made that order of externment must always be restricted to the area to which the illegal activities of the externee extend. There can be doubt that the

executive order has also to show when questioned that there was application of mind. It is the existence of material and not the sufficiency of material which can be questioned as the satisfaction is primarily subjective somewhat similar to one required to be arrived at by the detaining authority under the preventive detention laws. The scope of judicial review of administrative orders is rather limited. The consideration is limited to the legality of decision-making process and not legality of the order per se. Mere possibility of another view cannot be ground for interference.

[15] One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function of executive, quasi-legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary (See State of U. P. and Ors. v. Renusagar Power Co. and Ors. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the courts may be broadly summarized as follows. The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

> [16] The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those classes of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is 'illegality' the second 'irrationality', and the third 'procedural impropriety'. These principles were highlighted by Lord Diplock in Council of Civil Service Unions v. Minister for the civil Service. (commonly known as CCSU case). If the power has been

exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. (See Commissioner of Income-tax v. Mahindra and Mahindra Ltd.) The effect of several decisions on the question of jurisdiction has been summed up by grahame Aldous and John Alder in their book "applications for Judicial Review, Law and Practice" thus:

"There is a general presumption against ousting the jurisdiction of the Courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradig, which the Courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in council of Civil Service Unions v. Minister for the Civil Service this is doubtful. Lords Diplock, Seaman and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. Many prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest. " (Also see Padfield v. Minister of Agriculture, Fisheries and Food).

[19] Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgment of lord Greene in Associated Provincial picture Houses Ltd. v. Wednesbury corpn. 2. It reads as follows:

".. . . It is true that discretion must be exercised reasonably. Now what does that mean? lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority. . In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact,

all these things run into one another. "lord Greene also observed (KB p. 230: All ERp. 683)

".. . It must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable. . . The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another. " (emphasis supplied) THEREFORE, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the Choice and not for the Court to substitute its view.

[21] In other words, to characterize a decision of the administrator as "irrational" the court has to hold, on material, that it is a decision "so outrageous'' as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.

[22] These principles have been noted in aforesaid terms in Union of India and Anr. v. G. Ganayutham In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself. (See Indian Railway Construction Co. Ltd. v. Ajay Kumar).

56. Their Lordships of the Hon'ble Supreme Court in **Punjab SEB Ltd. v. Zora Singh** reported in (2005) 6 SCC 776, have held that there cannot be any doubt whatsoever that even if an order is found to be not vitiated by reason of malice on fact but still can be held to be invalid if the same has been passed for unauthorized purposes, as it would amount to malice in law. Their lordships have held as under:

[40] Furthermore, there cannot be any doubt whatsoever that even if an order is found to be not vitiated by reason of malice on fact but still can be held to be invalid if the same has been passed for unauthorized purposes, as it would amount to malice in law.

[41] In Smt. S. R. Venkataraman v. Union of India this Court observed: "it is not therefore the case of the appellant that there was actual malicious intention on the part of the Government in making the alleged wrongful order of her premature retirement so as to amount to malice in fact. Malice in law is however, quite different. Viscount haldane described it as follows in Shearer v. Shields:

"A person who inflicts an injury upon another person in contravention of the law is not allowed to say that he did so with an innocent mind; he is taken to know the law, and he must act within the law. He may, therefore, be guilty of malice in law, although, so far the state of his mind is concerned, he acts ignorantly, and in that sense innocently. " thus malice in its legal sense means malice such as may be assumed from the doing of a wrongful act intentionally but without just cause or excuse, or for want of reasonable or probable cause. "

[42] In State of A. P. and Others v. Goverdhanlal Pitti, this Court observed:

> "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, 3rd Edn. , 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 his authoritative work on administrative Law (8th Edn. , at p. 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 seeks to "acquire land" "for a purpose not authorised by the Act. "[see also Chairman and MD, BPL Ltd. v. S. P. Gururaja and Others and P. Anjaneyulu v. Chief Manager, A. P. Circle, bharat Sanchar Nigam Ltd. , Govt. of India, Hyderabad and Another].

57. Their Lordships of the Hon'ble Supreme Court in **Jayrajbhai Jayantibhai Patel v. Anilbhai Nathubhai Patel** reported in (2006) 8 SCC 200, have held that in case of misuse of power, Court can interfere. Their lordships have further held that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court. Their lordships have held as under:

> [18] Having regard to it all, it is manifest that the power of judicial review may not be exercised unless the administrative decision is illogical or suffers from procedural impropriety or it shocks the conscience of the court in the sense that it is in defiance of logic or moral standards but no standardised formula, universally applicable to all cases, can be evolved. Each case has to be considered on its own facts, depending upon the authority that exercises the power, the source, the nature or scope of power and the indelible effects it generates in the operation of law or affects the individual or society. Though judicial restraint, albeit self-recognised, is the order of the day, yet an administrative decision or action which is based on wholly irrelevant considerations or material; or excludes from consideration the relevant material; or it is so absurd that no reasonable person could have arrived at it on the given material, may be struck down. In other words, when a Court is satisfied that there is an abuse or misuse of power, and its jurisdiction is invoked, it is incumbent on the Court to intervene. It is nevertheless, trite that the scope of judicial review is limited to the deficiency in the decision-making process and not the decision.

58. In the present case, laid down procedure has not been followed. There was no discussion in the meeting held on 29.7.2015.

59. Their Lordships of the Hon'ble Supreme Court in **Ganesh Bank of Kurundwad Ltd. v. Union of India** reported in (2006) 10 SCC 645 have reiterated the grounds of judicial review as under:

> 51. "13). One of the points that falls for determination is the scope for judicial interference in matters of administrative decisions. Administrative action is stated to be referable to broad area of Governmental activities in which the repositories of power may exercise every class of statutory function

of executive, quasi- legislative and quasi-judicial nature. It is trite law that exercise of power, whether legislative or administrative, will be set aside if there is manifest error in the exercise of such power or the exercise of the power is manifestly arbitrary. At one time, the traditional view in England was that the executive was not answerable where its action was attributable to the exercise of prerogative power. Professor De Smith in his classical work "Judicial Review of Administrative Action" 4th Edition at pages 285-287 states the legal position in his own terse language that the relevant principles formulated by the Courts may be broadly summarized as follows. The authority in which discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it; it must not act under the dictates of another body or disable itself from exercising discretion in each individual case. In the purported exercise of its discretion, it must not do what it has been forbidden to do, nor must it do what it has not been authorized to do. It must act in good faith, must have regard to all relevant considerations and must not be influenced by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. These several principles can conveniently be grouped in two main categories: (i) failure to exercise a discretion, and (ii) excess or abuse of discretionary power. The two classes are not, however, mutually exclusive. Thus, discretion may be improperly fettered because irrelevant considerations have been taken into account, and where an authority hands over its discretion to another body it acts ultra vires.

[14] The present trend of judicial opinion is to restrict the doctrine of immunity from judicial review to those classes of cases which relate to deployment of troupes, entering into international treaties, etc. The distinctive features of some of these recent cases signify the willingness of the Courts to assert their power to scrutinize the factual basis upon which discretionary powers have been exercised. One can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is 'illegality' the second 'irrationality', and the third 'procedural impropriety'. These principles were highlighted by Lord Diplock in Council of Civil Service Unions V/s. Minister for the Civil Service, (commonly known as CCSU Case). If the power has been exercised on a non-consideration or non-application of mind to relevant factors, the exercise of power will be regarded as manifestly erroneous. If a power (whether legislative or administrative) is exercised on the basis of facts which do not exist and which are patently erroneous, such exercise of power will stand vitiated. The effect of several decisions on the question of jurisdiction has been summed up by Grahame Aldous and John Alder in their book "Applications for Judicial Review, Law and Practice" thus:

There is a general presumption against ousting the jurisdiction of the courts, so that statutory provisions which purport to exclude judicial review are construed restrictively. There are, however, certain areas of governmental activity, national security being the paradig, which the courts regard themselves as incompetent to investigate, beyond an initial decision as to whether the government's claim is bona fide. In this kind of non-justiciable area judicial review is not entirely excluded, but very limited. It has also been

said that powers conferred by the Royal Prerogative are inherently unreviewable but since the speeches of the House of Lords in council of civil Service Unions V/s. Minister for the civil Service this is doubtful. Lords Diplock, Scaman and Roskili appeared to agree that there is no general distinction between powers, based upon whether their source is statutory or prerogative but that judicial review can be limited by the subject matter of a particular power, in that case national security. May prerogative powers are in fact concerned with sensitive, non-justiciable areas, for example, foreign affairs, but some are reviewable in principle, including the prerogatives relating to the civil service where national security is not involved. Another non-justiciable power is the Attorney General's prerogative to decide whether to institute legal proceedings on behalf of the public interest.

[15] The court will be slow to interfere in such matters relating to administrative functions unless decision is tainted by any vulnerability enumerated above; like illegality, irrationality and procedural impropriety. Whether action falls within any of the categories has to be established. Mere assertion in that regard would not be sufficient.

[16] The famous case commonly known as "The Wednesbury's case" is treated as the landmark so far as laying down various basic principles relating to judicial review of administrative or statutory direction.

[17] Before summarizing the substance of the principles laid down therein we shall refer to the passage from the judgement of Lord Greene in Associated Provincial Picture Houses Ltd. V/s. Wednesbury Corporation. It reads as follows:

"...It is true that discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology used in relation to exercise of statutory discretions often use the word 'unreasonable' in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting 'unreasonably'. Similarly, there may be something so absurd that no sensible person could even dream that it lay within the powers the authority.... In another, it is taking into consideration extraneous matters. It is unreasonable that it might almost be described as being done in bad faith; and in fact, all these things run into one another."

Lord Greene also observed

"...it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body can come to. It is not what the court considers unreasonable The effect of the legislation is not to set up the court as an arbiter of the correctness of one view over another."

[18] Therefore, to arrive at a decision on "reasonableness" the Court has to find out if the administrator has left out relevant factors or taken into account irrelevant factors. The decision of the administrator must have been within the four corners of the law, and not one which no sensible person could have reasonably arrived at, having regard to the above principles, and

must have been a bona fide one. The decision could be one of many choices open to the authority but it was for that authority to decide upon the choice and not for the Court to substitute its view.

[19] The principles of judicial review of administrative action were further summarized in 1985 by Lord Diplock in CCSU case as illegality, procedural impropriety and irrationality. He said more grounds could in future become available, including the doctrine of proportionality which was a principle followed by certain other members of the European Economic Community. Lord Diplock observed in that case as follows:

"...Judicial review has I think, developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognized in the administrative law of several of our fellow members of the European Economic Community."

Lord Diplock explained "irrationality" as follows:

"By 'irrationality' I mean what can by now be succinctly referred to as Wednesbury unreasonableness'. It applies to a decision which is to outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."

[20] In other words, to characterize a decision of the administrator as "irrational" the Court has to hold, on material, that it is a decision "so outrageous" as to be in total defiance of logic or moral standards. Adoption of "proportionality" into administrative law was left for the future.

[21] These principles have been noted in aforesaid terms in Union of India and Anr. V/s. C. Ganayutham. In essence, the test is to see whether there is any infirmity in the decision making process and not in the decision itself.

60. Their Lordships of the Hon'ble Supreme Court in **All India Railway Recruitment Board v. K. Shyam Kumar** reported in (2010) 6 SCC 614, have explained ‘”Wednesbury and Proportionality”. Their lordships have held that Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person. Proportionality, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Their lordships have held as under:

[36] Wednesbury and Proportionality - Wednesbury applies to a decision which is so reprehensible in its defiance of logic or of accepted moral or ethical standards that no sensible person who had applied his mind to the issue to be decided could have arrived at it. Proportionality as a legal test is capable of being more precise and fastidious than a reasonableness test as well as requiring a more intrusive review of a decision made by a public authority which requires the courts to 'assess the balance or equation' struck by the decision maker. Proportionality test in some jurisdictions is also described as the "least injurious means" or "minimal impairment" test so as to safeguard fundamental rights of citizens and to ensure a fair balance

between individual rights and public interest. Suffice to say that there has been an overlapping of all these tests in its content and structure, it is difficult to compartmentalize or lay down a straight jacket formula and to say that Wednesbury has met with its death knell is too tall a statement. Let us, however, recognize the fact that the current trend seems to favour proportionality test but Wednesbury has not met with its judicial burial and a state burial, with full honours is surely not to happen in the near future.

[37] Proportionality, requires the Court to judge whether action taken was really needed as well as whether it was within the range of courses of action which could reasonably be followed. Proportionality is more concerned with the aims and intention of the decision-maker and whether the decision-maker has achieved more or less the correct balance or equilibrium. Courts entrusted with the task of judicial review has to examine whether decision taken by the authority is proportionate, i.e. well balanced and harmonious, to this extent court may indulge in a merit review and if the court finds that the decision is proportionate, it seldom interferes with the decision taken and if it finds that the decision is disproportionate i.e. if the court feels that it is not well balanced or harmonious and does not stand to reason it may tend to interfere.

[38] Leyland and Anthony on Textbook on Administrative Law (5th edn. OUP, 2005) at p.331 has amply put as follows:

"Proportionality works on the assumption that administrative action ought not to go beyond what is necessary to achieve its desired results (in every day terms, that you should not use a sledgehammer to crack a nut) and in contrast to irrationality is often understood to bring the courts much closer to reviewing the merits of a decision".

[39] Courts have to develop an indefeasible and principled approach to proportionality till that is done there will always be an overlapping between the traditional grounds of review and the principle of proportionality and the cases would continue to be decided in the same manner whichever principle is adopted. Proportionality as the word indicates has reference to variables or comparison, it enables the Court to apply the principle with various degrees of intensity and offers a potentially deeper inquiry into the reasons, projected by the decision maker.

61. Their Lordships of the Hon'ble Supreme Court in **East Coast Railway v. Mahadev Appa Rao** reported in (2010) 7 SCC 678 have held that arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. Their lordships have held as under:

23. Arbitrariness in the making of an order by an authority can manifest itself in different forms. Non-application of mind by the authority making the order is only one of them. Every order passed by a public authority must disclose due and proper application of mind by the person making the order. This may be evident from the order itself or the record contemporaneously maintained. Application of mind is best demonstrated by disclosure of mind by the authority making the order. And disclosure is best done by recording the reasons that led the authority to pass the order in question. Absence of reasons either in the order passed by the authority or in the record

contemporaneously maintained is clearly suggestive of the order being arbitrary hence legally unsustainable.

30. We may hasten to add that while application of mind to the material available to the competent authority is an essential pre-requisite for the making of a valid order, that requirement should not be confused with the sufficiency of such material to support any such order. Whether or not the material placed before the competent authority was in the instant case sufficient to justify the decision taken by it, is not in issue before us. That aspect may have assumed importance only if the competent authority was shown to have applied its mind to whatever material was available to it before cancelling the examination. Since application of mind as a thresh-hold requirement for a valid order is conspicuous by its absence the question whether the decision was reasonable having regard to the material before the authority is rendered academic. Sufficiency or otherwise of the material and so also its admissibility to support a decision the validity whereof is being judicially reviewed may even otherwise depend upon the facts and circumstances of each case. No hard and fast rule can be formulated in that regard nor do we propose to do so in this case.

62. Members of HPSC have not applied mind as per the letter and spirit of the guidelines and material placed on record by all the stake-holders.

63. Their Lordships of the Hon'ble Supreme Court in **Kranti Associates (P) Ltd. v. Masood Ahmed Khan** reported in (2010) 9 SCC 496 have laid down principles on the recording of reasons in para-47 as under:

47. Summarizing the above discussion, this Court holds:

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 731-737).

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 1994 19 EHRR 553, at 562 para 29 and Anya vs. University of Oxford,2001 EWCA 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".

64. Their lordships of the Hon'ble Supreme Court in the case of ***Vijaya Devi Naval Kishore Bhartia and another vrs. Land Acquisition Officer and another,*** reported in ***(2003) 5 SCC 83,*** have held that "approval" does not mean anything more than either confirming, ratifying, assenting, sanctioning or consenting. It has been held as follows:

"9. From the Scheme of the Act, it is seen that the power of inquiry under Section 11 vests with the Collector who has to issue notice to the interested persons and hear the interested persons in the said inquiry. He also has to determine the measurements of the land in question and on the basis of material on record decide the compensation which in his opinion should be allowed for the land and if need be, he can also apportion the said compensation amongst the interested persons. The nature of inquiry which statutorily requires the interested parties of being heard and taking a decision based on relevant factors by the Collector shows the inquiry contemplated under Section 11 is quasi-judicial in nature, and the said satisfaction as to the compensation payable should be based on the opinion of the Collector and not that of any other person. Section 11 under the Act has not provided an appeal to any other authority as against the opinion formed by the Collector in the process of inquiry conducted by him. What is provided under the proviso to Section 11(1) is that the proposed award made by the Collector must have the approval of the appropriate Government or such officer as the appropriate Government may authorise in that behalf. In our opinion, this power of granting or not granting previous approval cannot

be equated with an appellate power. Black's Law Dictionary, 6th Edition, defines 'approval' to mean an act of confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. In the context of an administrative act, the word 'approval' in our opinion, does not mean anything more than either confirming, ratifying, assenting, sanctioning or consenting. It will be doing violence to the Scheme of the Act if we have to construe and accept the argument of learned counsel for the respondents that the word approval found in the proviso to Section 11(1) of the Act under the Scheme of the Act amounts to an appellate power. On the contrary, we are of the opinion that this is only an administrative power which limits the jurisdiction of the authority to apply his mind to see whether the proposed award is acceptable to the Government or not. In that process for the purpose of forming an opinion to approve or not to approve the proposed award the Commissioner may satisfy himself as to the material relied upon by the Collector but he cannot reverse the finding as if he is appellate authority for the purpose of remanding the matter to the Collector as can be done by an appellate authority; much less can the Commissioner exercising the said power of prior approval give directions to the statutory authority in what manner he should accept/appreciate the material on record in regard to the compensation payable. If such a power of issuing direction to the Collector by the Commissioner under the provision of law referred to hereinabove is to be accepted then it would mean that the Commissioner is empowered to exercise the said power to substitute his opinion to that of the Collector's opinion for the purpose of fixing the compensation which in our view is opposed to the language of Section 11 of the Act. Therefore, we are of the opinion that the Act has not conferred an appellate jurisdiction on the Commissioner under Section 15(1) proviso of the Act. This conclusion of ours is further supported by the scheme of the Act and Section 15A of the Act which is also introduced in the Act simultaneously with the proviso to Section 11(1) under Act 68 of 1984. By this amendment, we notice that the Act has given a power akin to the appellate power to the State Government to call for any records or proceedings of the Collector before any award is made, for the purpose of satisfying itself as to the legality or propriety of any finding or order passed or as to the irregularity of such proceedings and to pass such other order or issue such direction in relation thereto as it may think fit. Therefore it is not as if the acquiring authority namely the appropriate Government even if aggrieved by the fixation of compensation by the Collector it has no remedy. It can very well exercise the power under Section 15A and pass such orders as it thinks fit, of course, after affording an opportunity to such person who is likely to be prejudicially affected by such order of the appropriate Government, therefore, it is clear that the statute when it intended to give appellate or revisional power against the finding of the Collector in the fixation of compensation it has provided such power separately in Section 15A of the Act. Therefore, in our opinion, if the Commissioner while considering the proposed award of the Collector under the proviso to Section 11(1) of the Act to grant or not to grant approval if he thinks that the order of the Collector cannot be approved, he can at the most on the administrative side bring it to the notice of the appropriate Government to exercise its power under Section 15A of the Act, but he cannot as in the present case on his own exercise the said power because that power under Section 15A is confined to the appropriate Government

only. Therefore we have to negative the argument of Mr. Joshi that it is open to the Commissioner while considering the grant of approval to exercise the power either found in Section 15A of the Act or similar power exercising his jurisdiction under proviso to Section 11(1) of the Act."

65. Their lordships of the Hon'ble Supreme Court in the case of ***Ashok Kumar Sahu vrs. Union of India and others,*** reported in ***(2006) 6 SCC 704,*** have explained the expression "approval", "acceptance" and "ratification" as under:

> "18. The expression "approval" presupposes an existing order. "Acceptance" means communicated acceptance. A distinction exists between the expressions "approval" and "acceptance". Whereas in the latter, an application of mind on the part of the competent authority is sine qua non, approval of an order only envisages statutory entitlement. Approval of an order is required as directed by the statute. It can be given a retrospective effect. Even valid contract comes into being only after the offer is accepted and communicated. Where services of an employee are dispensed with, the order takes effect from the date when it is communicated and not from the date of passing of the order. {See State of Punjab vs. Amar Singh Harika [AIR (1966) SC 1313].}
>
> 19. We are, however, not oblivious of the fact that under certain circumstances, the expression, "approval" would mean to accept as good or sufficient for the purpose of intent. Ratification is noun, of the verb "ratify". It means the act of ratifying, confirmation, and sanction. The expression "ratify" means to approve and accept formally. It means to conform, by expressing consent, approval or formal sanction. "Approve" means to have or express a favourable opinion of to accept as satisfactory. In the instant case, there was no question of any ratification involved as wrongly assumed by the High Court. {See Maharashtra State Mining Corpn. Vs. Sunil, s/o Pundikarao Pathak [(2006) 5 SCC 96].}"

66. Their lordships of the Hon'ble Supreme Court in the case of ***Sant Lal Gupta and others vrs. Modern Cooperative Group Housing Society Limited and others,*** reported in ***(2010) 13 SCC 336,*** have held that "approval" means confirming, ratifying, assenting, sanctioning or consenting some act of another. The very act of approval means, the act of passing judgment, the use of discretion and determining as an adjudication therefrom unless limited by the context of the Statute. It has been held as follows:

> "10. Approval means confirming, ratifying, assenting, sanctioning or consenting to some act or thing done by another. The very act of approval means, the act of passing judgment, the use of discretion, and determining as an adjudication therefrom unless limited by the context of the Statute. (Vide:Vijayadevi Navalkishore Bhartia & Anr. v. Land Acquisition Officer & Anr., (2003) 5 SCC 83)."

67. The State Mission Director has apparently abdicated his authority and has permitted himself to be dictated by the Minister under whom he is working. He should have personally evaluated the data supplied to him and thereafter send it for approval of the High Powered Steering Committee. We reiterate that in the proceedings dated 29.7.2015, it is not stated that primarily the case of the Shimla town has been turned down on the pretext that it has not achieved its objective under the JnNURM Scheme and it has been sanctioned a new Scheme i.e. AMRUT. This ground has been taken in the reply filed by the State.

68. Their Lordships of the Hon'ble Supreme Court in the case of **Commissioner of Police, Bombay versus Gordhandas Bhanji** reported in ***AIR 1952 SC 16***, have held that it was clear that under rule 250, the Police Commissioner has been vested with the absolute discretion at any time to cancel or suspend any licence which had been granted under the Rules. But the power to do so was vested in him and not the State Government and could only be exercised by him at his discretion. Public orders, publically made, in exercise of a statutory authority can not be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind or what he intended to do. Public authorities can not play fast and loose with the powers vested in them, and persons to whose detriment orders are made, are entitled to know with exactness and precision, what they are expected to do or forebear from doing and exactly what authority is making the order. Their lordships have held as under:

> "9. An attempt was made by referring to the Commissioner's affidavit to show that this was really an order of cancellation made by him and that the order was his. order and not that of Government. We are clear that public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the acting and conduct of those to hum they are addressed and must be construed objectively with reference to the language used in the order itself.
>
> 10. Turning now to the language used, we are clear that by no stretch of imagination can this be construed to be an order which in effect says :--
>
> > "I, so and so, by virtue of the authority vested in me, do hereby order and direct this and that." If the Commissioner of Police had the power to cancel the license already grant- ed and was the proper authority to make the order, it was incumbent on him to say so in express and direct terms. Public authorities cannot play fast and loose with the powers vested in them, and persons to whose detriment orders are made are entitled to know with exactness and precision what they are expected to do or forbear from doing and exactly what authority is making the order.
>
> 17. It is clear to us from a perusal of these rules that the only person vested with authority to grant or refuse a license for the erection of a building to be used for pur- poses of public amusement is the Commissioner of Police. It is also clear that under Rule 250 he has been vested with the absolute discretion at any time to cancel or suspend any license which has been granted under the rules. But the power to do so is vested in him and not in the State Govern- ment and can only be exercised by him at his discretion. No other person or authority can do it."

69. Their Lordships of the Hon'ble Supreme Court in the case of **Chandrika Jha versus State of Bihar and others** reported in ***(1984) 2 SCC 41*** have held that only Registrar was empowered under relevant bye-law to constitute the first Board for a specific period and the Chief Minister was not competent to direct the Registrar to extend that period from time to time. The concerned minister was not competent to direct the Registrar to the manner of constituting the Board by forwarding list of persons to be nominated as members of the Board. Their lordships have held as under:

> "12. We fail to appreciate the propriety of the Chief Minister passing orders for extending the term of the first Board of Directors. Under the Cabinet system of Government, the Chief Minister occupies a position of pre-eminence and he virtually carries on the governance of the State. The Chief Minister may call for any information which is available to the Minister-in charge of any department and may issue necessary directions for carrying on the general administration of the State Government. Presumably, the Chief Minister dealt with the question as if it were an executive function of the State Government and thereby clearly exceeded his powers in usurping the statutory functions of the Registrar under bye-law 29 in extending the term of the first Board of Directors from time to time. The executive power of the State vested in the Governor under Art. 154 (1) connotes the residual or governmental functions that remain after the legislative and judicial functions are taken away. The executive power includes acts necessary for the carrying on or supervision of the general administration of the State including both a decision as to action and the carrying out of the decision. Some of the functions exercised under "executive powers" may include powers such as the supervisory jurisdiction of the State Government under s.65A of the Act. The Executive cannot, however, go against the provisions of the Constitution or of any law.
>
> 13. The action of the then Chief Minister cannot also be supported by the terms of s.65A of the Actwhich essentially confers revisional power on the State Government. There was no proceeding pending before the Registrar in relation to any of the matters specified in s.65A of the Act nor had the Registrar passed any order in respect thereto. In the absence of any such proceeding or such order, there was no occasion for the State Government to invoke its powers under s.65A of the Act. In our opinion, the State Government cannot for itself exercise the statutory functions of the Registrar under the Act or the Rules.

70. Their Lordships of the Hon'ble Supreme Court in the case of **State of U.P. and others versus Maharaja Dharmander Prasad Singh and others** reported in ***(1989) 2 SCC 505*** have held that exercise of power of revoking or cancelling the permission is akin to and partakes of a quasi-judicial complexion. In exercising that power the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority can not permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discretion. Their lordships have also held that relevance of the alleged factors which vitiate the decision making process of the executive should be reviewed by the Court. Their lordships have held as under:

> "55. It is true that in exercise of powers of revoking or cancelling the permission is akin to and partakes of a quasi-judicial complexion and that in exercising of the former power the authority must bring to bear an unbiased mind, consider impartially the objections raised by the aggrieved party and decide the matter consistent with the principles of natural justice. The authority cannot permit its decision to be influenced by the dictation of others as this would amount to abdication and surrender of its discre- tion. It would then not be the Authority's discretion that is exercised, but someone else's. If an authority "hands over its discretion to another body it acts ultra vires". Such an interference by a person or body extraneous to the power

would plainly be contrary to the nature of the power conferred upon the authority. De Smith sums up the position thus:

> "The relevant principles formulated by the courts may be broadly summarised as follows. The authority in which a discretion is vested can be compelled to exercise that discretion, but not to exercise it in any particular manner. In general, a discretion must be exercised only by the authority to which it is committed. That authority must genuinely address itself to the matter before it: it must not act under the dictation of another body or disable itself from exercising a discretion in each individual case. In the purported exercise of its discretion it must not do what it has been forbidden to do, nor must it do what it has not been authorised to do. It must act in good faith, must have regard to all relevant considerations and must not be swayed by irrelevant considerations, must not seek to promote purposes alien to the letter or to the spirit of the legislation that gives it power to act, and must not act arbitrarily or capriciously. Nor where a judgment must be made that certain facts exist can a discretion be validly exercised on the basis of an erroneous assumption about those facts. These several principles can conveniently be grouped in two main categories: failure to exercise a discretion, and excess or abuse of discretionary power. The two classes are not, however, mutually exclusive."

56. But the question is whether the issue of the show cause notice or the subsequent decision to cancel could be said to have been made at the behest or compulsion of Government. Shri Sorabjee refers to paragraphs 17 and 18 of Shri Kamal Pandey's letter dated 15.10.1985. We are not sure that this is a correct understanding of the position. The High Court did not see any casual connection between the Government's directive dated 15.10.1985 and the proceedings initiated by the Vice-Chairman on 9.1.1986. The High Court was of the view that directive confined itself to the can- cellation of the lease and as incidental thereto, required the stoppage of work pending decision whether the lease should be cancelled or not. This infact, was the basis for holding that the Vice-Chairman had no power to cancel. Lessees do not rely upon any subsequent directive to the Vice Chairman from the Government in the matter of revocation of the permission. The earlier directive dated 12.8.1985 from the Government to the Vice-Chairman spent itself out with the then Vice Chairman declining to act in accordance with it. There is no material to hold that Sri Govardhan Nair felt himself bound by that directive. Sri Sorabjee's contention based on an alleged surrender of discretion cannot, therefore, be upheld.

57. It has, therefore, to be held that the finding of the High Court that the Vice-Chairman had no competence to initiate proceedings to revoke the permission on the ground that the permission itself had been obtained by misrepresentation and fraud and on the ground that there were viola- tions of the conditions of the grant, appear to us to be unsupportable. The contention of the Respondent-Lessees that the show cause notice, dated 9.1.1986 and the cancellation order, dated 19.4.1986, are vitiated by a surrender of a discretion on the part of the Vice-Chairman cannot also be held to be well-founded. Sri Thakur's contention to the contrary on both these points would require to be accepted

60. However, Judicial review under Article 226 cannot be converted into an appeal. Judicial review is directed, not against the decision, but is confined to the examination of the decision making-process. In Chief Constable of the North Wales Police v. Evans, [1982] 1 WLR 1155 refers to the merits-legality distinction in judicial review. Lord Hail- sham said:

> "The purpose "of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment, reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court."

62. When the issue raised in judicial review is whether a decision is vitiated by taking into account irrelevant, or neglecting to take into account of relevant, factors or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question could reasonably have made such a decision, the judicial review of the decision making process includes examination, as a matter of law, of the relevance of the factors. In the present case, it is, however, not necessary to go into the merits and relevance of the grounds having regard to the view we propose to take on the point on natural justice.

71. Their lordships of the Hon'ble Supreme Court in **State of Bihar v. Subhash Singh** reported in (1997) 4 SCC 430, have held that the Constitution has devised permanent bureaucracy as part of the political executive. The normal principle that the permanent bureaucracy is accountable to the political executive is subject to judicial review. The doctrine of "full faith and credit" applied to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. The bureaucracy is also accountable for the acts done in accordance with the rules when judicial review is called to be exercised by the Courts. Their lordships have held as under:

> [3] The Constitution of India is the supreme law of the land, having flown from "We, the people of India, i.e., Bharat, having solemnly resolved to constitute India into a sovereign, socialist, secular democratic Republic. The sovereign power is distributed among the Legislature, the Executive and the Judiciary with checks and balances but not in water-tight rigid mound. In our democracy governed by the rule of law, the Judiciary has expressly been entrusted with the power of judicial reviews as sentinal in qui vive.Basically judicial review of administrative actions as also of legislation is exercised against the action of the State. Since the State or public authorities act in exercise of their executive or legislative power, they are amenable to the judicial review. The State, therefore, is subject to etat de droit, i.e. the State is submitted to the law which implies that all actions of the State or its authorities and officials must be carried out subject to the Constitution and within the limits set by the law, i.e., constitutionalism. In other words, the State is to obey the law. The more the administrative action in our welfare State expands widely touching the individuals, the more is the scope of judicial review of State action, Judicial review of administrative action is, therefore, an essential part of rule of law. The judicial control on administrative action, thus, affords the Courts to determine not only the constitutionality of the law but also the procedural part of administrative action as a part of judicial review. The Constitution has devised permanent bureaucracy as part of the political executive. By operation of Art. 53 read

> with Arts. 73 and 74 as well as Art. 154 read with Arts. 163 and 166, the business of the State is carried on in accordance with the rules of business issued by the President/the Governor, as the case may be, or the rules made for the subordinate officers in that behalf. The normal principle that the permanent bureaucracy is accountable to the political executive is subject to judicial review. The doctrine of "full faith and credit" applied to the acts done by the officers and presumptive evidence of regularity of official acts done or performed, is apposite in faithful discharge of duties to elongate public purpose and to be in accordance with the procedure prescribed. It is now settled legal position that the bureaucracy is also accountable for the acts done in accordance with the rules when judicial review is called to be exercised by the Courts. The hierarchical responsibility for the decision is their in-built discipline. But the Head of the Department/designated officer is ultimately responsible and accountable to the Court for the result of the action done or decision taken. Despite this, if there is any special circumstance absolving him of the accountability or if someone else is responsible for the action, he needs to bring them to the notice of the Court so that appropriate procedure is adopted and action taken. The controlling officer holds each of them responsible at the pain of disciplinary action. The object thereby is to ensure compliance of the rule of law.

72. Their Lordships of the Hon'ble Supreme Court in **Jagdish Prasad v. State of Rajasthan** reported in (2011) 7 SCC 789 have held that fairness has to be founded on reasons. Usually, the providing of Reasons demonstrates the concept of reasonableness but where the statutory rules provide the circumstances and criteria, ambit and methods by which the selection should be governed, they would become the yardstick of fairness.

73. Their Lordships of the Hon'ble Supreme Court in **Delhi Airtech Services (P) Ltd. v. State of U.P.** reported in (2011) 9 SCC 354 have held that the principles of public accountability and transparency in State action are applicable to cases of executive or statutory exercise of power, besides requiring that such actions also not lack bona fides. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable for both their inaction and irresponsible actions. Their lordships have held as under:

> 212. It was also the duty of respondent No.2 to ensure that the payments were made to the claimants prior to taking of possession but, in any case, it was an unequivocal statutory obligation on the part of the State/Collector to ensure that the payments were made to the claimants in terms of Section 17(1) read with Section 17(3A) prior to taking of possession. No justification whatsoever had been advanced and can be advanced for such an intentional default and the casual attitude of the concerned officers/officials in the State hierarchy.
>
> 213. These authorities are instrumentalities of the State and the officers are empowered to exercise the power on behalf of the State. Such exercise of power attains greater significance when it arises from the statutory provisions. The level of expectation of timely and just performance of duty is higher, as compared to the cases where the power is executively exercised in discharge of its regular business. Thus, all administrative norms and principles of fair performance are applicable to them with equal force, as they are to the Government department, if not with a greater rigour. The well established precepts of public trust and public accountability are fully

applicable to the functions which emerge from the public servants or even the persons holding public office.

215. The concept of public accountability and performance of functions takes in its ambit, proper and timely action in accordance with law. Public duty and public obligation both are essentials of good administration whether by the State or its instrumentalities. In the case of Centre for Public Interest Litigation & Anr. v. Union of India & Anr, 2005 8 SCC 202, this Court declared the dictum that State actions causing loss are actionable under public law. This is a result of innovation, a new tool with the courts which are the protectors of civil liberties of the citizens and would ensure protection against devastating results of State action. The principles of public accountability and transparency in State action are applicable to cases of executive or statutory exercise of power, besides requiring that such actions also not lack bona fides. All these principles enunciated by the Court over a passage of time clearly mandate that public officers are answerable for both their inaction and irresponsible actions. If what ought to have been done is not done, responsibility should be fixed on the erring officers; then alone, the real public purpose of an answerable administration would be satisfied.

74. Their Lordships of the Hon'ble Supreme Court in **Maharashtra Land Development Corpn. v. State of Maharashtra** reported in (2011) 15 SCC 616, have laid down grounds for judicial review i.e. Wednesbury principle and proportionality as under:

59. The Wednesbury principle was enunciated by Lord Greene MR in Associated Provincial Picture Houses Limited v. Wednesbury Corporation, 1947 2 AllER 680. To quote the learned Judge on the principle enunciated:

"What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question; the authority must disregard those irrelevant collateral matters."

60. However, the Wednesbury principle of reasonableness has given way to the doctrine of proportionality. Through his decision in the celebrated case of Council of Civil Services Unions v. Minister for the Civil Services, 1985 AC 374, Lord Diplock widened the grounds of judicial review. He mainly referred to three grounds upon which administrative action is subject to control by judicial review. The first ground being "illegality", the second "irrationality" and the third 'procedural impropriety'. He also mentioned that by further development on a case to case basis, in due course, there may be other grounds for challenge. He particularly emphasized the principles of proportionality. Thus, in a way, Lord Diplock replaced the language of 'reasonableness' with that of 'proportionality' when he said:

"By 'irrationality' I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness'...It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no

sensible person who had applied his mind to the question to be decided could have arrived at it...."

61. The principle of proportionality envisages that a public authority ought to maintain a sense of proportion between particular goals and the means employed to achieve those goals, so that administrative action impinges on the individual rights to the minimum extent to preserve public interest. Thus implying that administrative action ought to bear a reasonable relationship to the general purpose for which the power has been conferred. The principle of proportionality therefore implies that the Court has to necessarily go into the advantages and disadvantages of any administrative action called into question. Unless the impugned administrative action is advantageous and in public interest such an action cannot be upheld. At the core of this principle is the scrutiny of the administrative action to examine whether the power conferred is exercised in proportion to the purpose for which it has been conferred. Thus, any administrative authority while exercising a discretionary power will have to necessarily establish that its decision is balanced and in proportion to the object of the power conferred.

65. In Charanjit Lamba vs. Commanding Officer, Southern Command and Ors, 2010 AIR(SC) 2462, it was held that

"The constitutional requirement for judging the question of reasonableness and fairness on the part of the statutory authority must be considered having regard to the factual matrix obtaining in each case. It cannot be put in a straitjacket formula. It must be considered keeping in view the doctrine of flexibility. Before an action is struck down, the court must be satisfied that a case has been made out for exercise of power of judicial review. We are not unmindful of the development of the law that from the doctrine of Wednesbury unreasonableness, the court is leaning towards the doctrine of proportionality...."

66. The test of proportionality is therefore concerned with the way in which the decision-maker has ordered his priorities, i.e., the attribution of relative importance to the factors in the case. Thus, it is not so much the correctness of the decision that is called into question, but the method to reach the same. In this context, we are to see if the decision of the respondent-State in considering the disputed property to be automatically vested with the Government is commensurate with public interests, in a way that affects individual rights in a minimal way.

67. The decision of the Government, as we have elucidated earlier, has been guided by the provisions in the Act, which seek to conserve and protect private forests in the State of Maharashtra that have been facing severe depletion and exploitation. Therefore, the Act, which provides for the vesting of private forests with the Government, does so in the general interests of the public in tune with principles of environmental protection and sustainable development, to which we have alluded at the outset.

69. Therefore, after giving thoughtful consideration to the issues, we find that the appellant has failed to make out any case before us for interference with the orders passed by the High Court. Hence, in the light of the aforesaid issues, principles and precedents in question, we are of the considered opinion that the appeal is without merit and deserves to be dismissed.

75. Their Lordships of the Hon'ble Supreme Court in **Sanchit Bansal v. Joint Admission Board** reported in (2012) 1 SCC 157, have held that An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. Their lordships have held as under:

> 28. An action is said to be arbitrary and capricious, where a person, in particular, a person in authority does any action based on individual discretion by ignoring prescribed rules, procedure or law and the action or decision is founded on prejudice or preference rather than reason or fact. To be termed as arbitrary and capricious, the action must be illogical and whimsical, something without any reasonable explanation. When an action or procedure seeks to achieve a specific objective in furtherance of education in a bona fide manner, by adopting a process which is uniform and non-discriminatory, it cannot be described as arbitrary or capricious or mala fide.

76. Their Lordships of the Hon'ble Supreme Court in **Dipak Babaria v. State of Gujarat** reported in (2014) 3 SCC 502, have held that The Government must defend its action on the basis of the order that it has passed, and it cannot improve its stand by filing subsequent affidavits. Their lordships have held as under:

> 64. That apart it has to be examined whether the Government had given sufficient reasons for the order it passed, at the time of passing such order. The Government must defend its action on the basis of the order that it has passed, and it cannot improve its stand by filing subsequent affidavits as laid down by this Court long back in Commissioner of Police, Bombay vs. Gordhandas Bhanji, 1952 AIR(SC) 16 in the following words:-
>
> "Public orders, publicly made, in exercise of a statutory authority cannot be construed in the light of explanations subsequently given by the officer making the order of what he meant, or of what was in his mind, or what he intended to do. Public orders made by public authorities are meant to have public effect and are intended to affect the actings and conduct of those to whom they are addressed and must be construed objectively with reference to the language used in the order itself."
>
> This proposition has been quoted with approval in paragraph 8 by a Constitution Bench in Mohinder Singh Gill vs. Chief Election Commissioner, 1978 1 SCC 405 wherein Krishna Iyer, J. has stated as follows:-
>
> "8. The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out."
>
> 65. In this context it must be noted that the Revenue Minister's direction merely states that it is a private land, and the Governments letter dated 18.12.2009 speaks of the financial incapability of Inidgold. Neither the letter dated 18.12.2009 from the Government to the Collector, nor the order passed by the Deputy Collector on 15.1.2010 mention anything about:
>
> 1. the mineral policy of the Government of Gujarat.

> 2. the time taking nature of the process of acquiring the land and re-allotting it.
>
> 3. That the second sale was under the authority of the Collector available to him under the first proviso to Section 89(1) read with condition no. (4) of the permission dated 1.5.2003 granted to Indigold to purchase the concerned lands.
>
> In the absence of any of these factors being mentioned in the previous orders, it is clear that they are being pressed into service as an after-thought. The Government can not be allowed to improve its stand in such a manner with the aid of affidavits.

77. Their Lordships of the Hon'ble Supreme Court in **Common Cause v. Union of India** reported in (2014) 6 SCC 552, have held that this Court is duty bound to interfere whenever the Government acts in a manner, which is unreasonable and contrary to public interest. Their lordships have held as under:

> [9] Further, it is the stand of the petitioners that a petition filed in public interest cannot be held to be an adversarial system of adjudication and the petitioners in their case merely brought it to the notice of the Court as to how and in what manner the public interest is being jeopardized by arbitrary and capricious action of the authorities and, therefore, the principle of constructive res judicata cannot be made applicable in each and every public interest litigation, irrespective of the nature of litigation itself and its impact on the society and the larger public interest, which is being served. Placing reliance on the reasoning rendered in the aforesaid verdict the objection raised herein stands overruled.
>
> [19] Although, as asserted by the respondents herein that it is not the prima facie jurisdiction of this Court to examine what constitutes as "public purpose" or not however, as per judicial precedents in Kasturi Lal Lakshmi Reddy and other case laws as stated above, this Court is duty bound to interfere whenever the Government acts in a manner, which is unreasonable and contrary to public interest. In succinct, the Government cannot act in a manner, which would benefit a private party at the cost of the State; such an action would be both unreasonable and contrary to public interest. The present writ petitions challenge the Government advertisements of political nature at the cost of the public exchequer on the ground that they are in violation of Articles 14 and 21 of the Constitution. We shall examine and scrutinize the situation as portrayed by the petitioners as to whether there is need for specific guidelines to be issued by this Court to regulate the same.

78. The State Mission Director has acted mechanically and blindly not even prima facie satisfying himself whether the criteria laid down has been followed by the ULBs. The entire exercise seems to be a formality. The decision has been taken in non-transparent, opaque and tainted manner. The proceedings dated 15.7.2015 and 29.7.2015 are merely an eye wash. The proceedings have not been authenticated. No authority has put their signatures on the proceedings dated 15.7.2015 as well as 29.7.2015 as per the record made available to us. Now, as far as the proceedings dated 29.7.2015 are concerned, there is an attendance chart, but there is no attendance chart for the meeting held on 15.7.2015. The decision taken is unfair. There is procedural impropriety besides irrationality and capriciousness. Initially, it was stated that the meeting could not be convened due to shortage of time but the meeting was convened at 4.00 pm on 29.7.2015. Though, it has come in the noting portion that the members be informed telephonically but it was an

impossible situation since no officer except from Shimla or surrounding could attend the meeting at 4.00 pm. We are unable to understand why there was tearing hurry to complete the proceedings on 29.7.2015 itself when it was open to seek further extension from respondents No. 1 and 2 for identifying smart city. Greater the power to decide, higher is the responsibility to be just and fair. Every officer in the hierarchy of the State by virtue of his being public officer or public servant is accountable for his decisions to the public as well as to the State. The Principles of public accountability and transparency in State action are applicable to the cases of executive or statutory exercise of power.

79. In the instant case, the High Powered Committee has ignored the relevant considerations in its meeting held on 29.7.2015. The Committee was required to consider the entire gamut on the basis of the guidelines framed instead of being dictated. The manner in which the proceedings have been held, including the meeting on 15.7.2015 and 29.7.2015, smacks of bad faith. We have already considered at depth that the State Mission Director has not evaluated the Form-II received from the ULBs. He has not placed it before the High Powered Steering Committee for approval. The notings reveal that earlier it was suggested that the meeting could not have been held on 29.7.2015, but the same was held on the same day in a hush-hush and hurried manner The members of the Committee were not even informed. The purpose of High Powered Committee was to have broad based discussion. The petitioner has also alleged specific mala fides against the Minister concerned, but he has not been made party. However, there is sufficient material to reflect that there is malice in the proceedings. It also amounts to colourable exercise of power since the power vested in the Members of the Committee has been used for the purpose, other than for which it was supposed to be. The State Mission Director has abdicated/surrendered his powers by not at all evaluating the self appraisal sent by the Urban Local Bodies, as if, he was being dictated by some other agency.

80. The proceedings dated 15.7.2015 and 29.7.2015 are also arbitrary, unreasonable, capricious and irrational. The powers vested in the bureaucracy must be exercised in larger public interest and not to serve the private interest of any individual in the hierarchy. There must be fairness and reasonableness while forming the opinion. The power vested in the High Powered Committee has been used for improper and ulterior purposes. There is misdirection of fact and law, both, by the High Powered Committee. There is non-application of mind by all the Members of the Committee since they have not even insisted for the production of the material before them after evaluation by the State Mission Director. Members like Mayor of Shimla town, Joint Secretary (UD) and others have been left out from the deliberations. The meeting was to be convened by giving sufficient time to all the stakeholders to be present in the meeting, including the nominee of the Central Government. The High Powered Committee was supposed to approve the evaluation undertaken by the Mission Director, as per the Scheme of the Act. The Committee has usurped the powers of State Mission Director by straightway taking up the matter without the evaluation placed before it. It is a classic case of blatant abuse of power by the various functionaries of the State by considering extraneous considerations and overlooking the basic issues. Key responsibilities of the HPSC, as per Notification dated 25.6.2015 (annexure P-7) were to provide guidance to the mission and provide State level platform for exchange of ideas pertaining to development of smart cities, to oversee the process of first stage intra-state competition of the basis of stage criteria and to review the SCPs and send to the MoUD for participation in the challenge. It has failed to discharge its responsibilities even as per Notification dated 25.6.2015 (annexure P-7).

81. The officers should never surrender their discretion. Their lordships in **Tarlochan Dev Sharma v. State of Punjab** reported in (2001) 6 SCC 260 have held that the

Secretaries are not supposed to mortgage there own discretion, volition and decision making authority and be prepared to give way or being pushed back or pressed ahead at the behest of politicians for carrying out commands having no sanctity in law. It is high time to come out of syndrome of 'to be or not to be'. Bureaucrats should take independent decisions in the letter and spirit of the constitutional scheme in order to strengthen the democracy. Following the dictates of politicians without due application of mind would erode the democracy. They must have the courage to stand up and not to bend in order to uphold the 'rule of law'. They should take independent decisions as per their own judgment.

82. Accordingly, in view of the analysis and discussion made hereinabove, the present writ petition is allowed. The proceedings of first meeting held on 15.7.2015 and 2nd meeting held on 29.7.2015 of the State Level High Powered Steering Committee (HPSC) and communications dated 30.7.2015 and 31.7.2015 sent to the Government of India as well as Annexure P-2 dated 27.8.2015 are quashed and set aside and also all the consequential proceedings and decisions including submission of DPR by the State Government to the Government of India. Respondent Nos. 3 and 4 are directed to redo the entire exercise as per the observations made hereinabove in letter and spirit of the Mission Statement and Guidelines for selecting Smart Cities Mission within two weeks and thereafter respondents No. 3 and 4 shall forthwith send new recommendations to respondents No.1 and 2. Respondent Nos. 1 and 2 are further directed to treat it as a special case and process the same with other applicants.

83. Alas! The decision to exclude Shimla city and include, Dharamshala town, in the list of potential Smart Cities, has not been taken 'smartly'.

****

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

Smt. Champa and others . .....Appellants.

Versus

Sh. Vinod Kumar Sharma and others ...Respondents

FAO (MVA) No. 156 of 2009
Date of decision: 18th December, 2015

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 25 years which was duly established by matriculation certificate- Tribunal had erred in applying the multiplier of '14', whereas, multiplier of '16' is applicable- claimants are entitled to compensation of Rs. 2000x12x16= Rs.3,84,000/- towards loss of dependency. (Para-4 and 5)

Cases referred:

Munna Lal Jain and another versus Vipin Kumar Sharma and others 2015 AIR SCW 3105
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: M/s Vijay Sharma and O.P. Negi, Advocates.
For the respondents: Mr.Mohan Singh, Advocate, for respondent No.2.
Mr. J.S. Bagga, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral)

This appeal is directed against the judgment and award dated 21.11.2008, made by the Motor Accident Claims Tribunal-I Solan, District Solan, H.P. in Petition No. 6-S/2 of 2007, titled Smt. Champa and others versus Shri Vinod Kumar Sharma and others, for short "the Tribunal", whereby compensation to the tune of Rs.3,66,000/- alongwith interest @ 7.5% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Insurer, owner and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The claimants have questioned the impugned award on the ground that the Tribunal has fallen in an error in assessing the compensation. The learned counsel for the appellants argued that the age of the deceased was 24 years at the time of the accident, which is duly pleaded in the claim petition and is duly supported by the documents, i.e., postmortem report on the file, but without any basis, the Tribunal has recorded the age of deceased as 30 years in para 15 of the impugned award.

4. I have gone through the impugned award. I wonder how the Tribunal has come to the conclusion that the age of the deceased was 30 years. At this stage, Mr. J.S. Bagga, learned counsel for respondent No. 3 made available a copy of matriculation certificate of the deceased, across the Board, made part of the file. The date of birth of deceased is recorded as 8.10.1982 in the said certificate. Meaning thereby he was 25 years of age at the time of the accident.

5. Keeping in view the age of the deceased read with **Munna Lal Jain and another** versus **Vipin Kumar Sharma and others** reported in **2015 AIR SCW 3105**, the multiplier is to be applied according to the age of the deceased. The multiplier of "16' was applicable, keeping in view **Sarla Verma and others versus Delhi Transport Corporation and 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**, but the Tribunal has applied the multiplier of "14". Thus multiplier of "16" is applied in this case. Thus, the claimants have lost source of dependency to the tune of Rs.2000x12x16= Rs.3,84,000/-.

6. The amount of Rs.30,000/- awarded by the Tribunal on other heads is maintained.

7. Thus, in all, the claimants are held entitled to Rs.3,84,000+Rs.30,000= Rs.4,14,000/-, with interest as awarded by the Tribunal.

8. Having said so, the impugned award is modified as indicated hereinabove.

9. The insurer is directed to deposit the amount, if not already deposited, including the enhanced amount, in this Registry within six weeks from today. The Registry, on deposit of the amount, is directed to release the same in favour of the claimants, strictly in terms of the conditions contained in the impugned award, through payees cheque account.

10. The appeal stands disposed of accordingly.

11. Send down the record forthwith, after placing a copy of this judgment.

****

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

Des Raj and another ...Appellants.
Versus
Vijay Jamwal and others ...Respondents.

FAO No. 133 of 2009
Decided on: 18.12.2015

Motor Vehicles Act, 1988- Section 166- Owner-insured challenged the award on the ground that the right of recovery to the insurer was wrongly given- the Alto car having gross weight of 1165 kg had met with an accident and the offending driver had licence to drive light motor vehicle-held that, the offending vehicle fell in the category of light motor vehicle hence endorsement of PSV on the licence of the offending driver was not required- further held that, since the offending driver had valid licence to drive the offending vehicle and owner-insured has not committed willful breach- the Tribunal erred in granting right to recovery to the insurer- appeal allowed.(Para 5 to 15)

Cases referred:

National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors., 2008 AIR SCW 906

Kulwant Singh & Ors. versus Oriental Insurance Company Ltd., JT 2014 (12) SC 110

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Court 1531

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

For the appellants: Mr. Ajay Sharma, Advocate.

For the respondents: Respondents No. 1 and 4(a) to 4 (c) already ex-parte.
Mr. Amit Jamwal, Advocate, vice Mr. Praveen Chandel, Advocate, for respondent No. 2.
Mr. Jagdish Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Challenge in this appeal is to the judgment and award, dated 07.01.2009, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (for short "the Tribunal") in M.A.C.P. No. 69-B/II-2005, titled as Vijay Jamwal versus Des Raj and others, whereby compensation to the tune of Rs.3,69,000/-came to be awarded in favour of the claimants and the insurer was directed to satisfy the award at the first instance with right of recovery (for short "the impugned award").

2. The claimant-injured and the insurer 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 appellants, i.e. the owner-insured and the driver of the offending vehicle, have questioned the impugned award on the ground that the Tribunal has fallen in an error in granting right of recovery to the insurer

4. Thus, the only question to be determined in this appeal is - whether the Tribunal has rightly granted right of recovery in favour of the insurer? The answer is in the negative for the following reasons:

5. Admittedly, the driver was driving the offending vehicle, i.e. Alto Car, bearing registration No. HP-01 D-0459, at the relevant point of time, the gross vehicle weight of which is 1165 kilograms, as per the Certificate of Registration, Ext. RW-1/A, is a light motor vehicle.

6. 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."

7. 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.

8. At the cost of repetition, definition of "light motor vehicle" includes the words "transport vehicle" also. Thus, the definition, as given, mandates the "light motor vehicle" is itself a "transport vehicle", whereas the definitions of other vehicles are contained in Sections 2(14), 2 (16), 2 (17), 2 (18), 2 (22), 2 (23) 2 (24), 2 (25), 2 (26), 2 (27), 2 (28) and 2 (29) of the MV Act. In these definitions, the words "transport vehicle" are neither used nor included and that is the reason, the definition of "transport vehicle" is given in Section 2 (47) of the MV Act.

9. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> "The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-
>
> "13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.
>
> .....
>
> 17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."
>
> In the given circumstances of the case PSV endorsement was not required at all."

10. The Apex Court in a 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. The Apex Court in the latest judgment in the case titled as **Kulwant Singh & Ors. versus Oriental Insurance Company Ltd.,** reported in **JT 2014 (12) SC 110,** held that PSV endorsement is not required.

12. Having glance of the above discussions, I hold that the endorsement was not required.

13. The Apex Court in the case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Court 1531,** has laid down principles, how can insurer 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 the available defence(s) raised in the said 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."

14. 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."

15. Viewed thus, the Tribunal has fallen in an error in holding that the driver of the offending vehicle was not having a valid and effective driving licence to drive the offending vehicle and the owner-insured has committed willful breach. Accordingly, it is held that the driver of the offending vehicle was having a valid and effective driving licence to drive the same, the owner-insured has not committed any willful breach and the insurer is saddled with liability.

16. At this stage, learned counsel for the insurer stated at the Bar that amount awarded is excessive and the rate of interest is also on the higher side.

17. I have gone through the assessment made and am of the considered view that the compensation came to be rightly assessed at Rs.3,69,000/-, details of which have been given in paras 8 to 12 of the impugned award, needs no interference. However, the rate of interest, on the face of it, is on the higher side. Accordingly, the rate of interest is reduced and it is held that the claimant-injured is entitled to compensation to the tune of Rs.3,69,000/- with interest @ 7.5% per annum from the date of the impugned award till its realization.

18. Having glance of the above discussions, the appeal is disposed of and the impugned award is modified, as indicated hereinabove.

19. Registry is directed to release the statutory amount in favour of the appellants after proper identification.

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

****

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

FAO No.342 of 2009 with FAO No.390 of 2009.
Reserved on : 11.12.2015.
Decided on : 18.12.2015

1.	**FAO No.342 of 2009**	
	Jasbir Singh	.....Appellant
	Versus	
	Satwant Kaur and others	..... Respondents
2.	**FAO No.390 of 2009**	
	Satwant Kaur and others	.....Appellants
	Versus	
	Jasbir Singh and another	..... Respondents

Motor Vehicles Act, 1988- Section 149- Claimants pleaded that deceased was walking alongside the road- tractor loaded with sugarcane turned turtle and sugarcane fell on the deceased as a result of which he sustained injuries- respondent denied the contents of the claim petition evasively- Insurance Company admitted that deceased died because of negligence while crossing the road – it amended its reply and pleaded that deceased was travelling on the tractor as a gratuitous passenger- claimants led the evidence to prove that deceased was walking on the road- respondent examined Investigator who had concluded that deceased was sitting on the tractor at the time of accident after conducting investigations - Investigator also admitted that he had arrived at this conclusion on the basis of the statement of PW-3, when PW-3 had specifically stated on oath that deceased was walking on the roadside, the conclusion of Investigator cannot be relied upon- Tribunals have to decide the compensation case on the basis of preponderance of the probabilities and not on the basis of proof beyond reasonable doubt- held, that in these circumstance, Insurance Company was rightly held liable to pay compensation. (Para-10 to 26)

Motor Vehicles Act, 1988- Section 166- Deceased was 60 years of age- Tribunal had applied multiplier of '5', whereas, multiplier of '6' is applicable- deceased was a sculptor by profession- no satisfactory evidence was led to prove his income by guess work- it can be held that deceased was earning Rs.4,500/- per month- after deducting 1/3rd of the income towards personal expenses, loss of dependency is Rs.3,000/- per month- claimants are entitled to Rs.3,000/- x 12 x 6 = Rs.2,16,000/- under the head loss of source of dependency- in addition, Rs.10,000/- each awarded under the heads 'loss of estate', 'loss of love and affection' and 'funeral expenses'- thus, total compensation of Rs.2,46,000/- is awarded along with interest. (Para 33 to 36)

Cases referred:

Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646.

Savita vs. Bindar Singh & others, 2014 AIR SCW 2053

Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627

Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

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) 312

FAO No.342 of 2009:

For the appellant:	Mr.Bimal Gupta, Senior Advocate, with Mr.Vineet Vashisth, Advocate.
For the respondents:	Mr.Ramakant Sharma, Senior Advocate, with Ms.Soma Thakur, Advocate, for respondents No.1 to 3.
	Mr.Ashwani K. Sharma, Senior Advocate, with Ms.Monika Shukla, Advocate, for respondent No.4.

FAO No.390 of 2009:

For the appellant:	Mr.Ramakant Sharma, Senior Advocate, with Ms.Soma Thakur, Advocate.
For the respondents:	Mr. Mr.Bimal Gupta, Senior Advocate, with Mr.Vineet Vashisth, Advocate, for respondent No.1.
	Mr.Ashwani K. Sharma, Senior Advocate, with Ms.Monika Shukla, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Both these appeals are directed against the award, dated 15th May, 2009, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.65,000/, alongwith interest at the rate of 7.5% per annum, came to be granted in favour of the claimant and the owners and the driver came to be saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the claimant Jasbir Singh has questioned the impugned award by the medium of FAO No.342 of 2009 on the ground of adequacy of compensation, while the owners (Satwant Kaur and Paramjeet Singh) and the driver (Gurdev Singh) have assailed the impugned award in FAO No.390 of 2009 on the ground that the Tribunal has fallen in error in saddling them with the liability and has wrongly exonerated the insurer.

Facts:

3. Claimant Jasbir Singh invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), for grant of compensation to the tune of Rs.6.00 lacs, as per the break-ups given in the claim petition. It was averred that on 20.12.2005, at about 1.30 p.m., father of the claimant, namely, Bhajan Singh, aged about 60 years, was walking alongside the road, when a tractor bearing No.HP-17A-5033, owned jointly by Satwant Kaur and Paramjeet Singh (original respondents No.1 and 2), being driven by the driver, namely, Gurdev Singh (appellants in FAO No.390 of 2009), fell upon the said Bhajan Singh, as a result of which he sustained injuries and later on succumbed to the same. FIR No.428 of 2005, under Sections 279, 337 and 304-A of the Indian Penal Code, (for short, IPC), came to be registered at Police Station, Paonta Sahib. It was further averred that the deceased was sculptor by profession and was earning Rs.9,000/- per month. Thus, the claim petition filed by the claimant Jasbir Singh.

4. Respondents resisted the claim petition by filing replies.

5. On the pleadings of the parties, the Tribunal framed the following issues:

"1. Whether petitioner Jasbir Singh is the heir of deceased Bhajan Singh, who died in the accident, as alleged? OPP

2. Whether Bhajan Singh died in a vehicular accident involving tractor No.HP-17-A-5033 on 20-12-2005 at about 1.30 PM at place Bata Bridge being driven by respondent No.3 Gurdev Singh in a rash and negligent manner, as alleged? OPP

3. To what amount of compensation the petitioner is entitled to? OPP

4. Whether the present petition is the outcome of collusion between petitioner and respondents No.1 to 3, as alleged? OPR-4

5. Whether deceased himself was negligent and responsible for his death, as alleged? OPR-4.

6. Whether the tractor was being plied in contravention of the terms and conditions of insurance policy, as alleged? OPR-4.

7. Whether the driver of tractor did not possess a valid and effective driving licence at the time of accident, as alleged? OPR-4

8. Whether the tractor was not insured for carrying passengers and no extra premium was paid to the insurance company for covering the risk of passengers traveling in the trolley, as alleged? OPR-4.

9. Relief."

6. In order to prove his case, the claimant examined PW-1 MHC Arun Kumar and PW-3 Shri Dharam Singh, while the claimant himself stepped into the witness box as PW-2. On the other hand, respondents examined RW-1 ASI Sakir Khan, RW-2 Satwant Kaur (owner of the vehicle) and RW-3 Mehar Singh. Parties also proved on record Ext.PW-1/A (copy of FIR), Ext.PW-2/A (affidavit of PW-2 Jasbir Singh), Ext.PW-2/B (copy of the death certificate), Ext.PW-2/C (copy of the postmortem report), Ext.PW-3/A (affidavit of PW-3 Dharam Singh), Ext.PA (certified copy of the judgment in civil suit), Ext.RX (copy of the insurance policy), Ext.RW-2/A (affidavit of RW-2 Satwant Kaur), Ext.RW-2/B (copy of the RC), Ext.RW-2/C (copy of insurance policy), Ext.RW-2/D (uncertified copy of the driving licence), Ext.RW-3/A (copy of the driving licence register) and Ext.R1 (copy of the certificate).

7. The Tribunal after scanning the pleadings as well as the entire evidence held that the claimant was entitled for compensation to the tune of Rs.65,000/- alongwith interest at the rate of 7.5% per annum, and saddled the owners and the driver with the liability.

8. Feeling aggrieved, the claimant, and the owners and the driver have filed the instant appeals, as detailed above.

9. The following two questions arise for determination in the instant appeals:

i) Whether the Tribunal has rightly exonerated the insurer from the liability?

ii) Whether the amount of compensation awarded by the Tribunal is inadequate?

10. As far as the first question is concerned, the same is to be decided in favour of the owners and the driver for the following reasons. The claimant has specifically pleaded in the Claim petition that the deceased, at the relevant point of time, was walking alongside the road and the offending tractor loaded with sugarcane turned turtle and the sugarcane fell on the deceased as a result of which he sustained injures and succumbed to the same.

11. Respondents have evasively denied all the paragraphs of the Claim Petition. The insurance Company (original respondent No.4), in its first reply, has admitted that the deceased died because of his own negligence while crossing the road. However, thereafter, the insurance company amended its reply and pleaded therein that the deceased was traveling on the offending tractor as a gratuitous passenger. Thus, it was pleaded by the insurance company that the offending tractor was being plied in violation of the provisions of Sections 147 and 149 of the Act read with the terms and conditions contained in the insurance policy.

12. The claimant, in order to prove that the deceased, at the time of accident, was walking alongside the road, has stepped into the witness box as PW-2 and has stated that the deceased was not traveling on the offending tractor but was walking by the side of the road.

13. The claimant has also examined PW-3 Dharam Singh, who had lodged the FIR Ext.PW-1/A immediately after the accident had taken place. This witness has clearly stated that he had witnessed the accident and that the offending tractor, all of a sudden, turned turtle and the sugarcane fell on the deceased, who was standing beside the road.

14. On the other hand, the learned counsel for the insurer has relied heavily on the statement of RW-1 Sakir Khan, who had conducted the investigation and concluded that

the deceased was sitting on the tractor at the time of accident. In cross examination, RW-1 Sakir Khan has specifically stated that he reached at the conclusion on the basis of the statement made by Dharam Pal PW-3, who lodged the FIR of the accident.

15. Thus, the statement of PW-3 Dharam Pal was the sole basis for RW-1 Sakir Khan to conclude that the deceased was sitting on the tractor at the time of the accident. However, the said Dharam Pal, while appearing as PW-3, as has been discussed supra, has explicitly stated that the deceased was on the side of the road at the time of accident. The owner of the offending tractor, namely, Satwant Kaur (original respondent No.1) has specifically stated that the deceased was walking by the side of the road at the time of accident. Not only this, the insurer, in its first reply, though amended subsequently, admitted that the accident had occurred due to the negligence on the part of the deceased inasmuch as the deceased, all of a sudden, appeared from the road side, in front of the moving tractor.

16. From the above, it is, prima facie, established that the deceased was not traveling on the tractor, but was walking on the side of the road when the offending tractor turned turtle and the sugarcane fell on him, as a result of which he died.

17. It is beaten law of the land that the Courts, while determining the cases of compensation in vehicular accidents, must not succumb to the niceties and hyper technicalities of law. It is also well established principle of law that negligence in compensation cases has to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt. Furthermore, the claimants claiming compensation in terms of Section 166 of the Act is not to be seen as an adversial litigation, but is to be determined while keeping in view the aim and object of granting compensation.

18. My this view is fortified by the judgment of the Apex Court in **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 SCC 646**.

19. The Apex Court in **Savita vs. Bindar Singh & others, 2014 AIR SCW 2053,** has held that at the time of fixing compensation, courts should not succumb to niceties or technicalities of law. It is apt to reproduce paragraph 6 of the said decision hereunder:

> "6. After considering the decisions of this Court in Santosh Devi (Supra) as well as Rajesh v. Rajbir Singh (supra), we are of the opinion that it is the duty of the Court to fix a just compensation. At the time of fixing such compensation, the court should not succumb to the niceties or technicalities to grant just compensation in favour of the claimant. It is the duty of the court to equate, as far as possible, the misery on account of the accident with the compensation so that the injured or the dependants should not face the vagaries of life on account of discontinuance of the income earned by the victim. Therefore, it will be the bounden duty of the Tribunal to award just, equitable, fair and reasonable compensation judging the situation prevailing at that point of time with reference to the settled principles on assessment of damages. In doing so, the Tribunal can also ignore the claim made by the claimant in the application for compensation with the prime object to assess the award based on the principle that the award should be just, equitable, fair and reasonable compensation."

20. A reference may also be made to the decision of the Apex Court in **Sohan Lal Passi v. P.Sesh Reddy and others, AIR 1996 Supreme Court 2627,** in which, in paragraph 12, it was observed that the courts, while deciding claim petitions, must keep in

mind that the right of the claimants is not defeated on technical grounds. Relevant portion of paragraph 12 of the said decision is reproduced hereunder:

> "12. ..... While interpreting the contract of insurance, the Tribunal and Courts have to be conscious of the fact that right to claim compensation by heirs and legal representatives of the victims of the accident is not defeated on technical grounds. Unless it is established on the materials on record that it was the insured who had wilfully violated the condition of the policy by allowing a person not duly licensed to drive the vehicle when the accident took place, the insurer shall be deemed to be a judgment debtor in respect of the liability in view of sub-section (1) of Section 96 of the Act. It need not be pointed out that the whole concept of getting the vehicle insured by an insurance company is to provide an easy mode of getting compensation by the claimants, otherwise in normal course they had to pursue their claim against the owner from one forum to the other and ultimately to execute the order of the Accident Claims Tribunal for realisation of such amount by sale of properties of the owner of the vehicle. The procedure and result of the execution of the decree is well known."

21. This Court also, in the recent past, in series of judgments, has followed the similar principle and held that granting of compensation is just to ameliorate the sufferings of the victims and compensation is to be granted without succumbing to the niceties of law, hyper-technicalities and procedural wrangles and tangles.

22. A Single Judge of this Court in FAO No. 127 of 1999, titled as Bimla Devi and others versus Himachal Road Transport Corporation and others, decided on 22.08.2005, held that the claimants have to prove the case by leading cogent evidence and applied the mandate of CPC read with the Evidence Act, was questioned before the Apex Court by the medium of Civil Appeal No. 2538 of 2009, titled as **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and the Apex Court set aside the said judgment and held that strict proof is not required. It is apt to reproduce paras 2 and 12 to 15 of the judgment herein:

> "2. This appeal is directed against a judgment and order dated 22.8.2005 passed by the High Court of Himachal Pradesh, Shimla in FAO No. 127 of 1999 whereby and whereunder an appeal preferred against a judgment and award dated 28.10.1998 passed by the Motor Accident Claims TribunalII [MACT (I), Nahan] in MAC Petition No.21NL/2 of 1997, was set aside.
>
> xxx xxx xxx
>
> 12. While dealing with a claim petition in terms of Section 166 of the Motor Vehicles Act, 1988, a Tribunal stricto sensu is not bound by the pleadings of the parties; its function being to determine the amount of fair compensation in the event an accident has taken place by reason of negligence of that driver of a motor vehicle. It is true that occurrence of an accident having regard to the provisions contained in Section 166 of the Act is a sine qua non for entertaining a claim petition but that would not mean that despite evidence to the effect that death of the claimants predecessor had taken place by reason of an accident caused by a motor vehicle, the same would be ignored only on the basis of a post mortem report vis.a.vis the averments made in a claim petition.
>
> 13. The deceased was a Constable. Death took place near a police station. The post mortem report clearly suggests that the deceased died of a brain injury. The place of accident is not far from the police

station. It is, therefore, difficult to believe the story of the driver of the bus that he slept in the bus and in the morning found a dead body wrapped in a blanket. If the death of a constable has taken place earlier, it is wholly unlikely that his dead body in a small town like Dharampur would remain undetected throughout the night particularly when it was lying at a bus stand and near a police station. In such an event, the court can presume that the police officers themselves should have taken possession of the dead body.

14. The learned Tribunal, in our opinion, has rightly proceeded on the basis that apparently there was absolutely no reason to falsely implicate the respondent Nos. 2 and 3. Claimant was not at the place of occurrence. She, therefore, might not be aware of the details as to how the accident took place but the fact that the First Information Report had been lodged in relation to an accident could not have been ignored. Some discrepancies in the evidences of the claimant s witnesses might have occurred but the core question before the Tribunal and consequently before the High Court was as to whether the bus in question was involved in the accident or not. For the purpose of determining the said issue, the Court was required to apply the principle underlying burden of proof in terms of the provisions of Section 106 of the Indian Evidence Act as to whether a dead body wrapped in a blanket had been found at the spot at such an early hour, which was required to be proved by the respondent Nos. 2 and 3.

15. In a situation of this nature, the Tribunal has rightly taken a holistic view of the matter. It was necessary to be borne in mind that strict proof of an accident caused by a particular bus in a particular manner may not be possible to be done by the claimants. The claimants were merely to establish their case on the touchstone of preponderance of probability. The standard of proof beyond reasonable doubt could not have been applied. For the said purpose, the High Court should have taken into consideration the respective stories set forth by both the parties."

23. Applying the tests to the instant case, the claimant has, prima facie, proved that the deceased was not traveling on the tractor, but was walking by the side of the road and the tractor, being driven by its driver rashly and negligently, turned turtle and the sugarcane fell on the deceased, as a result of which he sustained injuries and ultimately lost his life.

24. Having said so, the findings of the Tribunal that the deceased was traveling on the tractor as a gratuitous passenger and that the owners had committed willful breach merit to be set aside and the same are set aside accordingly.

25. The factum of the driver having a valid and effective driving licence at the time of accident is not in dispute. It was for the insurer to plead and prove that the owners had committed willful breach of the terms and conditions contained in the insurance policy, has not led any evidence. Thus, the insurer has failed to prove that the owners had committed willful breach.

26. In view of the above discussion, my issue-wise findings are as under:

Issue No.1:

27. Findings returned by the Tribunal on this issue are not in dispute. Accordingly, the same are upheld.

Issues No.2:

28. In view of the above discussion, this issue is decided in favour of the claimant.

Issues No.4, 5 and 6:

29. From the above discussion, it is clear that the insurer has failed to prove these issues. Accordingly, these issues are decided against the insurer.

Issue No.7:

30. In regard to this issue, no arguments were advanced by the learned counsel for the insurer. There is no material on the record fromwhere it can be inferred that the driver of the offending tractor was not having a valid and effective driving licence at the time of accident. The Tribunal has rightly held that the driver of the offending tractor was having a valid and effective driving licence. Accordingly, this issue is also decided against the insurer.

Issue No.8:

31. In view of the discussion made hereinabove, this issue is also decided against the insurer.

32. As a consequence, the insurer is saddled with the liability.

Issue No.3:

33. Coming to issue No.3, the Tribunal has granted a meager compensation. Admittedly, the deceased was 60 years of age at the time of accident. The Tribunal has applied the multiplier of 5. However, in view of 2nd Schedule attached to the Act read with the judgment of 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) 312,** multiplier of '6' was just and appropriate.

34. As regards the income of the deceased is concerned, it was pleaded by the claimant in the claim petition that the deceased was a sculptor by profession and was earning Rs.9,000/- per month. However, no evidence has been led by the claimant to prove the said income. Therefore, by guess work, it can safely be held that the deceased would have been earning Rs.4,500/- per month.

35. In view of the law laid down by the Apex Court in Sarla Verma's case (supra), after deducting 1/3rd of the total income towards the personal expenses of the deceased, it is held that the claimant lost source of dependency to the tune of Rs.3,000/- per month. Accordingly, the claimant is held entitled to compensation to the tune of Rs.3,000/- x 12 x 6 = Rs.2,16,000/- under the head loss of source of dependency. In addition, a sum of Rs.10,000/- each, i.e. Rs.30,000/- in all, is also awarded under the heads 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

36. Having glance of the above discussion, the claimant is held entitled to Rs.2,16,000/- + Rs.30,000/- = Rs.2,46,000/-, alongwith interest as awarded by the Tribunal. The insurer is directed to deposit the entire amount alongwith up-to-date interest within a period of six weeks from today and on deposit, the Registry is directed to release the same in favour of the claimant forthwith, after proper identification.

37. The statutory amount deposited by the appellants in FAO No.390 of 2009, titled Satwant Kaur and others vs. Jasbir Singh and another, is awarded as costs throughout in favour of the claimant and the Registry is directed to release the said amount with interest accrued thereon in favour of the claimant forthwith. Remaining amount, if any, alongwith interest, be refunded in favour of the appellants through their bank account.

38. Both the appeals are allowed, as indicated above, and stand disposed of accordingly.

****

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

Kamlesh Kumari .....Appellant
Versus
Sudhanshu and others ..... Respondents

FAO No.136 of 2009 with CO No.360 of 2009.
Decided on : 18.12.2015

Motor Vehicles Act, 1988- Section 149- Tribunal saddled the owner with liability- award was challenged on the ground that 'K' was driving the vehicle and not 'R'- claimants had specifically pleaded that vehicle was being driven by 'R'- Tribunal had also found that vehicle was being driven by 'R'- 'R' had not questioned the finding recorded by the Tribunal- finding of the Tribunal that 'R' was driving the vehicle at the relevant time upheld. (Para-6 to 9)

For the appellant: Mr.Suneet Goel, Advocate.
For the respondents: Mr.Nitin Thakur, Advocate, for respondent No.1.
Nemo for respondent No.2.
Mr.Ajay Chandel, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

This appeal is directed against the award, dated 11th November, 2008, passed by the Motor Accident Claims Tribunal, Hamirpur, H.P., (for short, the Tribunal), in Claim Petition No.23 of 2007, titled Sudhanshu vs. Kamlesh Kumari and others, whereby compensation to the tune of Rs.1,29,738/, alongwith interest at the rate of 7.5% per annum, came to be granted in favour of the claimant, and the owner and the driver came to be saddled with the liability, (for short, the impugned award).

2. The driver, namely, Rajesh Kumar and the insurer have not questioned the impugned award, thus the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the owner/insured has questioned the impugned award by the medium of the instant appeal, on the ground that the Tribunal has fallen in error in saddling the owner with the liability, inasmuch as the offending vehicle was being driven by Kalwant Singh at the relevant point of time and not by Rajesh Kumar, as has been held by the Tribunal.

4. The claimant has also preferred cross objections No.360 of 2009 for enhancement of compensation.

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

6. It has been specifically pleaded by the claimant that the offending vehicle was being plied, at the time of accident, by original respondent No.2 i.e. Rajesh Kumar. The Tribunal, after scanning the evidence led by the parties, held that original respondent No.2 Rajesh Kumar had driven the offending vehicle rashly and negligently at the relevant point of time, who was not having a valid and effective driving licence to drive the vehicle. The said Rajesh Kumar has not questioned the findings recorded by the Tribunal.

7. Another aspect which cannot be lost sight off is that the Claim Petition was contested by the owner (present appellant) and the driver Rajesh Kumar jointly before the Tribunal, reply to the Claim Petition was also filed jointly and Mr.R.C. Sharma, Advocate, appeared for both of them before the Tribunal. After the passing of the impugned award, as has been noticed supra, the said Rajesh Kumar has chosen not to contest the findings recorded by the Tribunal that he had driven the vehicle rashly and negligently on the appointed day and had caused the accident. Thus, the findings have attained finality against the driver Rajesh Kumar.

8. However, during the course of hearing, the learned counsel for the appellant/owner tried to carve out a case by relying upon the statement of RW-1 Kulwant Singh, which is of no help since RW-1 Kulwant Singh has clearly stated that he never went to Haridwar with the vehicle belonging to the appellant. In cross examination also, RW-1 Kulwant Singh had not supported the case of the owner. The appreciation of evidence made by the Tribunal is legally correct and needs no interference.

9. Having said so, the findings returned by the Tribunal on issue No.1 needs to be upheld and the same are upheld accordingly. Consequently, the appeal is dismissed.

10. As far as Cross Objections are concerned, the amount of compensation, by no stretch of imagination, can be said to be inadequate. Accordingly, the Cross Objections are dismissed.

****

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

FAO No.141 of 2009 with FAO Nos.143, 154 & 155 of 2009.
Decided on : 18.12.2015

---

1. FAO No.141 of 2009

Kumari Vishav Bharti .....Appellant

Versus

Oriental Insurance Co. Ltd. ..... Respondents

2. FAO No.143 of 2009

Kumari Vishav Bharti and others .....Appellants

Versus

Oriental Insurance Co. Ltd. and another ..... Respondents

3. FAO No.154 of 2009

Oriental Insurance Co. Ltd. .....Appellants

Versus

Kumari Vishav Bharti and others ..... Respondents

4. FAO No.155 of 2009

Oriental Insurance Co. Ltd. .....Appellants

Versus

Kumari Vishav Bharti and another ..... Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was working as a Junior Basic Teacher on contract basis- her salary was Rs. 4351/-, which can be taken as Rs.4,500/- per month- after deducting 1/3rd towards the personal expenses, loss of dependency will be Rs.3,000/- per month- she was aged 33 years at the time of accident- multiplier of '16' will be applicable- therefore, claimant is held entitled to compensation of Rs.3,000/- x 12 x 16 = Rs.5,76,000/- under the head loss of source of dependency - a sum of Rs.10,000/- each awarded under the heads 'loss of estate', 'loss of love and affection' and funeral expenses - thus, total compensation of Rs.6,06,000/-, awarded along with interest @ 7.5% per annum from the date of filing of the petition. (Para-8 to 12)

Cases referred:

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) 312

Presence for the parties:

Mr.Nimish Gupta, Advocate, for the claimant(s).

Mr.Deepak Bhasin, Advocate, for the Insurance Company

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

FAO No.141 of 2009 and FAO No.155 of 2009

Both these appeals are directed against the award, dated 1st January, 2009, passed by the Motor Accident Claims Tribunal-I, Kangra at Dharamshala, H.P., (for short, the Tribunal), whereby compensation to the tune of Rs.1,92,000/, came to be granted in favour of the claimant on account of the death of her mother, namely, Ms.Monika, and the insurer came to be saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the claimant has questioned the impugned award on the ground of adequacy of compensation by way of FAO No.141 of 2009 and the insurer has challenged the same by filing FAO No.155 of 2009 on the ground that the Tribunal has wrongly fastened the insurer with the liability.

FAO No.143 of 2009:

3. By the medium of this appeal, the appellants/claimants, being minor daughter, mother and father of deceased Rakesh Kumar, have laid challenge to the award, dated 31st December, 2008, passed by the Motor Accident Claims Tribunal-I, Kangra at Dharamshala, H.P., (for short, the Tribunal), in Claim Petition No.100-G/II-2004, titled Kumari Vishav Bharti and others vs. Suresh Raina and another, whereby the claim petition came to be dismissed, (for short, the impugned award).

FAO no.154 of 2009:

4. In this appeal, the appellant/insurer has challenged the award, dated 31st December, 2008, passed by the Motor Accident Claims Tribunal-I, Kangra at Dharamshala, H.P., (for short, the Tribunal), in Claim Petition No.99-G/II-2004, titled Kumari Vishav

Bharti and others vs. Suresh Raina and another, whereby the claim petition came to be allowed and compensation to the tune of Rs.1,00,000/- came to be granted in favour of the claimants, (for short, the impugned award).

5. All the appeals are the outcome of one accident, therefore, the same are being disposed of by a common judgment.

Facts:

6. Claimants invoked the jurisdiction of the Motor Accident Claims Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), by the medium of Claim Petitions. It was pleaded that on 5th December, 2001, Rakesh Kumar alongwith his wife Smt.Monika, son (vasudev) and daughter (claimant Kumari Vishav Bharti) boarded Maruti Car bearing No.DL-4CA-7237, from Chamba to their house at Dehra in District Kangra, being driven by one Krishan Kumar. When the said car reached at village Bhali, at about 12.00 midnight, it fell off the road due to the rash and negligent driving of the driver, as a result of which Rakesh Kumar, Mrs.Monika and son Vasudev lost their lives.

7. Thus, the claimant Vishav Bharti filed the claim petition for grant of compensation to the tune of Rs.20.00 lacs on account of the death of her mother namely Mrs.Monika, which came to be allowed by the Tribunal and a sum of Rs.1,92,000/- came to be awarded, (subject matter of FAO Nos.141 of 2009 and 155 of 2009). On account of the death of Rakesh Kumar, the claimants (daughter and parents of the deceased) filed the claim petition for grant of compensation to the tune of Rs.20.00 lacs, which was dismissed by the Tribunal, (subject matter of FAO No.143 of 2009). On account of the death of Vasudev, the claimants, being sister and grandparents, filed the claim petition for grant of compensation to the tune of Rs.10.00 lacs, (subject matter of FAO No.154 of 2009).

FAO No.141 of 2009 & FAO No.155 of 2009:

8. As discussed above, FAO No.141 of 2009 has been filed by the claimant for enhancement of compensation, while FAO No.155 of 2009 has been filed by the insurer on the ground that the Tribunal has fallen in error in fastening it with the liability. Thus, the questions involved in these two appeals are – i) Whether the amount awarded is excessive and; ii) whether the Tribunal has rightly saddled the insurer with the liability.

9. The deceased Mrs.Monika was working as a Junior Basic Teacher on contract basis in a Government School. The salary of the deceased was Rs.4351/-, which is not in dispute. The Tribunal has grossly erred in taking the loss of dependency to the tune of Rs.1,000/- per month. If rounded off, the salary of the deceased can be taken as Rs.4,500/- per month. After deducting 1/3rd towards the personal expenses of the deceased, the total loss of source of dependency can be said to be Rs.3,000/- per month.

10. Admittedly, the deceased was 33 years of age at the time of accident. Keeping in view the 2nd Scheduled attached to the Motor Vehicles Act, 1988 read with the judgment of 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) 312,** the Tribunal has rightly applied the multiplier of 16.

11. Accordingly, the claimant is held entitled to compensation to the tune of Rs.3,000/- x 12 x 16 = Rs.5,76,000/- under the head loss of source of dependency. In addition, a sum of Rs.10,000/- each, i.e. Rs.30,000/- in all, is also awarded under the heads 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

12. Having glance of the above discussion, the claimant is held entitled to Rs.5,76,000/- + Rs.30,000/- = Rs.6,06,000/-, alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till realization, on account of the death of mother Mrs.Monika.

13. Coming to the next question as to who has to indemnify the amount of compensation, it is admitted fact that the offending vehicle was insured, at the time of accident, with the insurer. The insurer has not been able to prove that the offending vehicle was being driven in contravention of the terms and conditions contained in the insurance policy or that the driver of the offending vehicle was not having a valid and effective driving licence at the time of accident. Thus, it does not lie in the mouth of the insurer to claim that it was not liable to indemnify. Moreover, Mrs.Monika was a third party, therefore, the insurer cannot claim exoneration.

14. Having said so, the Tribunal has rightly fastened the liability on the insurer.

15. In view of the above discussion, FAO No.141 of 2009 is allowed, the claimant is held entitled to Rs.6,06,000/-, alongwith interest at the rate of 7.5% per annum from the date of filing of the claim petition till realisation, on account of the death of Mrs.Monika. The insurer is directed to deposit the enhanced amount alongwith up-to-date interest within a period of eight weeks from today. Accordingly, FAO No.155 of 2009 is dismissed.

FAO No.154 of 2009:

16. The Insurer has questioned the impugned award whereby compensation to the tune of Rs.1.00 lac, on account of the death of Vasudev (brother of Kumari Vishav Bharti), was granted by the Tribunal. Since the deceased was a third party, read with the discussion made hereinabove, the insurer came to be rightly saddled with the liability.

17. The amount of compensation is too meager. Unfortunately, the claimants have not questioned the impugned award, therefore, the same is reluctantly upheld.

18. Having regard to the above discussion, there is no merit in the appeal and the same is dismissed.

FAO No.143 of 2009:

19. The claimants have filed the instant appeal since the Claim Petition filed by them on account of the death of Rakesh Kumar was dismissed by the Tribunal.

20. I have gone through the impugned award. The Tribunal, after referring to evidence led by the parties, has come to the conclusion and rightly so that the deceased Rakesh Kumar was the owner of the offending vehicle and that he had obtained the insurance cover which never covered the risk of the owner. The Tribunal has rightly made the discussion in paragraphs 11 to 16 of the impugned award.

21. Having said so, no infirmity can be found with the award impugned in this appeal and, therefore, the same needs to be upheld. Accordingly, the appeal is dismissed. However, the claimants are at liberty to seek appropriate remedy by resorting to appropriate proceedings. In case the claimants resort to any such proceedings, the period spent by the claimants from the date of filing of the Claim Petition till today shall be excluded while computing the period of limitation.

22. All the appeals stand disposed of accordingly.

****

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

M/S Vishal Enterprises and another ...Appellants.
Versus
Smt. Lajja Devi and others ...Respondents.

FAO No. 177 of 2013
Decided on: 18.12.2015

Motor Vehicles Act, 1988- Section 166- Owner-insured and the driver challenged the award on the ground that insurer has been wrongly exonerated- held that, claimants have specifically pleaded that the deceased had hired the offending vehicle to transport potato crop to Chandigarh and to carry back the edible material in the same-owner/insured and driver have admitted this plea- the insurer has evasively denied it- insurer led no evidence to prove that owner-insured has committed willful breach-a person, who had hired the vehicle for transporting goods, was returning in the same vehicle cannot be said to be an unauthorised/gratuitous passenger- thus the Tribunal committed an error in holding the deceased as gratuitous passenger- appeal allowed. (Para 15 to 27)

Cases referred:
National Insurance Co. Ltd. versus Kamla and others, 2011 ACJ 1550
National Insurance Co. Ltd. versus Cholleti Bharatamma, 2008 ACJ 268 (SC)
Naresh Verma vs The New India Assurance Company Ltd. & others, I L R 2014 (V) HP 482
NHPC versus Smt. Sharda Devi & others, I L R 2014 (V) HP 844
National Insurance Company versus Smt. Sundri Devi and another, I L R 2015 (IV) HP 290

For the appellants: Mr. J.L. Bhardwaj, Advocate.
For the respondents: Ms. Shamma Khan, Advocate, vice Mr. Javed Khan, Advocate, for respondents No. 1 to 4.
Mr. Jagjit Singh Bagga, Advocate, for respondent No. 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Challenge in this appeal is to the judgment and award, dated 11.01.2013, made by the Motor Accident Claims Tribunal (II), Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 19 of 2011, titled as Smt. lajja Devi and others versus Sh. Khayali Ram and others, whereby compensation to the tune of Rs.5,09,700/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants, the owner-insured and the driver were held liable jointly and severally and the insurer was exonerated (for short "the impugned award").

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

3. The owner-insured and the driver of the offending vehicle have questioned the impugned award on the grounds taken in the memo of appeal.

4. Learned counsel for the appellant argued that the Tribunal has fallen in an error in saddling the owner-insured and the driver of the offending vehicle with liability and exonerating the insurer.

5. The argument of the learned counsel for the appellant is forceful for the following reasons:

6. The claimants filed claim petition before the Tribunal for grant of compensation being the victims of the motor vehicular accident, which was caused by the driver, namely Shri Khayali Ram, while driving truck, bearing registration No. HP-62A-0282, rashly and negligently, on 14.11.2010, at place Dhami Camp at Bagi Rungi Dhang near Tangish, P.O. Dhami, Shimla, in which deceased-Narender Kumar sustained injuries and succumbed to the injuries.

7. It has specifically been averred in para 10 of the claim petition that deceased-Narender Kumar alongwith other persons had hired the offending vehicle from Karsog to Chandigarh and vice versa in order to sell potatoes at Chandigarh and to take rice and atta for their livelihood.

8. The owner-insured and the driver of the offending vehicle have filed joint reply and admitted para 10 of the claim petition in their reply. Thus, there is no dispute about the said fact.

9. The insurer has also filed the reply and has replied evasively, however, has taken the ground that the deceased was travelling in the offending vehicle as a gratuitous passenger.

10. After examining the pleadings and documents, following issues came to be framed by the Tribunal:

> *"1. Whether the deceased Narender Kumar had died in a motor vehicle accident involving vehicle bearing registration No. HP-62A-0282 on 14.11.2010? OPP*
>
> *2. Whether respondent No. 1 was driving vehicle in a rash and negligent manner which led to the accident? OPR*
>
> *3. Whether the petitioners are entitled for compensation to the extent of Rs.15,00,000/-, if so, from whom? OPP*
>
> *4. Whether the petition is not maintainable? OPR-1 &2*
>
> *5. Whether the deceased was travelling as a gratuitous passenger, if so, its effect? OPR*
>
> *6. Whether the driver was not holding a valid and effective driving licence at the time of accident? OPR*
>
> *7. Whether the vehicle was being driven in violation of terms and conditions of insurance policy? OPR*
>
> *8. Relief."*

11. Claimants have examined Dr. Sangeet Dhilon, Shri Yog Raj and Shri Khazana Ram as their witnesses and one of the claimants, namely Smt. Lajja Devi, herself appeared in the witness box as PW-3. The owner-insured and the driver of the offending vehicle have examined Shri Tej Kumar in support of their case. The insurer has not led any evidence.

12. The Tribunal, after scanning the evidence, oral as well as documentary, held the claimants entitled to compensation, but exonerated the insurer from its liability despite the fact that the factum of insurance was admitted and saddled the owner-insured and driver of the offending vehicle with liability.

Issues No. 1, 2, 4 and 6:

13. There is no dispute viz-a-viz issues No. 1, 2, 4 and 6, thus, the findings returned by the Tribunal on the said issues have attained finality. Accordingly, the findings returned by the Tribunal on issues No. 1, 2, 4 and 6 are upheld.

14. The amount of compensation is also not in dispute. Therefore, the findings are to be returned only on part of issue No. 3, i.e. who has to pay compensation and on issues No. 5 and 7.

Issues No. 5 and 7:

15. It was for the insurer to plead and prove that the owner-insured has committed willful breach, has not led any evidence. But the Tribunal, in a cursory manner and neglecting the fact that the claimants have to prove the case by leading *prima facie* evidence and not beyond reasonable doubt, has exonerated the insurer.

16. The owner-insured and the driver of the offending vehicle have admitted that the same was hired by the deceased and was carrying the goods. Thus, there was no need to prove the said factum.

17. Even otherwise, the owner-insured and the driver of the offending vehicle have examined Shri Tej Kumar from Ganesh Trading Company as RW-1,who has proved the bill, Ext. RW-1/A, in terms of which goods were purchased by the deceased and loaded in the offending vehicle.

18. Moreover, the Tribunal has recorded in para 3 of the impugned award that the factum of accident, hiring of the offending vehicle and carrying of potatoes etc. is admitted. Despite that, it has fallen in an error in exonerating the insurer by holding that the deceased was a gratuitous passenger. Neither the insurer has led any evidence to prove that the deceased was a gratuitous passenger nor there is any proof on the file.

19. The pleadings, admission on the part of the owner-insured and the driver and the other documents on the file do disclose that the offending vehicle was hired by the deceased and goods were being carried in the said vehicle. Thus, no breach has been committed by the owner-insured.

20. This Court in a case titled as **National Insurance Co. Ltd. versus Kamla and others,** reported in **2011 ACJ 1550,** has also discussed the same issue while referring to the judgment of the Apex Court in **National Insurance Co. Ltd. versus Cholleti Bharatamma,** reported in **2008 ACJ 268 (SC)** and held that the person, who had hired the vehicle for transporting goods, was returning in the same vehicle, met with the accident, cannot be said to be an unauthorised/gratuitous passenger.

21. It is apt to reproduce paras 8 to 11 of the judgment rendered in **Kamla's case (supra)** herein:

> *8. Coming to the second plea taken by the learned counsel for the appellant that the deceased was a gratuitous passenger, a perusal of the reply filed by respondent No. 2, insurance company shows that they had only pleaded that the deceased was admittedly not employee of the insured and was traveling in the truck as a*

gratuitous passenger. Thus, it was submitted that the Insurance Company was not liable. Reliance was also placed upon the decision in ***National Insurance Co. Ltd. v. Cholleti Bharatamma, 2008 ACJ 268 (SC)****wherein the plea was taken that the owner himself travel in the cabin of the vehicle and not with the goods so as to be covered under Section 147. However, in case the driver permits a passenger to travel in the tool box, he cannot escape from the liability that he was negligent in driving the vehicle and moreover, in a petition under Section 163-A of the Motor Vehicles Act, rash or negligent driving is not to be proved and, therefore, this decision does not help the appellant.*

9. Learned counsel for the appellant had also relied upon the decision in ***National Insurance Co. Ltd. v. Maghi Ram****, 2010 ACJ 2096 (HP), wherein a learned Judge of this Court has considered the question and had observed that the Insurance Company is liable in respect of death or bodily injury to any person including the owner of goods or his authorized representative carried in the vehicle. It was observed that it is apparent that the goods must normally be carried in the vehicle at the time of accident.*

10. The allegations made by the petitioners in the petition as well as in the evidence were that the deceased had gone after hiring the truck with his vegetable and was coming in the same vehicle when the accident took place. The learned counsel for the claimants/respondents No. 1 to 4 had relied upon the decision of Hon'ble Punjab & Haryana High Court in ***National Insurance Co. Ltd. v. Urmila****,* ***2008 ACJ 1381 (P&H)****, wherein it was observed that a passenger was returning after selling his goods when the vehicle turned turtle due to rash and negligent driving. Insurance Company seeks to avoid its liability on the ground that the deceased was no longer owner of the goods as he had sold them off. It was observed that the deceased had hired the vehicle for transporting his animals for selling and was returning in the same vehicle. It was held that the deceased was not an unauthorized/gratuitous passenger in the vehicle till he reached the place from where he had hired the vehicle.*

11. The above decision clearly applies to the present facts, which are similar to the facts of the case and accordingly, I am inclined to hold that the deceased was not an unauthorized/ gratuitous passenger. No conditions of the insurance policy have been proved that the risk of the owner of goods was not covered in the insurance policy and as such, there is no substance in the plea raised by the learned counsel for the appellant, which is rejected accordingly."

22. The same principle has been laid down by this Court in a bunch of two appeals, **FAO No. 9 of 2007**, titled as **National Insurance Company Limited versus Smt. Teji Devi & others,** being the lead case, decided on 22nd August, 2014; **FAO No. 22 of 2007,** titled as **Naresh Verma versus The New India Assurance Company Ltd. & others,** decided on 26th September, 2014, **FAO No. 77 of 2010,** titled as **NHPC versus Smt. Sharda Devi & others,** decided on 17th October, 2014, and **FAO No. 638 of 2008,** titled as **National Insurance Company versus Smt. Sundri Devi and another,** and connected matter decided on 3rd July, 2015.

23. Applying the test to the instant case read with the admitted fact, one comes to an inescapable conclusion that the deceased was not travelling in the offending vehicle as a gratuitous passenger.

24. It is also worthwhile to record herein that the Tribunal has recorded trash findings in para 27 of the impugned award that the owner-insured and the driver of the offending vehicle have not placed on record the original documents, rather photo copies, the documents were not in order, cannot be read in evidence and held that the owner-insured has committed willful breach. I wonder how such findings can be recorded.

25. Having said so, the Tribunal has fallen in an error in exonerating the insurer and saddling the appellants, i.e. the owner-insured and the driver of the offending vehicle, with liability.

26. The factum of insurance is admitted. Accordingly, the findings returned by the Tribunal on issues No. 5 and 7 are set aside and the insurer is saddled with liability.

27. Viewed thus, the appeal merits to be allowed and the impugned award is to be modified. Accordingly, the appeal is allowed and the impugned award is modified, as indicated hereinabove.

28. The insurer is directed to deposit the awarded amount before the Registry within eight weeks. On deposition of the amount, the same be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by transferring the same to their respective accounts.

29. The statutory amount deposited by the appellants is awarded as costs in favour of the claimants. The same be also released in favour of the claimants in terms of the ratio contained in the impugned award.

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

****

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

Manohar Singh ...Appellant.

Versus

Pawan Kumar and others ...Respondents.

FAO No. 61 of 2009
Decided on: 18.12.2015

Motor Vehicles Act, 1988- Section 166- Claimant-injured challenged award on the ground of adequacy of compensation-the victim suffered 88% permanent disability in the accident which was outcome of contributory negligence- victim was 17 years of age at the time of accident- his income can be taken as Rs.3000/- per month and multiplier of 14 applied- apart from it, claimant held entitled to Rs.50,000/- under the head 'medical expenses incurred', Rs.50,000/- under the head 'future medical expenses', Rs.20,000/- under the head 'attendant charges', Rs.50,000/- under the head 'pain and sufferings undergone- the claimant further held entitled to Rs.50,000/- under the head 'loss of amenities of life' for the

reason that he will not be in a position to get a proper match, rather, will not be able to have marital life- insurers of both the vehicles saddled with liability- award modified.

(Para 8 to 16)

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 (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

For the appellant:	Mr. Sanjeev Kuthiala and Ms. Ambika Kotwal, Advocates.
For the respondents:	Mr. Deepak Bhasin, Advocate, for respondent No. 4. Nemo for other respondents.

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 dated 31.10.2008, made by the Motor Accident Claims Tribunal, Presiding Officer, Fast Track Court, Mandi, District Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 93/01, 59/2005, titled as Manohar Singh versus Pawan Kumar and others, whereby compensation to the tune of Rs.3,71,200/- with interest @ 7.5% per annum from the date of filing of the claim petition came to be awarded in favour of the claimant-injured and the insurers of both the vehicles involved in the accident were saddled with liability in equal shares (for short "the impugned award").

2. The respondents in the claim petition, i.e. the owners-insured, the drivers and the insurers of both the offending vehicles have not questioned the impugned award on any count, thus, the same has attained finality so far it relates to them.

3. The appellant-claimant-injured has questioned the impugned award on the ground of adequacy of compensation.

4. I deem it proper to record herein that the matter was listed before the Lok Adalat and both the insurance companies have made u-turn and that is why this appeal is on the dockets of this Court for the last more than six years, speaks how the insurance companies are dealing with the cases.

5. The moot question involved in this appeal is - whether the amount awarded by the Tribunal in terms of the impugned award is adequate or otherwise?

6. I have perused the record and the impugned judgment and am of the considered view that the awarded amount, on the face of it, is inadequate, rather meager, for the following reasons:

7. Manohar Singh, the appellant-claimant-injured became the victim of the accident, which was outcome of the contributory negligence of the drivers of both the offending vehicles and suffered 88% permanent disability, which stands proved by PW-4, Dr. S.R. Thakur and by other documents, i.e. discharge slips, Ext. PW-1/C, PW-1/D and the

disability certificate, Ext. PW-4/A. The said finding has not been challenged, thus, has attained finality.

8. A person, who has suffered 88% permanent disability, virtually has gone through pain and sufferings and has to suffer throughout the life. Not only he has to suffer pain and sufferings, but the injury has shattered the physical frame of the appellant-claimant-injured and is not in a position to earn anything. The amount awarded under all the heads is meager, is an eye-opener.

9. It is beaten law of land that while assessing compensation in injury cases, guess work is to be made.

10. 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**.

11. This Court has also laid down the same principle in a series of cases.

12. It has been averred in the claim petition that the appellant-claimant-injured was 17 years of age and the student of 10+2 at the relevant point of time, which is not in dispute. He was having a bright career ahead and due to the injury sustained by him, will not be able to earn anything in future. He has lost the total earning capacity and the minimum loss, which can be said to be suffered by him, in view of the latest judgments rendered by the Apex Court, is Rs.4,000/- - Rs.5,000/- per month. But, keeping in view the facts of the present case, it can be safely said and held that the claimant-injured has suffered loss of income to the tune of Rs.3,000/- per month.

13. In view of the age of claimant-injured, multiplier of '14' is to be applied while keeping in view the Second Schedule appended with the Motor Vehicles Act, 1988 (for short "MV Act") read with the ratio laid down by the Apex Court in the case titled 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 the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

14. Accordingly, it is held that the claimant-injured has suffered loss of income to the tune of Rs.3,000/- x 12 x 14 = Rs.5,04,000/- .

15. The claimant-injured has remained admitted at Zonal Hospital Mandi w.e.f. 19.08.2001 to 23.08.2001 and at IGMC w.e.f. 24.08.2001 to 23.09.2001 and as per the doctor, he has also to undergo treatment throughout his life. Thus, the claimant-injured is at least entitled to Rs.50,000/- under the head 'medical expenses incurred', Rs.50,000/- under the head 'future medical expenses', Rs.20,000/- under the head 'attendant charges', Rs.50,000/- under the head 'pain and sufferings undergone'. He is also entitled to Rs.50,000/- under the head 'loss of amenities of life' for the reason that he will not be in a position to get a proper match, rather, will not be able to have marital life. Thus, the injury has made his life miserable.

16. Having said so, the claimant-injured is held entitled to Rs.5,04,000/- + Rs.50,000/- + Rs.50,000/- + Rs.20,000/- + Rs.50,000/- + + Rs.50,000/- = Rs.7,24,000/- with interest @ 7.5% per annum from the date of the impugned award.

17. The factum of insurance of both the offending vehicles is not in dispute. Thus, insurers of both the offending vehicles are saddled with liability in equal shares and are directed to deposit the same before the Registry of this Court within eight weeks.

18. On deposition of the amount, the same be released in favour of the claimant-injured strictly as per the terms and conditions contained in the impugned award.

19. The appeal is allowed and the impugned award is modified, as indicated hereinabove.

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

****

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

National Insurance Co. Ltd. . .....Appellant.

Versus

Smt. Jamna Devi and others ...Respondents

FAO (MVA) No. 164 of 2009

Date of decision: 18th December, 2015

Motor Vehicles Act, 1988- Section 149- Insurer challenged the award on the ground that accident was outcome of contributory negligence of driver of the scooter and Alto car- Rs.75,000/- were reimbursed and an amount of Rs.75,000/- was wrongly awarded under the head "medical expenses" – interest awarded @ 12% p.a. was not in accordance with law- held, that it was prima facie proved that respondent No.2 was driving the vehicle in a rash and negligent manner- no evidence was led by the Insurer /owner and driver to dislodge the same- hence, the plea that accident was outcome of contributory negligence cannot be accepted- further held, that amount of Rs.75,000/- was wrongly awarded under the head 'medical expenses' and the Tribunal had erred in awarding interest @ 12% p.a.- amount of Rs.75,000/- deducted from the award and the interest reduced to 7.5% p.a. from the date of Claim Petition. (Para-5 to 7)

For the appellants: Mr. Jagdish Thakur, Advocate.

For the respondents: Mr.Dinesh Bhanot, Advocate, for re respondents No. 1 to 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, (Oral)

This appeal is directed against the judgment and award dated 5.8.2008, made by the Motor Accident Claims Tribunal-II Solan, District Solan, H.P. in MAC Petition No. 34-NL/2 of 2005, titled Smt. Jamna Devi and others versus Inderjeet Singh and others, for short "the Tribunal", whereby compensation to the tune of Rs.14,13,000/- alongwith interest @ 12% per annum with costs of Rs.5,000/- was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Claimants, owner and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on three grounds that:

(i) The accident was outcome of contributory negligence of the driver of scooter No. CH01-8745 and Alto Car No. HP-12-B-1310;

(ii) An amount of Rs.75,000/- under the head "medical expenses" stands reimbursed to the claimants by the department as the deceased was a government employee, serving in the police department; and

(iii) That interest @12% per annum awarded by the Tribunal is not in accordance with law.

4. I have gone through the impugned award and perused the record.

5. It is specifically pleaded by the claimants in the claim petition that the accident was outcome of rash and negligent driving of respondent No. 2, namely, Naresh Kumar. The claimants have led evidence and there are also documents on the file which prima facie do disclose that Naresh Kumar has driven the offending vehicle rashly and negligently. The insurer, owner and driver have not led any evidence to dislodge the same. Even the owner, driver and insurer have not questioned the finding returned on issue No.1. The insurer has also not taken this ground that Naresh Kumar was not driving the offending vehicle. Accordingly, the findings returned on issue No. 1 are upheld.

Issue No.3.

6. Before I deal with issue No. 2, I deem it proper to deal with issue No.3 at the first instance. The insurer has not led any evidence that the driver of the offending Car was not having a valid and effective driving licence. It has not been argued by the learned counsel for the appellant herein. I have gone through the driving licence, which do disclose that the driver was having a valid and effective driving licence to drive the offending vehicle.

Issue No.2.

7. The Tribunal has fallen in an error in awarding Rs.75,000/- under the head "medical expenses" which deserves to be deducted and is deducted accordingly. The Tribunal has also fallen in an error in awarding interest @12% per annum. The interest @7.5% is awarded accordingly from the date of the claim petition till its realization.

8. Having said so, the claimants are held entitled to Rs.14,13,000/- minus Rs.75,000/-= Rs.13,38,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization. Accordingly, the impugned award is modified as indicated hereinabove.

9. The insurer is directed to deposit the amount, if not already deposited, in this Registry within six weeks from today. The Registry, on deposit of the amount, is directed to release the same in favour of the claimants, strictly in terms of the conditions contained in the impugned award, and excess amount, if any, be released to the insurer, through payees cheque account.

10. The appeal stands disposed of accordingly.

11. Send down the record forthwith, after placing a copy of this judgment.

****

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

The New India Assurance Company .....Appellant

Versus

Sh. Rakesh Kumar & another ...Respondents

FAO No. 564 of 2009
Decided on : 18.12.2015

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the ground that the insured has committed willful breach of the terms and conditions of the policy and on other grounds- held that, the insurer has not sought the permission as required under section 170 of Motor Vehicle Act, hence he cannot challenge the award on other grounds- further held that vehicle involved in the accident was L.M.V as per its gross weight and endorsement of PSV was not required on the driving licence-the driver proved to be having L.M.V Licence and the appellant had failed to prove breach of the policy by the insured- the Tribunal, however erred in granted interest @ 9% per annum- It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, hence it should have been 7.5% per annum- award modified. (Para 3 to 15)

Cases referred:

National Insurance Co. Ltd. versus Swaran Singh and others, AIR 2004 Supreme Court

Pepsu Road Transport Corporation versus National Insurance Company, (2013) 10 Supreme Court Cases 217

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Satosh 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 SCC 738

Savita versus Binder Singh & others, 2014, AIR SCW 2053

Kalpanaraj & others 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, I L R 2015 (III) HP 1149

For the appellant : Mr. B.M. Chauhan, Advocate.

For the respondents: Mr. Virender Singh Rathore, Advocate, for respondent No. 1.
Mr. Ajay Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award, dated 1st August, 2009, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 16-D/II-2007, titled Rakesh Kumar versus Balwinder Kumar Sharma & another, whereby compensation to the tune of Rs.1,23,559/- with interest @ 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimant and the insurer-appellant herein came to be saddled with liability (hereinafter referred to as the "impugned award").

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

3. The insurer has not sought permission under Section 170 of the Motor Vehicles Act, 1988, for short 'the Act', thus cannot question the impugned award on other grounds, which are not available to it. However, I have gone through the impugned award. The findings recorded by the Tribunal are legally correct.

4. Learned Counsel for the appellant argued that the driver was not having valid and effective driving licence at the time of accident.

5. Admittedly, the driver was driving Jeep bearing registration No. HP-39-A-2128, the gross weight of which is 2150 kilograms, as per the Registration Certificate, Ext. RW-1/C, is a light motor vehicle.

6. 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 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."*

7. Section 2 (21) of the 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 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 Act defines a "transport vehicle". It means a public service vehicle, a goods carriage, an educational institution bus or a private service vehicle.

8. A Division Bench of the High Court of Jammu and Kashmir at Srinagar, of which I (Justice Mansoor Ahmad Mir, Chief Justice) was a member, in a case titled as **National Insurance Co. Ltd. versus Muhammad Sidiq Kuchey & ors.,** being **LPA No. 180 of 2002,** decided on **27th September, 2007,** has discussed this issue and held that a driver having licence to drive "LMV" requires no "PSV" endorsement. It is apt to reproduce the relevant portion of the judgment herein:

> *"The question now arises as to whether the driver who possessed driving licence for driving abovementioned vehicles, could he drive a passenger vehicle? The answer, I find, in the judgment passed by this court in case titled National Insurance Co. Ltd. Vs. Irfan Sidiq Bhat, 2004 (II) SLJ 623, wherein it is held that Light Motor Vehicle includes transport vehicle and transport vehicle includes public service vehicle and public service vehicle includes any motor vehicle used or deemed to be used for carriage of*

passengers. Further held, that the authorization of having PSV endorsement in terms of Rule 41 (a) of the Rules is not required in the given circumstances. It is profitable to reproduce paras 13 and 17 of the judgment hereunder:-

> *"13. A combined reading of the above provisions leaves no room for doubt that by virtue of licence, about which there is no dispute, both Showkat Ahamd and Zahoor Ahmad were competent in terms of section 3 of the Motor Vehicles Act to drive a public service vehicle without any PSV endorsement and express authorization in terms of rule 4(1)(a) of the State Rules. In other words, the requirement of the State Rules stood satisfied.*
>
> *.....*
>
> *17. In the case of Mohammad Aslam Khan (CIMA no. 87 of 2002) Peerzada Noor-ud-Din appearing as witness on behalf of Regional Transport Officer did say on recall for further examination that PSV endorsement on the licence of Zahoor Ahmad was fake. In our opinion, the fact that the PSV endorsement on the licence was fake is not at all material, for, even if the claim is considered on the premise that there was no PSV endorsement on the licence, for the reasons stated above, it would not materially affect the claim. By virtue of "C to E" licence Showkat Ahmad was competent to drive a passenger vehicle. In fact, there is no separate definition of passenger vehicle or passenger service vehicle in the Motor Vehicles Act. They come within the ambit of public service vehicle under section 2(35). A holder of driving licence with respect to "light Motor Vehicle" is thus competent to drive any motor vehicle used or adapted to be used for carriage of passengers i.e. a public service vehicle."*

In the given circumstances of the case PSV endorsement was not required at all."

9. Admittedly, the driver was having driving licence to drive 'light motor vehicle'. This Court has held in so many cases, FAO No. 538 of 2007, titled as Oriental Insurance Company Ltd. versus Sh. Khem Chand & others, decided on 27.02.2015, being one of them, that the driver who was having licence to drive "light motor vehicle", requires no "PSV" endorsement.

10. The Apex Court in a case titled as **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court,** has laid down principles, how can insurer avoid its liability. It is apt to reproduce relevant portion of para 105 of the judgment in **Swaran Singh's case (supra):**

> *"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."

11. 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."*

12. The insurer has failed to prove that the insured has committed willful breach.

13. The Tribunal has awarded interest @ 9% per annum from the date of filing of the claim petition, is on the higher side.

14. 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.

15. 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.

16. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

17. The Registry is directed to release the amount to the claimants, strictly as per the terms and conditions contained in the impugned award and the balance amount, if any, be released in favour of the appellant through payees' account cheque.

18. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

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

Oriental Insurance Co. Ltd. .....Appellant.

Versus

Smt. Giano Devi and others ...Respondents

FAO (MVA) No. 124 of 2009
Judgment reserved on 11.12.2015
Date of decision: 18th December, 2015

Motor Vehicles Act, 1988- Section 141- Insurer contended that there was collusion between owner, claimant, driver and the owner had committed willful breach of the terms and conditions of the policy- respondents No.1 and 2 had accepted that deceased was working with them as helper/labourer/conductor- held, that mere admission is not sufficient to infer collusion- the insurer had not led any evidence to establish the same- further, no evidence was led to establish the breach of the terms and conditions of the policy- appeal dismissed. (Para-9 to 15)

For the appellant: Mr. G.C. Gupta, Sr. Advocate with Ms. Meera Devi, Advocate.

For the respondents: Mr.Bhupinder Pathania, Advocate, for respondents No. 1 and 2.
Mr. B.M. Chauhan, Advocate, for respondent No.3.
Nemo for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Challenge in this appeal is to the judgment and award dated 26.11.2008, made by the Motor Accident Claims Tribunal-II Kangra at Dharamshala in MACP No. 59-G/2005, titled Giano Devi and another versus Ramesh Singh and others, for short "the Tribunal", whereby compensation to the tune of Rs.2,69,000/- alongwith interest @ 7.5% per annum and Rs.7000/- as costs, was awarded in favour of the claimants and insurer came to be saddled with the liability, hereinafter referred to as "the impugned award", for short.

2. Claimants, owner and driver have not questioned the impugned award on any ground, thus it has attained finality so far it relates to them.

3. The insurer has questioned the impugned award on the ground that the owner has committed willful breach and there is collusion between the claimants, owner and the driver. Thus, the insurer was not liable.

4. In order to determine the controversy, it is necessary to give a brief resume of the relevant facts herein.

5. The claimants being the victims of a vehicular accident caused by driver, namely, Kikkar Singh, while driving offending vehicle bearing registration No. HP/63-0815, rashly and negligently at Pawali Kainchie, within the jurisdiction of Police Station Rohru on 26.12.2008, in which the deceased sustained injuries and succumbed to the same. The deceased was performing the job of a conductor-cum-labourer in the said vehicle. The claimants have claimed compensation to the tune of Rs.6 lacs, as per the break-ups given in the claim petition.

6. The respondents resisted and contested the claim petition and following issues came to be framed.

(i) Whether the respondent No.2 being driver of offending vehicle HP-63-0815 owned by respondent No. 1 was driving it n a rash and negligent manner on 26.12.2004 and had thrown the vehicle in a ditch at Pabli Kainchi within the jurisdiction of Police Station Rohru causing the death of the deceased? OPP.

(ii) If issue No. 1 is proved in affirmative, whether the petitioners being parents of the deceased are entitled to claim compensation from the respondents? If so to what amount and from whom? OPP.

(iii) Whether the respondent No. 2 was not having a valid and effective driving licence on the day of accident, as alleged? If so its effect? OPR-3.

(iv) Whether the offending vehicle was not insured with respondent No. 3 as alleged? OPR-3.

(v) Whether the petition has been filed by the petitioners ion collusion with respondents Nos. 1 and 2 as alleged?OPR3.

(vi) Whether the petition is not maintainable because of non-joinder of necessary parties as alleged? OPR-3.

(vii) Whether the deceased was a gratuitous passenger traveling in the vehicle as alleged/ If so, its effect? OPR-3.

(viii) Relief.

7. The parties have led the evidence.

8. Respondents No. 1 and 2 before the Tribunal have filed the amended reply. It is apt to reproduce paras 3 and 6 of the said reply herein.

> "3.In reply to para No. 4, 10: Admitted to be correct. In fact the deceased was traveling in the vehicle involved in the accident, but it is true that he was working as conductor cum labourer in the said vehicle.
>
> 4-5.... ...
>
> 6.In reply to para no. 24:- Partly admitted to the extent that the respondent no.2 was driving the vehicle involved in accident and the deceased was traveling in it and the respondent himself got some inquiries. It is wrong that the respondent no. 2 was driving the vehicle in a very high speed and in rash and negligent manner. For the rest of the contents the replying respondents are not aware as to the correctness as such denied, the petitioners are not entitled to the compensation as claimed by them."

9. Respondents No. 1 and 2 have virtually admitted that the deceased was working with them as helper/labourer/conductor, which is not in dispute. The question is when the owner and driver admit that the deceased was performing the job of a conductor-cum-labourer/helper, how can the insurer be allowed to plead that he was a gratuitous passenger. It was for the insurer to plead and prove the said fact.

Issue No.1.

10. The Tribunal has specifically held that the accident was outcome of rash and negligent driving of the driver, namely Kikar Singh. There is no dispute about issue No.1. Thus, the findings returned by the Tribunal on issue No. 1 are upheld.

Issue No.3.

11. Before I deal with issue No.2, I deem it proper to deal with issue No.3 at the first instance. It was for the insurer to prove that the driver was not having a valid and effective driving licence, has failed to discharge the onus. Even the learned counsel for the appellant has not questioned the findings returned on this issue. Accordingly, the findings returned on issue No. 3 are upheld.

Issue No.4.

12. The factum of insurance is not in dispute in this appeal. Accordingly, the findings returned on this issue are upheld.

Issue No.5.

13. The insurer has not led any evidence to prove that there is collusion between the claimants, driver and the owner. The accident has taken place. The deceased has died. How can it be said that there is collusion between the claimants, driver and the owner. The only dispute is whether the deceased was performing the job of a helper/conductor/labourer or he was a gratuitous passenger. That does not mean that there was any collusion. However, the insurer has not led any evidence to this effect, thus, the findings returned on this issue are upheld.

Issue No.6.

14. It was for the insurer to carve out a case how the claim petition is not maintainable because of non-joinder of necessary parties, has not led any evidence and even the learned counsel for the appellant has not been able to carve out a case that the claim petition is not maintainable because of non-joinder of necessary parties.

15. Viewed thus, the findings returned on issue No. 6 are upheld.

Issues No. 2 & 7.

16. Both these issues are interlinked, hence are taken up together. The claimants have specifically averred in the claim petition that the deceased was conductor/helper, which has been admitted by the respondents, as discussed hereinabove. The owner and driver have not led any evidence to prove this fact. However, the claimants have led evidence and proved the said fact and the Tribunal has rightly made discussions in paras 13 to 15 of the impugned award, cannot be said that the Tribunal has returned the findings illegally and without any substance and evidence. Having said so, the findings returned on issues No. 2 and 7 merit to be upheld and are accordingly upheld.

17. The amount awarded though appears to be meager but the claimants have not questioned the same, thus, reluctantly upheld.

18. Having glance of the above discussion, I see no reason to interfere with the impugned award. Accordingly, the appeal is dismissed and the impugned award is upheld.

19. 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 payee's cheque account.

20. Send down the record, forthwith, after placing a copy of this judgment.

****

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

Satya Parkash Sharma & others .....Appellants

Versus

Vinod Kumar & others ..... Respondents

FAO No.30 of 2009
Date of decision: 18.12.2015

Motor Vehicles Act, 1988- Section 166- Claimants challenged the award on the ground of adequacy of compensation- held that, the age of the deceased was 55 years, and therefore, multiplier of 8 was rightly applied; however the Tribunal had fallen into error by awarding Rs. 20,000/- in various heads and Rs. 10,000/- each was awardable under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate', and 'funeral expenses- further held, Tribunal erred in exonerating the insurer on the ground that the deceased was a gratuitous passenger - at best the right of recovery was to be granted- award modified.

(Para 5 to 9)

Cases referred:

Sarla Verma(Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

Madan Mohan and another, 2013 AIR (SCW) 3120

Munna Lal Jain & another versus Vipin Kumar Sharma & others, 2015 AIR SCW 3105

For the appellants: Mr. Narain Singh Shandil, Advocate.

For the respondents: Mr. Tanuj Sharma, Advocate vice Mr. Atul Jhingan, 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)

This appeal is directed against the award and judgment, dated 16th October, 2008, made by the Motor Accident Claims Tribunal, Shimla (for short, "the Tribunal") in M.A.C.C. No.31-S/2 of 2005, titled Sh. Satya Parkash Sharma, & others vs. Sh. Vinod Kumar & others, whereby a sum of Rs.2,72,000/- alongwith interest at the rate of 9% per annum came to be awarded as compensation in favour of the claimants and the owner of the offending vehicle was saddled with the liability (for short the "impugned award").

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

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. The learned counsel for the appellants has argued that the Tribunal has fallen in an error in applying the multiplier of '7'.

5. The age of the deceased was 55 years at the time of the accident and the multiplier applicable was '9' in view of Schedule-II appended to the Motor Vehicles Act, 1988 read with the judgment made by the Apex Court in cases tilted as ***Sarla Verma(Smt.) and others*** versus ***Delhi Transport Corporation and another***, reported in ***AIR 2009 SC 3104***, which decision was upheld by the larger Bench of the Apex Court in ***Reshma Kumari & others*** versus ***Madan Mohan and another***, reported in ***2013 AIR (SCW) 3120*** and 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**.

6. In view of the above, multiplier of '9' is just and appropriate multiplier applicable in the present case. The Tribunal has rightly assessed the loss of dependency of the claimants to tune of Rs.3,000/- per month i.e. Rs.36,000/- per annum. Thus, the claimants are held entitled to compensation to the tune of Rs.36,000 X 9= Rs.3,24,000/- under the head 'loss of dependency'.

7. The Tribunal has awarded Rs.20,000/- under various heads, which is not legally correct. In view of the recent judgment of the Apex Court, a sum of Rs.10,000/- each is awarded under the heads 'loss of love and affection', 'loss of consortium', 'loss of estate', and 'funeral expenses, i.e. total amounting to Rs. 40,000/-.

8. In view of the above discussion, the claimants are held entitled to Rs.3,24000/- + Rs.40,000/- (Rs.3,64,000/-in all), alongwith interest as awarded by the Tribunal.

9. It appears that the insurer stands exonerated on the ground that the deceased was a gratuitous passenger. The owner has not questioned the said findings, though, the factum of insurance is admitted. Thus, at best, the right of recovery was to be granted. Accordingly, the insurer is directed to satisfy the award at the first instance with right of recovery.

10. The insurer is directed to deposit the awarded amount in the Registry of this Court within eight weeks. On deposit, the award amount be released in favour of the

claimants, strictly in terms of the terms and conditions contained in the impugned award, through payees account cheque. However, the insurer is at liberty to lay a motion for recovery before the Tribunal.

11. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

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

****

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

United India Insurance Company Ltd. .....Appellant
Versus
Sanjay Kumar & others .....Respondents

FAO No. 641 of 2008 a/w
Cross Objection No. 71 of 2010
Decided on : 18.12.2015

Motor Vehicles Act, 1988- Section 166- Insurer challenged the award on the grounds that FIR of the accident was not lodged; accident resulted due to contributory negligence and petition was bad for non-joinder and mis-joinder of the parties- held that, findings qua rashness and negligence of the driver were never challenged by the owner of the offending vehicle- no evidence was led by the owner/insured to show as to how the petition was bad for mis-joinder and non-joinder of the parties- further held that Motor Vehicles Act, 1988 has gone a sea change and Claims Tribunal can treat report of accident forwarded to it under Section 158 (6) of the Act as an application for compensation- the Tribunal has also rightly assessed the compensation- appeal and cross-objections dismissed.(Para 13 to 18)

For the Appellant : Mr. Sanjeev Kuthiala and Ms. Ambika Kotwal, Advocates.
For the Respondents: Mr. Sunil Chauhan, Advocate, for respondent No. 1.
Respondent No. 2 is dead
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 the award dated 30.08.2008, made by the Motor Accident Claims Tribunal, Fast Track Court, Mandi, District Mandi, H.P. (hereinafter referred to as "the Tribunal") in Claim Petition No. 20/2001-115/2005, titled **Shri Sanjay Kumar versus Sh. Harbans Lal & others,** whereby compensation to the tune of Rs.3,28,360/- with interest @ 7.5% per annum from the date of filing of the claim petition, was awarded in favour of the claimant-respondent No. 1 herein and the insurer-appellant herein came to be saddled with liability (for short, "the impugned award").

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

3. The appellant-insurer has questioned the impugned award, on the grounds taken in the memo of appeal.

4. The grounds of attack as taken by the learned Counsel for the appellant-insurer are that no F.I.R. was lodged, accident was outcome of contributory negligence, the claim petition was bad for non-joinder and mis-joinder of necessary parties and the amount awarded is excessive.

5. All these arguments, though attractive, but are devoid of any force for the following reasons.

6. Claimant-Sanjay Kumar, who was conductor, became the victim of the motor vehicular accident, which was allegedly caused by driver, Jiwan Lal @ Hari Singh, respondent No. 2 in the claim petition, while driving truck bearing registration No. HP-34-0665, rashly and negligently, on 15.09.1999, at about 4.00 p.m., near Dasuya, District Hoshiarpur, Punjab and in the process, conductor-claimant sustained injuries on his shoulder, was taken to hospital at Dasuya and was admitted there for two days. Thereafter, he was referred to Indira Gandhi Medical College, Shimla and was admitted there from 18.09.1999 to 23.10.1999, constraining him to file the claim petition before the Tribunal, for grant of compensation to the tune of Rs.10,00,000/-, as per the break-ups given in the claim petition.

7. Alongwith this appeal, respondent No. 1-claimant has filed Cross Objection No. 71 of 2010, for enhancement of the compensation.

8. The respondents in the claim petition contested the same on the grounds taken in their memo of objections.

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

"1. Whether the accident took place on 15.09.1999 near Dasuya District Hoshiarpur (Pb.) due to rash and negligent driving of the driver of the Truck No. HP-34-0665 and the petitioner sustained injuries? …OPP

2. If issue No. 1 is proved in affirmative, whether the petitioner is entitled to compensation as claimed, to what extent and from whom? …OPP

3. Whether the petition is bad for non-joinder & mis-joinder of necessary parties? …OPR-1

4. Whether the respondent No. 2 alleged to have been driving the vehicle at the time of the accident was not having valid and effective driving licence, if so, its effect? ….OPR-3.

5. Whether the respondent No. 3 is not liable to indemnify the claim on account of breach of terms and conditions of the Insurance Policy?…opr-3

6. Relief."

Issue No.1

10. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that the claimant has proved that driver, namely, Jiwan Lal alias Hari Singh, has caused the accident, while driving the offending vehicle, i.e. Truck bearing registration No. HP-34-0665, rashly and negligently, on 15.09.1999, at about 4.00 p.m., near Dasuya, District Hoshiarpur, Punjab. The said findings have not been

questioned by the driver. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

11. Before I deal with issue No. 2, I deem it proper to deal with issues No. 3 to 5.

Issue No. 3

12. It was for the insured-owner to discharge the onus, has neither led any evidence nor questioned the impugned award, on any count. Thus, the appellant-insurer cannot question the findings returned by the Tribunal on issue No. 3. While going through the impugned award, one comes to an inescapable conclusion that the claim petition was not bad for non-joinder and mis-joinder of necessary parties.

13. Motor Vehicles Act, 1988 has gone a sea change and sub section (6) to Section 158 and sub section (4) to Section 166 of the Act have been added, whereby the Claims Tribunal can treat report of accident forwarded to it under Section 158 (6) of the Act as an application for compensation.

14. Having said so, the Tribunal has rightly decided issue No.3 and accordingly, the findings returned by the Tribunal on this issue are upheld.

Issues No. 4 & 5.

15. It was for the insurer to prove these issues, have not led any evidence. The factum of insurance is not in dispute. Accordingly, the findings returned by the Tribunal on issues No. 4 & 5 are upheld.

Issue No. 2.

16. The claimant was admitted in the hospital for more than one month, has suffered permanent disability to the extent of 45%, which has shattered his physical frame. The Tribunal has given details relating to assessment of the compensation right from paras 23 to 28 of the impugned award, rightly made the discussion and assessed the just and appropriate compensation, is legally correct, needs no interference.

17. Accordingly, the findings returned by the Tribunal on Issue No. 2 are upheld.

18. Now, coming to the cross-objection filed by the claimant, appear to have been filed on flimsy grounds, merits to be dismissed.

19. Accordingly, the impugned award is upheld and the appeal and cross objection are dismissed.

20. The Registry is directed to release the awarded amount in favour of the claimant, strictly in terms of the conditions contained in the impugned award, through payees' account cheque or to deposit in his account.

21. Send down the records after placing a copy of the judgment on the file of the claim petition.

****

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

United India Insurance Company Ltd. ...Appellant.

Versus

Sh. Talaru Ram and others ...Respondents.

FAO No. 537 of 2008
Reserved on : 11.12.2015
Decided on: 18.12.2015

Motor Vehicles Act, 1988- Section 163-A- Deceased was running an auto electrician shop- he was travelling in a newly purchased Maruti Van being driven by 'S'- driver and deceased were murdered and their dead bodies were thrown in Nalla – a claim petition was filed pleading that accident had arisen out of use of the vehicle – a preliminary objection was raised that accident was not out of use of the vehicle, but was the result of crime- police filed a final report disclosing that driver, deceased and accused were travelling in the vehicle- accused had killed the driver due to enmity and had also killed the deceased- held, that offence was committed inside the vehicle and is out of use of the motor vehicle- the negligence is not required to be proved in a petition under Section 163-A of M.V. Act, therefore, petition was fully maintainable. (Para-4 to 36)

Motor Vehicles Act, 1988- Section 166- Tribunal had awarded lower compensation- held, that it is the duty of the Courts to award proper compensation and Appellate Court is within its power to enhance the compensation, even if, no appeal has been preferred on this ground- therefore, compensation enhanced. (Para-45 to 57)

Cases referred:

Shivaji Dayanu Patil and another versus Vatschala Uttam More, 1991 ACJ 777

Rita Devi (Smt) and others versus New India Assurance Co. Ltd. and another, (2000) 5 Supreme Court Cases 113

Union of India versus Bhagwati Prasad (D) and others, AIR 2002 Supreme Court 1301,

Malikarjuna G. Hiremath versus Oriental Insurance Co. Ltd. & Anr., II (2009) ACC 738 (SC

Surinder Kumar Arora & another versus Dr. Manoj Bisla & others, 2012 AIR SCW 2241

Lachoo Ram and others versus Himachal Road Transport Corporation, (2014) 13 Supreme Court Cases 254

Oriental Insurance Company Limited versus Premlata Shukla & others, 2007 AIR SCW 3591

Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors., 2009 AIR SCW 4298

Sarla Verma and others vs Delhi Transport Corporation and another, AIR 2009 SC 3104

Reshma Kumari & others versus Madan Mohan and another, 2013 AIR SCW 3120

Nagappa versus Gurudayal Singh and others, AIR 2003 Supreme Court 674

State of Haryana and another vs Jasbir Kaur and others, AIR 2003 Supreme Court 3696

The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another, AIR 2003 Supreme Court 4172

A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213

Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 491

Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr., 2009 AIR SCW 3717

Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800

For the appellant:	Mr. Ashwani K. Sharma, Senior Advocate, with Ms. Monika Shukla, Advocate.
For the respondents:	Mr. B.N. Sharma, 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)

Appellant-insurer has thrown challenge to the judgment and award, dated 26.06.2008, made by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr,

H.P. (for short "the Tribunal") in M.A.C. Petition No. 79 of 2004, titled as Talaru Ram and another versus Sh. Vinod Kumar and another, whereby compensation to the tune of Rs.2,54,000/- with interest @ 7½% per annum from the date of filing of the petition till its realization came to be awarded in favour of the claimants and the appellant-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. Appellant-insurer has questioned the impugned award on various grounds taken in the memo of appeal. Precisely, the challenge to the impugned award is on the ground that the claim petition was not maintainable for the reason that deceased-Dharam Pal, son of the claimants, was brutally murdered.

4. A very important question of law has been raised in the memo of appeal, which was also raised before the Tribunal.

5. In order to determine the issue, it is necessary to give brief resume of the case, the womb of which has given birth to the appeal in hand:

6. Claimants filed a claim petition before the Tribunal under Section 163A of the Motor Vehicles Act, 1988 (for short "the MV Act") and claimed compensation to the tune of Rs.ten lacs, as per the break-ups given in the claim petition.

7. It has been averred in the claim petition that deceased-Dharam Pal was running an auto electrician shop in Village Kingal, was travelling in a newly purchased Maruti Van, which, later on, was registered as HP-02-0190, was being driven by Shri Santosh Kumar. The driver as well as the deceased-Dharam Pal were murdered in between Oddi and Narkanda and their dead bodies were thrown in Thachru Nallah. Further averred that the deceased was earning Rs.6,000/- from the profession of auto electrician and also helping his parents in agricultural vocation.

8. The claimants have stated in para 22 of the claim petition that the accident was outcome of use of motor vehicle. It is apt to reproduce para 22 of the claim petition herein:

> "22. Cause of accident. : Sh. Dharam Pal deceased was travelling as passenger and illfated vehicle from Kingal to Narkand & when he was going in the vehicle was murdered arised out of the use of the said vehicle alognwith the driver of the vehicle and his dead bodies was thrown in Thacru Nala in between Oddi and Narkanda. The murdered must has some enmity with the driver."

9. The driver of the offending vehicle was also murdered, that is why, he was not arrayed as party-respondent in the array of respondents.

10. The insurer and the owner-insured of the offending vehicle resisted the claim petition on the grounds taken in the memo of objections.

11. Following issues came to be framed by the Tribunal on 29.04.2005:

> "1. Whether Sh. Dharam Pal had died on account of use of motor vehicle No. HP-02-0190? OPP
>
> 2. If issue No. 1 is proved to what amount of compensation and from whom are the petitioners entitled to? OPP

3. Whether this Tribunal has no jurisdiction to proceed with the trial of the claim petition? OPR-2

4. Whether vehicle No. HP-02-0190 was under the insurance cover of respondent No. 2, if not with what effect? OPR-2

5. Relief."

12. The claimants examined Shri Sadanand as PW-1, Shri Rajesh Bharti as PW-3 and claimant-Talaru Ram himself appeared in the witness box as PW-2. The respondents in the claim petition have examined Shri Ashok Negi, Shri Shyam Lal, Shri Tek Singh, Shri Sudhir Pandey and Shri Ganga Ram as their witnesses. Parties have also placed on record copies of final report submitted under Section 173 of the Code of Criminal Procedure (for short "CrPC"), FIR, post-mortem report, birth certificate and other documents including the documents of the offending vehicle, i.e. registration certificate, insurance cover note and the route permit. All the documents stand exhibited.

Issues No. 1 and 3:

13. After scanning the evidence, oral as well as documentary, the Tribunal held that the accident was outcome of use of the vehicle.

14. Learned Senior Counsel appearing on behalf of the appellant argued that the accident was not out of use of motor vehicle, but was a crime - a brutal murder. Thus, the claim petition was not maintainable and the findings returned by the Tribunal on issue No. 1 are not legally correct.

15. It is admitted fact that the driver and deceased-Dharam Pal were murdered in the vehicle. The owner-insured of the vehicle has specifically averred that the death of the deceased and the driver was because of criminal assault. FIR No. 74/2004, dated 26.08.2004, was lodged at Police Station Kumarsain. Investigation was conducted and final police report was presented against accused Rajinder Singh Thakur, Vijay Thakur and Surjit Khachi for commission of offence under Sections 302 and 392 read with Section 34 of the Indian Penal Code (for short "IPC").

16. The perusal of final report, Ext. PW-1/A, too discloses that the driver, deceased-Dharam Pal and the accused persons were travelling in the vehicle, had enmity with the driver, killed him and also killed Dharam Pal in the vehicle. The crime was committed with a fine lace like thread inside the vehicle and the bodies were thrown in the nallah.

17. The police report and other evidence on the file have remained unrebutted. Even, learned senior counsel for the appellant has not been able to show that the crime was not committed in the vehicle.

18. The question is - whether the death/murder of Dharam Pal is out of use of vehicle in the given circumstances of the case? The answer is in the affirmative for the following reasons:

19. The legal representatives of the driver of the vehicle have not made any claim. The claim, which is being adjudicated upon, is by the legal representatives/ heirs/dependents of deceased-Dharam Pal.

20. As discussed hereinabove and as recorded by the Tribunal, the entire offence was committed inside the vehicle, thus, out of 'use of motor vehicle'. The claimants have filed claim petition under Section 163A of the MV Act and not under Section 166 of the MV Act. In a claim petition filed under Section 166 of the MV Act, the claimants have to plead

and prove that the accident was outcome of rash and negligent driving of the vehicle by its driver. Sine qua non for maintaining the claim petition under Section 166 of the MV Act is the rashness and negligence on the part of the driver of the vehicle, but in a claim petition under Section 163A of the MV Act, rashness and negligence is not a sine qua non and it is also not even an ingredient in the said provision.

21. It is worthwhile to reproduce Section 163A of the MV Act herein:

> "**163A. Special provisions as to payment of compensation on structured formula basis. -** (1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the 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 motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.
>
> Explanation. - For the purposes of this sub-section, "permanent disability" shall have the same meaning and extent as in the Workmen's Compensation Act, 1923 (8 of 1923).
>
> (2) In any claim for compensation under sub-section (1), 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 or vehicles concerned or of any other person.
>
> (3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule."

22. While going through this provision of law, the words used are 'use of motor vehicle'.

23. The Court has to be cautious and has to draw a fine distinction. If the motive, criminal intention and conspiracy was to kill Dharam Pal, perhaps the remedy was anywhere else.

24. The facts, the final report and other circumstances do disclose that the prima facie motive and intention of the accused persons were to kill the driver of the vehicle and not Dharam Pal. Thus, Dharam Pal became the victim because of travelling in the vehicle and his death is outcome of 'use of motor vehicle'.

25. The Apex Court in the case titled as **Shivaji Dayanu Patil and another versus Vatschala Uttam More,** reported in **1991 ACJ 777,** has interpreted the words and expression 'use of motor vehicle' and held that these have a wide connotation. It is apt to reproduce paras 31 to 36 of the judgment herein:

> "31. The words "arising out of" have been used in various statutes in different contexts and have been construed by Courts widely as well as narrowly, keeping in view the context in which they have been used in a particular legislation.
>
> 32. In Heyman v. Darwins Ltd., 1942 AC 356, while construing the arbitration clause in a contract, Lord Porter expressed the view that as compared to the word 'under', the expression 'arising out of' has a wider meaning. In Union of India v. E.B. Aaby's Rederi A/S, 1975

AC 797, Viscount Dilhorne and Lord Salmon stated that they could not discover any difference between the expression "arising out of" and "arising under" and they equated "arising out of" in the arbitration clause in a Charter Party with "arising under."

33. In Samick Lines Co. Ltd. v. Owners of the Antonis P. Lemos, (1985) 2 WLR 468, the House of Lords was considering the question whether a claim for damages based on negligence in tort could be regarded as a claim arising out of an agreement under section 20(2)(1)(h) of the Supreme Court Act, 1981 and fell within the admiralty jurisdiction of the High Court. The words "any claim arising out of any agreement relating to the carriage of goods in a ship or to the use of hire of a ship" in section 20(2)(1)(h) were held to be wide enough to cover claims, whether in contract or tort arising out of any agreement relating to the carriage of goods in a vessel and it was also held that for such an agreement to come within paragraph (h), it was not necessary that the claim in question be directly connected with some agreement of the kinds referred to in it. The words "arising out of" were not construed to mean "arising under" as in Union of India v. E.B. Aaby's A/S, 1975 AC 797, which decision was held inapplicable to the "The words" injury caused by or ar ising out construction of S. 20(2)(1)(h) and it was observed by Lord Brandon:

> "With regard to the first point, I would readily accept that in certain contexts the expression 'arising out of' may, on the ordinary and natural meaning of the words use, be the equivalent of the expression 'arising under', and not that of the wider expression 'connected with'. In my view, however, the expression 'arising out of' is, on the ordinary and natural meaning of the words used, capable, in other contexts, of being the equivalent of the wider expression 'connected with'. Whether the expression 'arising out of' has the narrower or the wider meaning in any particular case must depend on the context in which it is used."

Keeping in view the context in which the expression was used in the statute it was construed to have the wider meaning viz. 'connected with'.

34. In the context of motor accidents the expressions 'caused by' and 'arising out of' are often used in statutes. Although both these expressions imply a causal relationship between the accident resulting in injury and the use of the motor vehicle but they differ in the degree of proximity of such relationship. This distinction has been lucidly brought out in the decision of the High Court of Australia in Government Insurance Office of N.S.W. v. R.J. Green & Lloyd Pty. Ltd., 1967 ACJ 329 (HC, Australia), wherein Lord Barwick, C.J., has stated :

> "Bearing in mind the general purpose of the Act I think the expression' arising out of' must be taken to require a less proximate relationship of the injury to the relevant use of the vehicle than is required to satisfy the words caused by'. It may be that an association of the injury with the use of the vehicle while

> it cannot be said that that use was causally related to the injury may yet be enough to satisfy the expression 'arise out of' as used in the Act and in the policy."
>
> 35. In the same case, Windeyer, J. has observed as under :
>
> "The words 'injury by or arising out of the use of the vehicle' postulate a causal relationship between the use of the vehicle and the injury. 'Caused by' connotes a 'direct' or 'Proximate' relationship of cause and effect. 'Arising out of' extends this to a result that is less immediate; but it still carries a sense of consequence."
>
> 36. This would show that as compared to the expression 'caused by', the expression 'arising out of' has a wider connotation. The expression 'caused by' was used in sections 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In section 92-A, Parliament, however, chose to use the expression 'arising out of' which indicates that for the purpose of awarding compensation under section 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be,connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression "arising out of the use of a motor vehicle" in section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

26. While going through the judgment (supra), one comes to an inescapable conclusion how the accident and injury/death have relationship with use of motor vehicle.

27. The Apex Court in another case titled as **Rita Devi (Smt) and others versus New India Assurance Co. Ltd. and another,** reported in **(2000) 5 Supreme Court Cases 113,** has discussed the scope of Section 163A of the MV Act and the expression 'death due to accident arising out of the use of motor vehicle' occurring in Section 163A of the MV Act. It is profitable to reproduce paras 9 to 18 of the judgment herein:

> "9. A conjoint reading of the above two sub-sections of Sec. 163-A shows that a victim or his heirs are entitled to claim from the owner / insurance company a compensation for death or permanent disablement suffered due to accident arising out of the use of the motor vehicle (emphasis supplied), without having to prove wrongful act or neglect or default of anyone. Thus, it is clear, if it is established by the claimants that the death or disablement was caused due to an accident arising out of the use of motor vehicle, then contention of the Insurance Company which was accepted by the High Court is that the death of the deceased (Dasarath Singh) was not caused by an accident arising out of the use of motor vehicle. Therefore, we will have to examine the actual legal import of the words "death due to accident arising out of the use of motor vehicle".
>
> 10. The question, therefore is, can a murder be an accident in any given case? There is no doubt that "murder", as it is understood, in the common parlance is a felonious act where death is caused with

intent and the perpetrators of that act normally have a motive against the victim for such killing. But there are also instances where murder can be by accident on a given set of facts. The difference between a "murder" which is not an accident and a "murder" which is an accident, depends on the proximity of the cause of such murder. In our opinion, if the dominant intention of the act of felony is to kill any particular person, then such killing is not an accidental murder, but is a murder simpliciter, while if the cause of murder or act of murder was originally not intended and the same was caused in furtherance of any other felonious act, then such murder is an accidental murder.

11. In Challis v. London and South Western Rly. Co., (1905) 2 KB 154, the Court of Appeal held where an engine driver while driving a train under a bridge was killed by a stone wilfully dropped on the train by a boy from the bridge, that his injuries were caused by an accident. In the said case, the Court rejecting an argument that the said incident cannot be treated as an accident held :

> "The accident which befell the deceased was, as it appears to me, one which was incidental to his employment as an engine driver, in other words, it arose out of his employment. The argument for the respondents really involves the reading into the Act of a proviso to the effect that an accident shall not be deemed to be within the Act, if it arose from the mischievous act of a person not in the service of the employer. I see no reason to suppose that the legislature intended so to limit the operation of the Act. The result is the same to the engine driver, from whatever cause the accident happened; and it does not appear to me to be any answer to the claim for indemnification under the Act to say that the accident was caused by some person who acted mischievously.

12. In the case of Nisbet v. Rayne & Burn, (1910) 2 KB 689, where a cashier, while travelling in a railway to a colliery with a large sum of money for the payment of his

employers' workmen, was robbed and murdered. The Court of Appeal held :

> That the murder was an accident from the standpoint of the person who suffered from it and that it arose out of an employment which involved more than the ordinary risk, and consequently, that the widow was entitled to compensation under the Workmen's Compensation Act, 1906. In this case, the Court followed its earlier judgment in the case of Challis (supra). In the case of Nisbet (supra) the Court also observed that it is contended by the employer that this was not an accident within the meaning of the Act, because it was an intentional felonious act which caused the death, and that the word accident negatives the idea of intention. In my opinion, this contention ought not to prevail, I think it was an accident from the point of view of Nisbet, and that it makes - no difference whether the pistol shot was deliberately fired at Nisbet or whether it was intended for somebody else and not for Nisbet."

13. The judgment of the Court of Appeal in Nisbet case (supra) was followed by the majority judgment by the House of Lords in the case of Board of Management of Trim Joint District School v. Kelly, 1914 AC 667.

14. Applying the principles laid down in the above cases to the facts of the case in hand, we find that the deceased, a driver of the auto-rickshaw, was dutybound to have accepted the demand of fare-paying passengers to transport them to the place of their destination. During the course of this duty, if the passengers had decided to commit an act of felony of stealing the auto-rickshaw and in the course of achieving the said object of stealing the auto-rickshaw, they had to eliminate the driver of the auto-rickshaw then it cannot but be said that the death so caused to the driver of the auto-rickshaw was an accidental murder. The stealing of the auto-rickshaw was the object of the felony and the murder that was caused in the said process of stealing the auto-rickshaw is only incidental to the act of stealing of the auto-rickshaw. Therefore, it has to be said that on the facts and circumstances of this case the death of the deceased (Dasarath Singh) was caused accidentally in the process of committing theft of the auto-rickshaw.

15. Learned Counsel for the respondents contended before us that since the Motor Vehicles Act has not defined the word "death" and the legal interpretations relied upon by us are with reference to the definition of the word "death" in the Workmen's Compensation Act the same will not be applicable while interpreting the word death in the Motor Vehicles Act, because according to her, the objects of the two Acts are entirely different. She also contends that on the facts of this case no proximity could be presumed between the murder of the driver and the stealing of the auto-rickshaw. We are unable to accept this contention advanced on behalf of the respondents. We do not see how the object of the two Acts, namely, the Motor Vehicles Act and the Workmen's Compensation Act are in any way different. In our opinion, the relevant object of both the Acts is to provide compensation to the victims of accidents. The only difference between the two enactments is that so far as the Workmen's Compensation Act is concerned, it is confined to workmen as defined under that Act while the relief provided under Chapter X to XII of the Motor Vehicles Act is available to all the victims of accidents involving a motor vehicle. In this conclusion of ours, we are supported by Sec. 167 of the Motor Vehicles Act as per which provision, it is open to the claimants either to proceed to claim compensation under the Workmen's Compensation Act or under the Motor Vehicles Act. A perusal of the objects of the two enactments clearly establishes that both the enactments are beneficial enactments operating in the same field, hence the judicially accepted interpretation of the word death in the Workmen's Compensation Act is, in our opinion, applicable to the interpretation of the word death in the Motor Vehicles Act also.

16. In the case of Shivaji Dayanu Patil v. Vatschala Uttam More, (1991) 3 SCC 530 this Court while pronouncing on the

interpretation of Section 92-A of the Motor Vehicles Act, 1939 held as follows : (SCC p. 532, para 12)

> "... Section 92-A was in the nature of a beneficial legislation enacted with a view to confer the benefit of expeditious payment of a limited amount by way of compensation to the victims of an accident arising out of the use of a motor vehicle on the basis of no-fault liability. In the matter of interpretation of a beneficial legislation the approach of the Courts is to adopt a construction which advances the beneficent purpose underlying the enactment in preference to a construction which tends to defeat that purpose."

17. In that case, in regard to the contention of proximity between the accident and the explosion that took place, this Court held : (SCC pp. 549-50, para 36)

> "36. This would show that as compared to the expression 'caused by', the expression 'arising out of' has a wider connotation. The expression 'caused by' was used in Sections. 95(1)(b)(i) and (ii) and 96(2)(b)(ii) of the Act. In Section 92-A, Parliament, however, chose to use the expression 'arising out of' which indicates that for the purpose of awarding compensation under Section 92-A, the causal relationship between the use of the motor vehicle and the accident resulting in death or permanent disablement is not required to be direct and proximate and it can be less immediate. This would imply that accident should be connected with the use of the motor vehicle but the said connection need not be direct and immediate. This construction of the expression arising out of the use of a motor vehicle in Section 92-A enlarges the field of protection made available to the victims of an accident and is in consonance with the beneficial object underlying the enactment."

18. In the instant case, as we have noticed the facts, we have no hesitation in coming to the conclusion that the murder of the deceased (Dasarath Singh) was due to an accident arising out of the use of motor vehicle. Therefore, the trial Court rightly came to the conclusion that the claimants were entitled for compensation as claimed by them and the High Court was wrong in coming to the conclusion that the death of Dasarath Singh was not caused by an accident involving the use of motor vehicle."

28. In this judgment, the Apex Court has also discussed the intention, motive and other aspects in order to make a distinction and to arrive at a prima facie finding whether the accident falls within the expression 'use of motor vehicle'. The case in hand is squarely covered by para 10 of the judgment (supra).

29. In the case titled as **Union of India versus Bhagwati Prasad (D) and others,** reported in **AIR 2002 Supreme Court 1301,** the Apex Court has discussed the concept of joint tortfeasor and maintainability of claim petition, jurisdiction of the Claims Tribunal and the expression 'accident arising out of use of motor vehicle'. Though, the judgment is not directly applicable to the facts of the case, but the principle is applicable for the reason that the expression 'use of motor vehicle' stands thrashed out. It is apt to reproduce relevant portion of para 3 of the judgment herein:

"3. ..... In our considered opinion, the jurisdiction of the Tribunal to entertain application for claim of compensation in respect of an accident arising out of the use of a motor vehicle depends essentially on the fact whether there had been any use of motor vehicle and once that is established, the Tribunals jurisdiction cannot be held to be ousted on a finding being arrived at a later point of time that it is the negligence of the other joint tortfeasor and not the negligence of the motor vehicle in question. We, are therefore, of the considered opinion that the conclusion of the Court in the case of Union of India v. United India Insurance Co. ltd., 1997 (8) SCC 683 to the effect -

"It is ultimately found that mere is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of the other parties/agencies, then on that finding, the claim would go out of Sec. 110(1) of the Act because the case would men become one of exclusive negligence of the Railways. Again, if the accident had arisen only on account of the negligence of persons other than the driver/ owner of the motor vehicle, the claim would not be maintainable before the Tribunal" is not correct in law and to that extent the aforesaid decision must be held to have not been correctly decided."

30. The Apex Court in another case titled as **Malikarjuna G. Hiremath versus Oriental Insurance Co. Ltd. & Anr.,** reported in **II (2009) ACC 738 (SC),** has discussed the scope of Section 3 of the Workmen's Compensation Act, 1923 and the expression 'accident arising out of and in the course of employment'. The Apex Court has also discussed the entire law dealing with the principles for grant of compensation, which are applicable in this case also. It is apt to reproduce paras 10 to 19 of the judgment herein:

"10. The expression "accident" means an untoward mishap which is not expected or designed. "Injury" means physiological injury. In Fenton v. Thorley & Co. Ltd. (1903) AC 448, it was observed that the expression "accident" is used in the popular and ordinary sense of the word as denoting an unlooked for mishap or an untoward event which is not expected or designed. The above view of Lord Macnaghten was qualified by the speech of Lord Haldane A.C. in Trim Joint District, School Board of Management v. Kelly (1914) A.C. 676 as follows:

"I think that the context shows that in using the word "designed" Lord Macnaghten was referring to designed by the sufferer."

11. The above position was highlighted by this Court in Jyothi Ademma v. Plant Engineer, Nellore and Anr., V (2006) SLT 457=III(2006) ACC 356 (SC)=III(2006) CLT 178(SC)=2006(5) SCC 513.

12. This Court in ESI Corpn. v. Francis De Costa, 1996 (6) SCC 1 referred to, with approval, the decision of Lord Wright in Dover Navigation Co. Ltd. v. Isabella

Craig, 1940 AC 190, wherein it was held: (All ER p. 563)

"Nothing could be simpler than the words `arising out of and in the course of the employment . It is clear that there are two

> conditions to be fulfilled. What arises `in the course of the employment is to be distinguished from what arises `out of the employment . The former words relate to time conditioned by reference to the man s service, the latter to causality. Not every accident which occurs to a man during the time when he is on his employment--that is, directly or indirectly engaged on what he is employed to do - gives a claim to compensation, unless it also arises out of the employment. Hence the section imports a distinction which it does not define. The language is simple and unqualified."

13. We are not oblivious that an accident may cause an internal injury as was held in Fenton (Pauper) v. J. Thorley & Co. Ltd., 1903 AC 443 by the Court of Appeal:

> "I come, therefore, to the conclusion that the expression `accident is used in the popular and ordinary sense of the word as denoting an unlooked-for mishap or an untoward event which is not expected or designed."

Lord Lindley opined:

> "The word `accident is not a technical legal term with a clearly defined meaning. Speaking generally, but with reference to legal liabilities, an accident means any unintended and unexpected occurrence which produces hurt or loss. But it is often used to denote any unintended and unexpected loss or hurt apart from its cause; and if the cause is not known the loss or hurt itself would certainly be called an accident. The word `accident is also often used to denote both the cause and the effect, no attempt being made to discriminate between them. The great majority of what are called accidents are occasioned by carelessness; but for legal purposes it is often important to distinguish careless from other unintended and unexpected events."

14. There are a large number of English and American decisions, some of which have been taken note of in ESI Corpn.'s case (supra) in regard to essential ingredients for such finding and the tests attracting the provisions of Section 3 of the Act. The principles are:

(1) There must be a causal connection between the injury and the accident and the accident and the work done in the course of employment.

(2) The onus is upon the applicant to show that it was the work and the resulting strain which contributed to or aggravated the injury.

(3) If the evidence brought on records establishes a greater probability which satisfies a reasonable man that the work contributed to the causing of the personal injury, it would be enough for the workman to succeed, but the same would depend upon the fact of each case.

15. An accident may lead to death but that an accident had taken place must be proved. Only because a death has taken place in course of employment will not amount to accident. In other words,

death must arise out of accident. There is no presumption that an accident had occurred.

16. In a case of this nature to prove that accident has taken place, factors which would have to be established, inter alia, are:

(1) stress and strain arising during the course of employment,

(2) nature of employment,

(3) injury aggravated due to stress and strain.

17. In G.M., B.E.S.T. Undertaking v. Agnes, 1964 (3) SCR 930 referring to the decision of the Court of Appeal in Jenkins v. Elder Dempster Lines Ltd., 1953 (2) All ER 1133, this Court opined therein that a wider test, namely, that there should be a nexus between accident and employment was laid down. It also followed the decision of this Court in Saurashtra Salt Mfg. Co. v. Bai Valu Raja, AIR 1958 SC 881.

18. In Mackinnon Mackenzie & Co. (P) Ltd. v. Ibrahim Mohd. Issak, 1969 (2) SCC 607, this Court held:

"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 causal 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."

19. The above position was again highlighted in Shakuntala Chandrakant Shreshti v. Prabhakar Maruti Garvali and Anr., VIII (2006) SLT 654=IV (2006) ACC 769 (SC)=2007 (11) SCC 668."

31. The Apex Court in the case titled as **Surinder Kumar Arora & another versus Dr. Manoj Bisla & others,** reported in **2012 AIR SCW 2241,** held that rash and negligent driving of the driver is sine qua non for maintaining claim petition under Section 166 of the MV Act, which is not the essential ingredient for maintaining claim petition under Section 163A of the MV Act. It is apt to reproduce paras 9 and 10 of the judgment herein:

“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."

32. Learned Senior Counsel for the appellant tried to make the foundation of his case by pressing into service the judgment made by the Apex Court in the case titled as **Lachoo Ram and others versus Himachal Road Transport Corporation,** reported in **(2014) 13 Supreme Court Cases**

254. The very foundation is without any basis, as discussed hereinabove.

33. The Apex Court has examined the scope of Sections 163A and 166 of the MV Act in the case titled as **Oriental Insurance Company Limited versus Premlata Shukla & others,** reported in **2007 AIR SCW 3591,** and **Bimla Devi & Ors. versus Himachal Road Transport Corpn. & Ors.,** reported in **2009 AIR SCW 4298,** and made a fine distinction.

34. The principle laid down by the Apex Court in the said judgments is of no help to the appellant for the reason that the claim petition in hand was filed before the Tribunal in terms of Section 163A of the MV Act, whereas the petitions filed in the cases relied upon by the learned Senior Counsel for the appellant were filed under Section 166 of the MV Act and the question involved was as to whether the petition under Section 166 of the MV Act was maintainable without proving the rashness and negligence, which is not the case here.

35. Having said so, the arguments of the learned Senior Counsel for the appellant are misconceived. Accordingly, findings returned by the Tribunal on issues No. 1 and 3 are upheld.

36. Before I deal with issue No. 2, I deem it proper to determine issue No. 4.

Issue No. 4:

37. Learned Senior Counsel for the appellant has not questioned the liability and has not even disputed the factum of insurance. However, the Tribunal has rightly discussed

issue No. 4 and the findings returned on the said issue are to be upheld. Accordingly, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 2:

38. The claimants have pleaded and proved that deceased-Dharam Pal was 22 years of age at the time of the accident and the claimants were 38 and 36 years of age at the time of filing of the claim petition.

39. It is beaten law of land that multiplier is the best method to assess the compensation. The Tribunal has applied multiplier of '15', which is just and appropriate in view of the Second Schedule appended with the MV Act read with the ratio laid down by the Apex Court in the case titled 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 the case titled as **Reshma Kumari & others versus Madan Mohan and another,** reported in **2013 AIR SCW 3120.**

40. The claimants have specifically pleaded that the deceased was earning Rs.6,000/- per month and have also proved the same. Thus, by guess work, it can be safely held that the income of the deceased was not less than Rs.5,000/- per month from all vocations.

41. In view of the law laid down by the Apex Court in **Sarla Verma's case (supra)** and upheld by a larger Bench of the Apex Court in **Reshma Kumari's case (supra),** 50% was to be deducted towards the personal expenses as the deceased was bachelor.

42. Viewed thus, the claimants-parents have lost source of income/dependency to the tune of Rs.2,500/- per month. Accordingly, the claimants are held entitled to compensation to the tune of Rs.2,500/- x 12 x 15 = Rs.4,50,000/- under the head 'loss of income/dependency'. The appellants-claimants are also held entitled to compensation to the tune of Rs.10,000/- under the head 'loss of love and affection', Rs.10,000/- under the head 'loss of estate' and Rs.10,000/- under the head 'funeral expenses'.

43. The moot question is - whether the Tribunal or Appellate Court is/are within its/their jurisdiction to enhance the compensation without the prayer being made for the same?

44. The poor claimants have not questioned the adequacy of compensation, have been dragged to the lis right from 29.10.2004 and are still waiting for the day to receive the compensation. More than eleven years have elapsed, they have suffered and are still suffering.

45. It would be profitable to reproduce Section 168 (1) of the MV Act herein:

> "**168. Award of the Claims Tribunal. -** On receipt of an application for compensation made under section 166 , the Claims Tribunal shall, after giving notice of the application to the insurer and after giving the parties (including the insurer) an opportunity of being heard, hold an inquiry into the claim or, as the case may be, each of the claims and, subject to the provisions of section 162 may make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid and in making the award the Claims Tribunal shall specify the amount which shall be paid by the insurer or owner or driver of the vehicle

involved in the accident or by all or any of them, as the case may be:

....."

46. The mandate of Section 168 (1) (supra) is to 'determine the amount of compensation which appears to be just'.

47. Keeping in view the object of granting of compensation and the legislature's wisdom read with the amendment made in the MV Act in the year 1994, it is for the Tribunal or the Appellate Court to assess the just compensation and is within its powers to grant the compensation more than what is claimed and can enhance the same.

48. This Court in a case titled as **United India Insurance Company Ltd. versus Smt. Kulwant Kaur,** reported in **Latest HLJ 2014 (HP) 174,** held that the Tribunal as well as the Appellate Court is/are within the jurisdiction to enhance the compensation and grant more than what is claimed.

49. The same principle has been laid down by the Apex Court in the cases titled as **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674; State of Haryana and another versus Jasbir Kaur and others,** reported in **AIR 2003 Supreme Court 3696; The Divisional Controller, K.S.R.T.C. versus Mahadeva Shetty and another,** reported in **AIR 2003 Supreme Court 4172; A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213;** and **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916.**

50. It is apt to reproduce para 10 of the judgment in **Nagappa's case (supra)** herein:

> "10. Thereafter, Section 168 empowers the Claims Tribunal to "make an award determining the amount of compensation which appears to it to be just". Therefore, only requirement for determining the compensation is that it must be 'just'. There is no other limitation or restriction on its power for awarding just compensation."

51. It would also be profitable to reproduce para 25 of the judgment in **Ningamma's case (supra)** herein:

> "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."

52. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** also laid down the same principle while discussing, in para 27 of the judgment, the ratio laid down in the judgments rendered in the cases titled as Nagappa v. Gurudayal Singh & Ors, (2003) 2 SCC 274; Devki Nandan Bangur and Ors. versus State of Haryana and Ors. 1995 ACJ 1288; Syed Basheer Ahmed & Ors. versus Mohd. Jameel & Anr., (2009) 2 SCC 225; National Insurance Co. Ltd. versus Laxmi Narain Dhut, (2007) 3 SCC 700; Punjab State Electricity Board Ltd. versus Zora Singh and Others (2005) 6 SCC 776; A.P. SRTC versus STAT and State of Haryana & Ors. versus Shakuntla Devi, 2008 (13) SCALE 621.

53. The Apex Court in a latest judgment in a case titled **Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service,** reported in **2013 AIR SCW 5800,** has specifically held that compensation can be enhanced while deciding the appeal, even though prayer for enhancing the compensation is not made by way of appeal or cross appeal/objections. It is apt to reproduce para 9 of the judgment herein:

> "9. In view of the aforesaid decision of this Court, we are of the view that the legal representatives of the deceased are entitled to the compensation as mentioned under the various heads in the table as provided above in this judgment even though certain claims were not preferred by them as we are of the view that they are legally and legitimately entitled for the said claims. Accordingly we award the compensation, more than what was claimed by them as it is the statutory duty of the Tribunal and the appellate court to award just and reasonable compensation to the legal representatives of the deceased to mitigate their hardship and agony as held by this Court in a catena of cases. Therefore, this Court has awarded just and reasonable compensation in favour of the appellants as they filed application claiming compensation under Section 166 of the M.V. Act. Keeping in view the aforesaid relevant facts and legal evidence on record and in the absence of rebuttal evidence adduced by the respondent, we determine just and reasonable compensation by awarding a total sum of Rs. 16,96,000/- with interest @ 7.5% from the date of filing the claim petition till the date payment is made to the appellants."

54. Having said so, the Tribunal/Appellate Court is within its powers to award the just compensation. Applying the ratio, I deem it proper to enhance the compensation.

55. Having glance of the above discussions, the claimants are held entitled to total compensation to the tune of Rs.4,50,000/- + Rs.10,000/- + Rs.0,000/- + Rs.10,000/- = Rs.4,80,000/- with interest as awarded by the Tribunal.

56. The appellant-insurer is directed to deposit the enhanced awarded amount before the Registry within eight weeks. The awarded amount already deposited be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification. After deposition of the enhanced awarded amount, the same be also released in favour of the claimants through payee's account cheque or by transferring to their respective accounts.

57. In view of the above, the impugned award is modified and the appeal is disposed of, as indicated hereinabove.

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

****

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

United India Insurance Company Ltd. ...Appellant.

Versus

Udham Singh (since deceased) through LRs. and others ...Respondents.

FAO No. 67 of 2009
Decided on: 18.12.2015

Motor Vehicles Act, 1988- Section 166- Insurer has questioned the award on the ground that there was breach of condition by the owner/insured-held that, the appellant has not led any evidence to prove that the offending driver was not possessing valid driving licence-breach of the condition not proved- appeal dismissed.(Para 3 to 9)

For the appellant: Mr. Ajeet Sharma, Advocate, vice Mr. Rajiv Jiwan, Advocate.

For the respondents: Mr. Ajay Chandel, Advocate, vice Mr. H.S. Rangra, Advocate, for respondents No. 1 (a) to 1 (c) and 2.
Mr. Jitender P. Ranote, Advocate, vice Mr. B.S. 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 the judgment and award, dated 04.09.2008, made by the Motor Accident Claims Tribunal-II, Mandi, District Mandi, Himachal Pradesh (for short "the Tribunal") in Claim Petition No. 41 of 2001, titled as Shri Udham Singh and another versus Sh. Pawan Kumar and others, whereby compensation to the tune of Rs.2,35,000/- 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 (for short "the impugned award").

2. The claimants, the owner-insured and the driver of the offending vehicle have not questioned the impugned award on any count, thus, the same has attained finality so far it relates to them.

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

4. Learned proxy counsel appearing on behalf of the appellant-insurer argued that the vehicle was not in the good condition and fitness certificate was not issued in favour of the owner-insured of the offending vehicle.

5. It is worthwhile to record herein that neither such ground has been taken before the Tribunal nor any such issue has been framed by the Tribunal. However, the only ground taken before the Tribunal that the driver of the offending vehicle was not having a valid and effective driving licence to drive the same and the Tribunal has framed the issue.

6. It was for the insurer to prove that the driver was not having a valid and effective driving licence, has not led any evidence, thus, has failed to prove the same. Even otherwise, the driving licence of the driver of the offending vehicle is on the record as Ext. R-

2, the perusal of which does disclose that the driver was having a valid and effective driving licence. This was the only ground taken before the Tribunal.

7. It was for the insurer to plead and prove that the owner-insured of the offending vehicle has committed any willful breach. No such ground has been taken. Moreover, the insurer has neither pleaded nor proved the same.

8. Having said so, the Tribunal has rightly saddled the insurer with liability. The impugned award is well reasoned, needs no interference.

9. Having glance of the above discussions, the impugned award is upheld and the appeal is dismissed.

10. 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 after proper identification.

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

****

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

Vidya Devi & another .....Appellants

Versus

Smt. Kamla Gandhi & others .....Respondents

FAO No. 199 of 2009
Decided on : 18.12.2015

Motor Vehicles Act, 1988- Section 166- Claimants challenged the award on the ground of adequacy of compensation- held that, the age of the deceased was 21 years, and the Tribunal has wrongly applied the multiplier of 7; whereas it should have been 15 as per settled law- tribunal had taken the income of the deceased as Rs. 3000/- whereas it was to be taken as Rs. 4000/- in view of the pleadings and evidence- further held that the Tribunal fell into an error by not awarding compensation under the head 'funeral expenses', loss of estate' and 'loss of love and affection' in favour of the claimants- a sum of Rs. 30,000/- awarded under these heads- award modified accordingly. (Para 6 to 10)

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. Vinod Chauhan, Advocate vice Mr. Adarsh Vashista, Advocate.

For the Respondents: Nemo for respondent No. 1.
Mr. J.L. Bhardwaj, Advocate, for respondent No. 2.
Mr. B.M. Chauhan, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

Challenge in this appeal is to the award dated 22nd October, 2008, made by the Motor Accident Claims Tribunal, Bilaspur, H.P. (hereinafter referred to as "the Tribunal") in M.A.C. Petition No. 44 of 2006, titled Vidya Devi & another versus Smt. Kamla Gandhi & others, whereby compensation to the tune of Rs.2,13,000/- with interest @ 9% per annum from the date of filing of the claim petition till its realization, was awarded in favour of the claimants-appellants herein and against the insurer-respondent No. 3 herein (for short, "the impugned award").

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

3. The claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Heard. Perused.

5. The amount awarded is meager for the following reasons.

6. Admittedly, the deceased was 21 years of age at the time of accident and was a bachelor. The Tribunal has fallen in an error in applying the multiplier of '7'. The multiplier of '15' is applicable in this case, as per 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** 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.**

7. The Tribunal has taken the income of the deceased as Rs.3,000/- per month. The claimants have pleaded that the deceased was earning Rs.4,000/- per month, as a conductor and Rs.10,000/- from other vocations. It can be safely held, rather admitted, that the monthly income of the deceased was not less than Rs.4,000/. After deducting one-half towards the personal expenses of the deceased, while keeping in view the ratio laid down by the Apex Court in ***Sarla Verma's, Reshma Kumari's and Munna Lal Jain's,*** cases, *supra,* the claimants are held entitled to the tune of Rs.2,000/- x 12 = Rs.24,000 x 15 = Rs.3,60,000/- under the head 'loss of dependency'.

8. The Tribunal has not awarded compensation under the heads 'loss of estate' and 'funeral expenses'. Keeping in view the recent judgments of the Apex Court, a sum of Rs.10,000/- each, is also awarded under the heads, 'funeral expenses', loss of estate' and 'loss of love and affection' in favour of the claimants, i.e. Rs.30,000/-.

9. The Tribunal has rightly awarded Rs.15,000/-, under the heads, 'attendant charges and special diet' and Rs.10,000/- under the head 'travelling expenses' are maintained.

10. Having said so, it is held that the claimants are entitled to compensation to the tune of Rs.3,60,000/- + Rs.10,000/- + Rs.10,000/- + Rs.10,000/- + Rs.15,000/- + Rs.10,000/, total amounting to Rs.4,15,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

11. The amount of compensation is enhanced and the impugned award is modified, as indicated above. The appeal is accordingly disposed of.

12. The insurer is directed to deposit the enhanced amount alongwith interest, within a period of eight weeks from today before the Registry. On deposit, 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 in the account.

13. Send down the records after placing a copy of the judgment on the Tribunal's file.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Man Singh .....Appellant.
Versus
State of H.P. .....Respondent.

Cr. Appeal No.414 of 2014.
Reserved on: 11.12.2014.
Date of Decision : 19/12/2015

Indian Penal Code, 1860- Section 302 read with Section 34- Accused came to Kirtan and threatened to stop it- he returned after five minutes and had altercation with the deceased- co-accused came with the knife and stabbed the deceased on the chest due to which deceased fell down- accused were convicted by the trial Court- one of the accused was acquitted by the High Court- a specific finding was recorded in the criminal appeal that testimonies of eye witnesses were not satisfactory- there were contradictions in the testimonies of eye witnesses- their testimonies are incredible and unnatural- no person intervened in the scuffle which makes the prosecution version highly doubtful- none of the witnesses deposed that accused was holding a knife , therefore, prosecution version was not proved beyond reasonable doubt- accused acquitted. (Para-9 to 27)

For the Appellant: Mr.Suneel Awasthi, Advocate.
For the Respondent: Mr. M. A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

The instant appeal is directed against the impugned judgment rendered on 2.5.2013 by the learned Sessions Judge, Kullu, Himachal Pradesh, in Sessions Trial No.68 of 2012 whereby the learned trial Court convicted and sentenced the accused/appellant to undergo life imprisonment and to pay a fine of Rs.10,000/- and in default thereof the accused was sentenced to further undergo simple imprisonment for six months for his having committed an offence punishable under Section 302 read with Section 34 of the Indian Penal Code (hereinafter referred to as the IPC).

2. The brief facts of the case are that Bir Singh had invited two deities on 24.4.2012 in his house and on that day, many persons had assembled in his house. On the evening of 25.4.2012, some persons were busy in preparing meal and some were sitting in front of the house of co-accused Moti Ram and were performing 'Kirtan'. At about 11 p.m. Bir Singh went to serve meal to the devotees, namely, Bhag Chand, Beli Ram, Vijay Kumar, Dola Ram, Ram Saran and others, who were performing 'Kirtan'. Accused Man Singh came there and threatened them to stop the 'Kirtan', otherwise he will commit murder. Accused Man Singh left the room and came after about five minutes and had an altercation with Beli Ram. In the meantime, co-accused Moti Ram came there wielding a knife in his hand and stabbed Beli Ram in the chest, who fell on the floor. Beli Ram died on the way to hospital and taken to the house of his brother Sabja Chand. Thereafter, dead body was kept in the house of Sabja Chand and the police was informed by PW-1 Bir Singh. The police visited the spot and recorded the statement of PW-1 Bir Singh under Section 154 of the Code of Criminal Procedure, comprised in Ex.PW1/A on the basis of which FIR Ex.PW9/A was registered in the police station. The police conducted the investigation in the case.

3. On completion of the investigation, into the offence, allegedly committed by the accused, report under Section 173 Cr.P.C. was prepared and filed in the Court.

4. The appellant/accused herein and co-accused Moti Ram were charged, for, theirs having committed an offence punishable under Section 302 read with Section 34, IPC, by the learned trial Court, to, which they pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 10 witnesses. On closure of the prosecution evidence, the statements of accused, under Section 313 of the Code of Criminal Procedure, were recorded, in, which they pleaded innocence and claimed false implication. However, the accused also examined three witnesses in defence.

6. The accused/appellant is aggrieved by the judgment of conviction recorded by the learned trial Court. Shri Suneel Awasthi, learned Advocate has concerted to vigorously contend before this Court qua the findings of conviction, recorded by the learned trial Court, being not based on a proper appreciation of evidence on record by it, rather, theirs being sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court, in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

7. On the other hand, the learned Additional Advocate General appearing for the State, 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 they 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 first witness, who stepped into the witness box in proof of the prosecution case is PW-1, Bir Singh. He deposes that on 24.4.2012, he had invited deities in his house. He further deposes that two deities had come to his house and many persons had also come along with deities to his house. On 25.4.2012, in the evening, the congregation was busy in preparing meal and some of the devotees were sitting in his house in front of the house of Moti Ram and performing 'Kirtan'. He deposes that some persons were preparing meat in the corner of verandah. He continues to depose that at about 11 p.m. Moti Ram, Bhag Chand, Beli Ram, Vijay Kumar, Dola Ram, Ram Saran and others were performing 'Kitran'. When this witness proceeded to serve meal to the persons sitting in

the room of the house of Moti Ram, in the meantime, Man Singh son of Radhu came there and warned to stop Kirtan, and threatened that otherwise, he would commit murder. PW-1 further deposes that thereafter he left the room and after about five minutes again entered in the room and entered into an argument and altercation with Beli Ram. In the meantime, Moti Ram also arrived there and had an altercation with Beli Ram. Both of them have been deposed to have dragged Beli Ram out of the room. He deposes that he along with others followed them. Thereafter Moti Ram, who was having a knife in his right hand stabbed Beli Ram in his chest. Beli Ram has been deposed by this witness to have told him that he had been stabbed by Moti Ram and thereafter he fell on the floor. Subsequently, blood started oozing out from the chest of Beli Ram and when they were shifting Beli Ram to the hospital, accused Man Singh has been deposed to have threatened that he will kill every one with 'Behli'. It has been stated by this witness that when they were taking Beli Ram to hospital, the house of Sabja Chand falls in between, hence, he was taken to the house of Sabja Chand, where Beli Ram was found dead. Thereafter, the dead body of Beli Ram was kept in the house of Sabja Chand. Man Singh and Moti Ram has been deposed by this witness to have committed murder of Beli Ram in furtherance of their common intention. He further deposes that he had reported the matter to the police. His statement Ex.PW1/A has been deposed by this witnesses to have been recorded by the police. He continue to depose that on 26.4.2012, the police had come to the spot and took into possession, knife, blood stained jacket, blood, blood stained soil, controlled sample vide memo Ex.PW1/B in his presence and in the presence of Bhag Chand. The articles have been deposed by this witness to have been kept in parcels and the parcels have been deposed to have been sealed with seal S. Sample of seal 'S" has been deposed by this witness to have been drawn on a piece of cloth Ex.PW1/C, which has been deposed to be bearing his signature as well as the signatures of Bhag Chand. He further deposes that the seal after use was handed over to him. The inquest papers Ex.PW1/D and Ex.PW1/E have been deposed by this witness to have been prepared by the police. He had identified the accused in the Court to be the same. In cross-examination, he has deposed that he had not served any liquor. However, he deposes that he cannot say as to whether from where the devotees had brought liquor. He denied that devotees were consuming liquor in the room. He also deposes in his cross-examination that after conclusion of the altercation, all the persons come out including the accused and the deceased. He has stated in his deposition comprised in his cross-examination that at the relevant time Raj Kumar was also there. 10-15 persons have been deposed by this witness to have assembled on the spot. In his cross-examination, he deposes that Moti Ram was already having a knife in his hand and that Moti Ram stabbed Beli Ram in his presence.

10. PW-2, Bhag Chand in his deposition comprised in his examination-in-chief has deposed that on 25.4.2012, a religious function was organized in the house of Bir Singh and some of the devotees were performing 'Kritan'. At about 11.00 p.m., Bir Singh has been deposed by this witness to have come to serve food to the congregation. In the meantime, accused Man Singh has been deposed to have entered in the room and threatened either to stop the 'kirtan', otherwise, he would commit murder and after meteing threats he left the room. After five minutes, Man Singh has been deposed by this witness to have again entered the room. Man Singh and Moti Ram, both of whom this witness has identified in the Court, have been further deposed by this witness to have dragged Beli Ram out of the room. In the verandah , accused Man Singh has been deposed by this witness to have caught hold of Beli Ram and Moti Ram stabbed Beli Ram in his chest with knife which he was carrying in his left hand. Thereafter, he deposes that blood started oozing out of the wound and that Beli Ram told him that he was stabbed by Moti Ram and he fell down on the floor. He continues to depose that they carried Beli Ram for treatment towards Neoli and when they reached at Neoli, Sabja Chand, brother of Beli Ram, after checking him, found him dead. He further deposes that the dead body of Beli Ram was kept in one room in the house of

Sabja Chand. The police has been deposed by this witness to have came the next morning. He along with Bir Singh have been deposed by him to have remained associated in the investigation conducted by the police. He further deposes that on 26.4.2012, the police took into possession various articles vide memo Ex.PW1/B in his presence and in the presence of Bir Singh. The articles have been deposed by this witness to have been sealed with seal 'S' in cloth parcels. Sample of seal has been deposed by this witness to have been drawn on a piece of cloth, Ex.PW1/C and Ex.PW1/C when have been deposed by this witness to be bearing his signature as well as the signatures of Bir Singh. The parcels Ex.P-1 to Ex. P-5 have been deposed by this witness to be the same. They have been deposed by this witness to have been prepared and sealed at the spot. Articles Ex.P-6 to Ex.P-11 have been identified by this witness to be the same, which were sealed by the police in his presence. Seal after its use has been deposed by this witness to have been handed over to PW-1 Bir Singh. In his cross-examination, he deposed that they noticed knife in the hand of Moti Ram. He deposes that 40-50 persons were present on the spot. He continues to depose that before falling on the floor, Beli Ram told that he was stabbed by Moti Ram. He has also deposed in his cross-examination that knife was thrown by the accused on the side of verandah and was recovered from that place.

11. PW-3 Vijay Kumar deposes that on 24.4.2012, he had gone with his wife to the house of Beli Ram, who is maternal uncle of his wife at Village Satesh. He deposes that Beli Ram, father of PW-1 had invited two deities and on 25.4.2012, there was also religious function in the house of PW-1. At about 11 p.m., he along with Ram Saran, Dola Ram, Moti Ram, Belu Ram, Beli Ram, Bhag Chand etc., were sitting in the room of the house of Moti Ram and were performing 'Kritan'. At about 11. p.m. accused Man Singh entered the room and threatened not to make noise, otherwise, he would commit murder. He further deposes that, thereafter he left the room and returned after five minutes and had a scuffle with Beli Ram. He further deposes that, subsequently, they came out of the room in the verandah and followed them. In the verandah, Man Singh caught hold of Beli Ram and Moti Ram stabbed Beli Ram with knife in his chest. Both the accused have been identified by this witness in the Court to be the same. He has also deposed that Beli Ram told them that he has been stabbed by Moti Ram and thereafter, he fell down on the floor. He continued to depose that blood started coming out from the wound. He deposes that thereafter they lifted Beli Ram for his treatment and brought him to Neoli. When they reached near the house of Sabja Chand, brother of Beli Ram, Subja Chand was called and he found Beli Ram to be dead. Thereafter, the dead body of Beli Ram was kept in one room of the house of Sabja Chand. Knife Ex.P-7 has been deposed by this witness to be the same. In his cross-examination, he deposes that he heard Beli Ram saying that he was given knife blow by Moti Ram.

12. PW-4 Dr. M.L. Bandhu, has proved on record post mortem report Ex.PW4/C. He deposes that he along with Dr. Ashok Rana conducted the post mortem examination of the deceased. On examination of the dead body, they noticed:-

"EXTERNAL APPEARANCE:-

Moderately built body measuring 5x2" rigor mortis present. No decomposition was seen. The person was wearing leg trouser, white shirt and blue underwear. We noticed two injuries on the dead body, on over right chest 3 cm from right nipple measuring 2 cm and wound gaping was present. Another wound was found on posterior aspect of right thigh measuring 3 cm and wound was gaping exposing underline muscle.

CRANIUM AND SPINAL CORD : Normal.

THORAX

A stab wound 3cm medial to right nipple measuring 2 cm. was seen and a probe could be passed up to the depth of 5 cm. There was extra vasation on blood in intercostal muscles and pectralis major and punctured. Extra vasation approximately 6x7 cm in size. Right lung showed punctured wound present in middle lobe and the lung was collapsed Frank blood approx. 300-350 ml was present on right thoracic cavity. The rest of the findings were normal."

He deposes that on the basis of the findings given above, they opined that the person died owing to haemorrhage (intra thoracic) causing severe respiratory distress and cardio respiratory collapse. Viscera has been deposed by this witness to have been sent for chemical examination. He further deposes that as per report Ex.PW4/b, no alcohol/poison could be detected in the contents of the parcel sent for analysis. Post mortem report Ex.PW4/C has been deposed by this witness to be bearing his signature as well as the signatures of Dr. Ashok Rana. He further deposes that stab injury sustained by deceased is possible with the help of knife Ex.P-7, shown to this witness in Court. In cross-examination, he has denied the suggestion that injury sustained by the deceased can possibly be caused by fall on hard surface.

13. PW-5, HHC Laxman Dass deposes that on 4.5.2012, MHC Tara Chand, P.S. Bhunter had handed over to him six parcels duly sealed with seals along with sample seals vide R.C. No.46/12 and he deposited the same at RFSL, Gutkar and thereafter handed over the receipt to MHC.

14. PW-6 M.C. Ved Vayas, proved Ex.PW4/A, copy of report No.4, dated 26.4.2012 which has been deposed by this witness to be the true and correct copy of the original brought by him in the Court.

15. PW-7 Rajesh Kumar, Assistant Director, Physics and Ballistics, Regional Forensic Science Laboratory, Mandi deposes that two sealed parcels were received in the laboratory on 4.5.2012 through C, Luxman Dass and on their examination, he issued report Ex.PW7/A. Ex.P-4 and Ex.P-5 have been deposed by this witness to be the same parcels which bears his signatures. In cross-examination, he has denied the suggestion that the case property was not received for chemical examination.

16. PW-8 SI-SHO, Lal Chand deposes that after completion of investigation and receipt of reports of chemical examiner, he prepared the challan and presented the same in the Court.

17. PW-9 H.C. Tara Chand deposes that on 26.4.2012, he was officiating SHO of P.S. Bhunter and on receipt of statement under Section 154, Cr.P.C. recorded by SI-SHO, Ashok Sain, he recorded FIR Ex.PW9/A. He further deposes that on 26.4.2012, SI-SHO Ashok Kumar deposited with him a parcel sealed with 8 seals of seal 'S' stated to be containing blood stained jacket of deceased Beli Ram, another parcel, sealed with six seals of seal S, stated to be containing knife, third parcel, sealed with four seals of seal S, stated to be contained soil, fourth parcel sealed with 4 seals of seal S, stated to be containing a blood sample in a matchbox and fifth parcel sealed with 4 seals of seal S, stated to be containing controlled sample of soil and sand along with sample seal. Entry at serial No.69 of the Register No.19 has been made by him. He further deposes that on the same day C. Bhupinder Singh deposited viscera of deceased with him qua which he made an entry at Sr. No. 70 of 2012 in the register. He further deposed that on the same day, C. Bhupinder Singh deposited with him a parcel sealed with 4 seals of seal CH, stated to be containing

clothes of the deceased which were entered by him at serial No. 71 of the register. He continues to depose that aforesaid articles were sent to RFSL, Gutkar through HHC Luxman Dass No.154 vide R.C. No. 46, who after depositing the case property handed over the R.C and receipt to him. He proved Ex.PW9/B, copy of abstract of Malkahana register and Ex.PW9/C, copy of R.C.. Ex.PW9/B and Ex.PW9/C have been deposed by this witness to be true and correct copies of the original brought by him in Court.

18. PW-10 S.I. Ashok Kumar deposes that he had partly investigated the case. He deposes that on 26.4.2012, at about 4.15 a.m., he received information from Pradhan, G.P. Deori Dhar and report Ex.PW6/A was recorded in the daily diary register. Thereafter, he visited the spot along with other members of the police party. He deposes that when, he reached Neoli, he recorded the statement of Bir Singh under Section 154, Cr.P.C., Ex.PW1/A, which was sent to police station for registration of the FIR. He further deposes that he took into possession the dead body of the deceased and prepared inquest papers Ex.PW1/D and Ex.PW1/E. He further deposes that thereafter he went to the spot along with complainant Bir Singh and prepared the spot map Ex.PW10/A. He further deposes that he took into possession blood along with controlled sample lying in the verandah of Moti Ram's house, knife, the blood stained jacket, which was worn by Beli Ram, vide memo Ex.PW1/B in the presence of witnesses. These articles have been deposed by this witness to have been sealed in separate parcels with seal S and the sample of the seal impression was drawn on separate piece of cloth Ex.PW1/C. The accused have been deposed by this witness to have been arrested vide memo Ex.PW10/D and Ex.PW10/E. He further deposes that in his investigation, it had come that two deities were invited by PW-1 Bir Singh in his house and 'Devloos' of deity were performing 'kirtan' and that accused persons attacked deceased Beli Ram. Accused Moti Ram stabbed Beli Ram and accused Man Singh caught hold of deceased. In cross-examination, he deposes that when they reached Neoli, many people had assembled on the spot and the proceeding at Neoli took about 1 or 2 hours. He further deposes that the knife was taken into possession from the spot. He has admitted the suggestion that knife is not in a bent condition in photograph Ex. C-3 and Ex. C-6. He deposes that the knife may have bend when the same was kept in jar. He denied the suggestion that he had not investigated the case properly. It has been denied by this witness that no recoveries were made from the spot and that the case property was tampered with. He has also denied the suggestion that the finger prints found on the knife were not intentionally taken by the police party. He has further denied the suggestion that a false case has been registered against accused persons at the instance of the complainant party.

19. The learned trial Court construed the testimonies of PW-1, PW-2 and PW-3 qua the incident being imbued with veracity. The reason as put forth by the learned trial Court in imputing/imbuing credibility to the testimonies qua the incident of PW1, PW2 and PW-3 was founded on the fact of theirs being eye witnesses or theirs having rendered an inspiring vivid ocular version qua the occurrence, besides with their testimonies being bereft of any inter se or intra se contradictions were hence construed to be inspiring confidence. Consequently, the learned trial Court had found it safe and fit, on the strength on their testimonies to record findings of conviction against the accused. Moreover, the learned trial Court also relied upon the testimony of PW-4 Dr. M.L. Bandhu, who proved post mortem report Ex.PW4/C and had unequivocally deposed qua the fact of fatal injuries as stood sustained by the deceased being sustainable or causable by knife, Ex. P-7, deposed by the purported eye witnesses to the incident to have been used by accused Moti Ram.

20. Accused Moti Ram under a rendition of this Court of 19.08.2014 in Criminal Appeal No. 4060 of 2013 stands acquitted. Since the role attributed to accused Man Singh is of his being in the company of accused Moti Ram at a stage when the latter purportedly

delivered a blow with knife Ext.P-7 on the person of the deceased sequelling injuries which as displayed by Ext.PW-4/C proven by PW-4 led to the demise of Beli Ram. This Court has in its rendition of 19.08.2014 on an incisive reading of the depositions of the material witnesses recorded a firm conclusion of the testimonies of the purported eye witnesses to the occurrence not acquiring any hue of veracity for sustaining the prosecution version of co-accused Moti Ram who therein stood acquitted by it having committed the murder of Beli Ram. With the ascribed inculpatory role to co-accused Moti Ram qua his committing the murder of Beli Ram standing dispelled, the role of co-accused Man Singh to whom the prosecution ascribes the role of his being in the company of co-accused Moti Ram at the relevant time, also stands negatived. The aforesaid conclusion of the inculpatory role attributed by the prosecution to accused Man Singh of his being in the company of co-accused Moti Ram standing dispelled arising from the factum of co-accused Moti Ram standing acquitted by this Court under its rendition of 19.08.2014 nonetheless it may not be appropriate to thereupon form any formidable conclusion qua the negation of the inculpatory role aforesaid standing ascribed to accused Man Singh unless the evidence on record is delved into. Consequently, this Court proceeds to embark upon an in depth analysis of the testimonies of the purported eye witnesses of the prosecution witnesses, who deposed as PW-1, PW-2 and PW-3.

21. For the reasons to be recorded hereinafter, not only the testimonies of the purported eye witnesses to the occurrence are gripped with a vice of severe and blatant interse and intra se contradictions, hence rendering them unworthy of credence, as also the probative value of knife, Ex.P-7 recovered under recovery memo Ex.PW1/B in its purportedly connecting the principal accused Moti Ram in the commission of the offence alleged against them, looses vigour and potency. Consequently, this Court would also not imbue/impute any evidentiary value to the post mortem report, Ex.PW4/C proved by PW-4, in which he has disclosed qua the fatal injuries sustained by the deceased being causable or sustainable by the user of knife, Ex. P-7.

22. Initially, the testimony of PW-1 is to be adverted to. On its close and incisive reading, it, emanates though his having deposed in his examination-in-chief, qua the factum of Man Singh accused having arrived at the site of occurrence and his having meted threats against the 'kirtan', organized in the house of PW-1, being continued, in absence, whereof, he threatened that he would commit murder. However, subsequently on his departure from the place of occurrence, he has been deposed to have re-entered the room and to have had an altercation with Beli Ram, in which altercation with Beli Ram, accused Man Singh was joined by accused Moti Ram. Both have been deposed to have dragged Moti Ram out of the room to the verandah. However, he has deposed that Moti Ram, who was having a knife in his right hand, stabbed Beli Ram in his chest. In the examination-in-chief of PW-1 it stands emerged qua the deceased Beli Ram before falling on the floor having communicated to him of his having been stabbed by Moti Ram. In his cross-examination, he has deposed that at the relevant time Raj Kumar was also there. However, Raj Kumar stood not joined as a witness. Surprisingly, also when he concedes to the fact of 10-15 persons having assembled on the spot, none interceded to halt the scuffle which ensued inter se Beli Ram and both the accused. Moreover, he tacitly concedes to the fact of the devotees consuming liquor in the room which tacit admission qua the said fact arising in his cross-examination qua his feigning ignorance as to wherefrom the devotees had brought liquor conveys that the entire congregation was inebriated. Even though, PW-1, the purported eye witness to the occurrence deposed that he saw accused Moti Ram deliver a fatal stab blow in the chest of Beli Ram. Nonetheless, the said fact appears to be wholly a prevarication in the face of the further fact existing in his examination-in-chief, wherein he has deposed that the deceased Beli Ram had, before falling on the floor, told him that he has been stabbed by Moti Ram.

The aforesaid fact as deposed by PW-1 in his examination in chief has also been consistently deposed by PW-2 and PW-3. The existence of the aforesaid fact in the examinations-in-chief of PW-1, PW-2 and PW-3 impinging upon a revelation qua the genesis of the occurrence having been made by the deceased to them inasmuch as the deceased before falling on the floor having disclosed to them of Moti Ram having stabbed him, nails and clinches an inference of its existence, hence, portraying the fact of PW-1, PW-2 and PW-3 having not witnessed the occurrence, rather, theirs standing apprised by deceased Beli Ram of accused Moti Ram having delivered a stab blow on his chest at a time when on his receiving the purported knife blow on his chest, he fell on the floor. Consequently, it, appears that only the purported dying declaration qua the occurrence was made by Beli Ram to PW-1, PW-2 and PW-3. However, PW-1, PW-2 and PW-3 have twisted and concocted the genesis of the occurrence so as to ingeniously project that they had witnessed the occurrence, whereas, they did not, for in case they did, there was no occasion for them to unravel in their respective testimonies of any disclosure qua the genesis of the occurrence having been made to them by deceased Beli Ram, before he fell on the floor, after his having received the purported knife blow. Even the fact of the purported dying declaration as made by deceased Beli Ram to PW-1, PW-2 and PW-3 cannot be believed nor does it constitute any evidence of probative value, especially when the genesis of the prosecution story, is, not anvilled upon the purported dying declaration made by the deceased Beli Ram to PW-1, PW-2 and PW-3 rather, is, anvilled upon the eye witness account qua the incident, manifested in the depositions of PW-1, PW-2 and PW-3, whose depositions are, however, incredible theirs carrying a tinge of unnaturalness.

23. PW-2 has also corroborated the testimony of PW-1 qua the incident. However, PW-2 has contradicted and improved upon the testimony of PW-1. Though, PW-1 has not attributed any role to co-accused Man Singh in the incident, yet in his deposition in his examination-in-chief, PW-2, has deposed of both Moti Ram and Man Singh having dragged deceased Beli Ram out of the Room and brought him to the verandah and in the verandah accused Man Singh is alleged to have caught hold of Beli Ram and Moti Ram is deposed to have stabbed Beli Ram in his chest with knife which he was carrying in his left hand. The said improvement is dire and wide. It has immense ramifications, inasmuch, as it belies the veracity of the depositions of both PW-1 and PW-2, inasmuch as with both omitting to depose in harmony and consistency with each other qua the inculpatory role in the occurrence of co-accused Man Singh, as such, they are to be construed to have not simultaneously witnessed the occurrence or rather a conclusion can also be formed that as a matter of fact, none witnessed the occurrence and of theirs rendering a prevaricated and untruthful account qua the occurrence.

24. The above inference is accentuated by the factum of none in the congregation having interceded in the purported scuffle, which ensued interse the accused and the deceased, which lack of intervention on the purported scuffle by any member of the congregation renders open an inference of the incident having not taken place in the manner as projected by the prosecution. As a natural concomitant further fortification to the conclusion aforesaid is garnered by the factum of, though Raj Kumar having been deposed both by PW-1 and PW-2 to have come to the site of occurrence, yet his omission to be joined as a witness, succors a conclusion of his omission standing goaded by the investigator, leaning towards rendering a concocted account qua the occurrence, through PW-1, PW-2 and PW-3, rather than projecting a truthful and impartisan version qua it. Even PW-3, though has deposed in tandem with PW-2 qua the occurrence, inasmuch, as alike/akin too, PW-2, he has attributed a role, to, co-accused Man Singh of the latter having held deceased Beli Ram for facilitating accused Moti Ram to deliver the fatal stab blow with knife Ext.P-7 on his chest. Consequently, with his rendering a version in tandem with PW-2 and in

contradiction and contra distinction to PW-1, his, alike testimony to PW-2, hence, being ingrained with inter se and intra se contradictions qua the occurrence with the testimony of PW-1, too, renders his testimony to be unebelievable. Moreover, though both PW-1 and PW-2 depose that at the apposite and relevant time, they had witnessed accused Moti Ram to be holding and wielding a knife in his left hand with which he delivered a blow on the chest of Beli Ram. However, in the narration qua the incident preceding to the fact as unfolded by them in the latter part of their respective examinations-in-chief, of theirs having witnessed accused Moti Ram to be holding or wielding a knife with which he delivered a stab blow on the chest of the deceased, there, is no narration or articulation by both PW-1 and PW-2, of, theirs having noticed accused Moti Ram holding or wielding a knife, hence the abrupt communication by them in the latter part of their examinations-in-chief, of theirs having witnessed accused Moti Ram to be wielding or holding a knife with which he purportedly delivered a stab blow on the chest of the deceased Beli Ram, as such, appears to be an afterthought, as well, as an ingeniously engineered move on their part to connect accused Moti Ram and Man Singh in the commission of the offence of murder of Beli Ram. Such ingenuity reeks of untruth and is to be discarded.

25. Even, PW-3 in his entire examination-in-chief omitted to disclose the fact that in the entire train of events preceding the delivery of the purported knife blow by accused Moti Ram, on, the chest of the deceased Beli Ram, he had ever noticed accused Moti Ram to be holding or wielding a knife, hence, when even in the scuffle inter se the accused and the deceased which occurred inside the room of Moti Ram, none of the witnesses, plain speakingly voice the fact of theirs having noticed accused Moti Ram to be holding or wielding a knife, hence, the sudden and abrupt disclosure by PW1, PW-2 and PW-3, of theirs having noticed or witnessed accused Moti Ram to be holding or wielding a knife with which he delivered the fatal stab blow on the chest of the deceased Beli Ram, is, a fact which tellingly denudes the prosecution version of its veracity, as also, renders the fact of PW-1, PW-2 and PW-3 having witnessed the occurrence, to be bereft of any truth. In aftermath, the reliance placed upon the testimonies of PW-1, PW-2 and PW-3 by the learned trial Court was ill thought as also, in-sagacious.

26. An in-depth analysis of the depositions of the principal prosecution witnesses who are espoused by the prosecution to have witnessed the occurrence when underscores the factum of theirs respective testimonies qua the occurrence for the aforestated reasons being ridden with a vice of improvements besides intra se contradictions, compels this Court to also conclude of their depositions, disclosing therein of accused Man Singh being at the relevant time in the company of Moti Ram when the latter purportedly stabbed deceased Beli Ram with a knife, being bereft of creditworthiness. In sequel, the factum of this Court having while discarding the testimonies of the aforesaid purported eyewitnesses acquitted principal accused Moti Ram for his purported incriminatory act of his stabbing deceased Beli Ram on the latters chest with Knife Ext.P-7 which begot his demise gives immense strength to this Court to also dispel the presence of accused Moti Ram at the site of occurrence at the relevant time or this Court is impelled to also over rule his presence thereat in the company of principal accused Moti Ram.

27. For the foregoing reasons, the appeal is allowed and the judgment of the learned trial Court is set-aside qua accused Man Singh. Accused Man Singh is acquitted of the offences charged. He be set at liberty forthwith, if not required in any other case. Fine amount, if any, deposited by the accused, be refunded to him. Records be sent back.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of Himachal Pradesh ..... Appellant
Versus
Ashok Kumar .....Respondent

Cr. Appeal No. 543/2015
Reserved on: 18.12.2015
Decided on: 19.12.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 300 grams of charas- he was given option to be searched before Magistrate, Gazetted Officer or by the police party- held, that only two options are available to the accused either to be searched before Gazetted Officer or Magistrate and giving third option is contrary to Section 50 of N.D.P.S. Act- in these circumstances, accused was rightly acquitted by the trial Court. (Para-15 and 16)

Case referred:
State of Rajasthan v. Parmanand, (2014) 5 SCC 345

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondent : Nemo.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 7.2.2015 rendered by learned Special Judge, Shimla, Himachal Pradesh in Sessions Trial No. 10-S/7 of 2011, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as 'Act' for convenience sake) has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 21.1.2011 SI Ajay Kumar Bhardwaj alongwith other police officials was present at Civil Supply gas Agency near Bhatta Kuffar Chowk. At about 1.40 pm, he noticed a person wearing grey coloured jacket coming from gas agency side. On seeing the police, he tried to run away. He was nabbed. Accused gave his option to be searched by police in the presence of witnesses vide Ext PW-2/A. Personal search of the accused was carried out. A polythene envelope was found from the right pocket of the grey coloured jacket worn by the accused. It was found to be charas. It weighed 300 grams. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 11 witnesses to prove its case against the prosecution. Accused was also examined under Section 313 CrPC. He pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. PW-1 HC Salig Ram deposed that on 22.1.2011 at about 2.50 pm, Constable Kanchan Kumar brought special report in FIR No. 15/11.

7. PW-2 Anil Kumar deposed that 2-3 years back, he was sitting in his shop. Police officials came to his shop and requested to accompany them for the purpose of search. He refused to accompany them and after 1 ½ hour police officials came back to his shop and asked him to sign some paper. He signed the same without reading. No proceedings have taken in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. He has identified the signatures on Ext. PW-2/A and Ext. PW-2/E.

8. PW-3 Rakesh has testified that he was not associated as independent witnesses nor he has seen any documents. Documents Ext. PW-2/A to Ext. PW-2/D were put to him. He deposed that the same did not bear his signatures.

9. PW-5 MHC Shiv Kumar deposed that on 21.1.2011, Additional SHO Sohan Lal deposited one sealed parcel sealed with seal impression 'C' and 'S'. He has entered the same in Malkhana register No. 19 at Sr. No. 636. He forwarded the case property with NCB form etc. vide RC No. 7/11 through Constable Bhoop Singh to FSL Junga.

10. PW-7 Ajay Bhardwaj deposed that at about 1.40 pm, he noticed accused. He was wearing grey coloured jacket. He tried to run back. He was nabbed. He apprised the accused about his right to be searched before a gazetted officer or a Magistrate or by the police. According to him, accused opted to be searched by the police in the presence of witnesses. Ext. PW-2/A was prepared. Thereafter, police personnel gave their personal search. Accused was also searched. Contraband was recovered from him. It weighed 300 gms. Charas was put in same polythene envelope. Thereafter, it was put in cloth parcel sealed with seal impression 'C', six in number. Contraband was taken into possession vide Ext. PW-2/C. NCB form Ext. PW-7/D was filled at the spot. Case property was produced in the police station. It was resealed by SI Sohan Lal with seal impression 'S'.

11. PW-8 Prakash Chand deposed that accused was apprised by Investigating Officer of his right to be searched before a gazetted officer or a Magistrate and accused was also given option whether he wanted to be searched by the police.

12. PW-9 Kanchan Kumar also deposed that Investigating Officer has given option to the accused to give search to a Gazetted Officer or a Magistrate, which was his legal right or to the police. Accused gave option to be searched by the police. He has taken Rukka to the Police Station. He also identified the case property.

13. PW -10 Bhoop Singh has taken the case property to FSL Junga.

14. PW-11 Inspector Sohan Lal deposed that the case property was produced before him by Ajay Bhardwaj. He resealed the same and filled up necessary columns of the NCB form.

15. What emerges from the facts enumerated herein above is that accused was nabbed at about 1.40 pm on 21.1.2011. Case of the prosecution has not at all been supported by independent witness PW-2 Anil Kumar and PW-3 Rakesh Thakur. According to PW-7 Ajay Bhardwaj, PW-8 Prakash Chand, PW-9 Kanchan Kumar, Investigating Officer has given option to the accused to be searched before a gazetted officer or a Magistrate or by him. According to Section 50 of the Act, there are only two options available to the accused

either to be searched before a gazetted officer or a Magistrate. There is no third option to be searched before a police officer, as has been done in the present case.

16. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand** reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.
>
> 16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.
>
> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

17. Case of the prosecution has not been supported by the independent witnesses. Accordingly, the prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

18. There is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

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

RFA No. 122 of 2008 alongwith RFA Nos. 128, 146, and 113 of 2008.
Reserved on: 14/12/2015.
Date of Decision :19.12.2015

RFA No. 122 of 2008	
State of H.P. and others	.....Appellants.
Versus	
Kesar Singh and others.	...Respondents.
RFA No. 128 of 2008	
Collector Land Acquisition and another	.....Appellants.
Versus	
Devi Roop Singh and others.	...Respondents.
RFA No. 113 of 2008	
State of H.P. and others	.....Appellants.
Versus	
Sansar Singh and others.	...Respondents.
RFA No. 146 of 2008	
Collector Land Acquisition and another	.....Appellants.
Versus	
Khazan Singh and others.	...Respondents.

Land Acquisition Act, 1894- Section 18- Lands of the petitioner were acquired for the construction of Mandi-Kanwal road- Land Acquisition Collector assessed the compensation but his award was challenged by making a reference- Additional District Judge enhanced the compensation- the State feeling aggrieved from the said judgment filed an appeal- it was contended in appeal that Reference Court had wrongly relied upon the average price of land in Mohals Manyana and Saniyardi considering the distance between these Mohals and Mandi town- record shows that even Land Acquisition Collector had concluded that five years average price of land of Mohal Chanwari was inadequate for determination of the

compensation- therefore, Additional District Judge had correctly taken into consideration the one year of average price of land situated in other mohals- appeal dismissed.

(Para-6 to 9)

For the Appellants: Mr. Vivek Singh Attri, Dy. A.G.

For the respondents: Mr. R.R.Rahi, Advocate, for respondents 1 to 9 in RFA No. 122 of 2008.

Mr. G.R.Palsra, Advocate, for respondent No. 6 in RFA NO. 128 of 2008 and for respondents No. 1 to 6, 8 to 12 and 14 to 21 in RFA No. 146 of 2008.

The following judgment of the Court was delivered:

Sureshwar Thakur, *Judge*

The aforementioned appeals arise out of a common award passed by the learned Additional District Judge, Mandi in land reference petitions, hence they are being disposed of by a common judgment.

2. The lands of the petitioners were acquired by the Land Acquisition Collector under Award No.49, of 23.6.1998. The Land Acquisition Collector assessed compensation for the lands of the petitioner brought under acquisition. Their lands are situated in Mohal Chanwari, Illaqua Pachhit, Tehsil Sadar, District Mandi, H.P. The land of the petitioners were acquired for the construction of Mandi-Kanwal road. On the basis of the one year average price of land of adjoining Mohal Vair, the Land Acquisition Collector assessed compensation for the lands of the petitioners brought under the acquisition and located in the adjoining Mohal Chanwari, whereby market value of Barani-I/Gair Mumkin Makan was assessed at the rate of 5650 per bigha, Bagicha Barani-II, at the rate of 5650/- per bigha, Bagicha Barani Faldar at the rate of Rs.9050/- per bigha, Banjar Kadim at the rate of Rs.1700/- per bigha and Khadatar at the rate of Rs.1600/- per bigha.

3. The award of the Land Acquisition Collector was subjected to impeachment by way of the land holders/land owners preferring reference petitions under Section 18 of the Land Acquisition Act before the learned District Judge, Mandi, who assigned them for adjudication to the Court of the learned Additional District Judge, Mandi. In the impugned award the learned Additional District Judge, Mandi, on a consideration of the material as laid before him had enhanced compensation as awarded to the landowners by the Land Acquisition Collector. The enhancement of compensation by the learned Additional District Judge Mandi, was begotten by reliance upon the average of one year average price of the adjoining three mohals all of which were concluded to be contiguous to each other hence he came to award uniform rates of compensation for all categories of lands irrespective of their classification.

4. The State of Himachal Pradesh is aggrieved by the Awards rendered by the learned Additional District Judge, Mandi and consequently, by way of the present appeals has hence challenged them before this Court.

5. The learned counsel appearing for the parties have been heard at length.

6. The reason as propagated by the learned Deputy Advocate General for ingraining the impugned award of the learned Additional District Judge, with the vice of mis-appreciation and non appreciation of evidence on record, stands anvilled upon the fact of Mohal Chanwari where the land brought under acquisition is situate, while standing situated at a distance of 7 kilometers from Mandi Town, whereas lands in adjoining Mohals

of Manyana and Saniyardi being nearer and more proximate to Mandi town, as such, in the reckoning of and taking into consideration by the learned Additional District Judge, Mandi, the one year average price of lands existing therein for assessing compensation qua lands brought under acquisition in Mohal Chanwari, located improximately, vis-à-vis Mohals Maniyana and Saniyardi to Mandi town, was inappropriate.

7. This Court has delved into the entire material on record wherefrom it has disinterred the factum of, of three Mohals, two Mohals i.e. Vair and Maniyana whose one year average price of the lands stood reckoned besides taken into consideration by the learned Additional District Judge, Mandi, along with the average five years' price of land in Mohal Chanwari, averaging whereof led to a determination by him of the compensation amount payable to the respondents herein being in closer vicinity to Mandi town vis-à-vis Mohal Chanwari, where the lands of the petitioners are situated. It is apparent on a reading of the impugned award that even the Land Acquisition Collector in his award had concluded qua the five years average price of land of Mohal Chanwari being inadequate as such he relied upon the one year average price of land of adjoining Mohal Vair, for the purpose of assessment and determination of market value of the lands of the petitioners located in Mohal Chanwari. However, in the said exercise resorted to by the Land Acquisition Collector, for determination of compensation for the lands of the petitioners located in Mohal Chanwari, it was concluded by the learned Additional District Judge that neither fair, just, nor reasonable compensation has come to be hence assessed by the Land Acquisition Collector, inasmuch as for various categories of land he had assessed abysmally low rates of compensation in favour of the petitioners/landholders. The learned Additional District Judge has hence while proceeding to assess just, fair and reasonable compensation for the lands of the petitioners located in mohal Chanwari, had taken into consideration five years average price of land located in Mohal Chanwari and one year average price of lands situated in Mohal Vair and Maniyana, which latter mohals adjoin Mohal Chanwari as such ultimately, the learned Additional District Judge, Mandi assessed just, fair and reasonable compensation payable to the petitioner for their lands brought under acquisition.

8. There is no controversy interse the parties at contest of Mohals Vair, Saniyardi, Maniyana and Chanwari being contiguous to each others. The fact of five years average price of land in Mohal Chanwari where the lands of the petitioners stand located being abysmally low besides inadequate to beget determination of reasonable compensation stands uncontroverted. The record also displays qua the five years average price of land in Mohal Chanwari, not begetting any escalation rather its continuing to be pegged at a nadir whereas the one year average price of lands located in the Mohals adjoining Mohal Chanwari, inasmuch, as in Mohals Saniyardi and Maniyana displaying a steep hike, which lack of escalation in the price of land located in Mohal Chanwari wherein the lands of the petitioners are located, viz.a.viz the escalation and hike in the price of the lands in its adjoining Mohals, also appears to stand begotten by the fact of hence sale transactions standing effected in adjoining Mohals whereas such sale transactions remained uneffected in Mohal Chanwari. Consequently, sequelling the lowness in the one year average price of land in Mohal Chanwari and escalation in the one year average price of land in the Mohals adjoining it. If the aforesaid reason is to be attributed by this Court for the inadequacy of the one year average price of land in Mohal Chanwari and adequacy of or the reasonableness of the one year average price of land in adjoining Mohals, the petitioners ought not to be discriminated or injustice ought not be perpetrated upon them nor can they be when their lands are located in contiguity to lands in adjoining Mohals, financially impoverished by assessing a painfully low amount of compensation for the reason merely of no sale transaction reflecting a genuine prevalent market value of land in commensuration to the market value of lands located in adjoining Mohals having taken place therein

especially when for lack of occurrence of sale transactions, in Mohal Chanwari no fault can stand attributed to them. Rather, it is to be endeavoured by this Court as aptly done by the learned Additional District Judge, Mandi to concert to adjudge a reasonable, just and fair compensation for the lands of the petitioners on the strength of as aptly done by the learned Additional District Judge, Mandi, the one year average price of the lands located in adjoining Mohals, to Mohal Chanwari. Such an exercise as undertaken would undo injustice to the petitioners which has come to be perpetrated upon them by the Land Acquisition Collector constituted in his ignoring the fact of even when five years average price of land in Mohal Chanwari was concluded by him to be inadequate, his reckoning the one year average price of land in Mohal Vair for assessing compensation for the lands of the petitioners hence untenably leaving aside or omitting to take into consideration the one year average price of lands in the Mohals adjoining it i.e. of Saniyardi and Maniyana, which rather had noticed a hike and escalation in the one year average price of the lands located therein merely on the strength of sale transactions having occurred their and theirs standing not occurred in Mohal Chanwari, which omission has obviously occasioned a gross and palpable under assessment of compensation in favour of the petitioners/landowners for their lands as brought under acquisition. Consequently, in the learned Additional District Judge while applying a just, fair and reasonable parameter has as such awarded just, fair, reasonable and equitable compensation amount for the lands of the petitioners/landowners. As a result, also when he has assessed a uniform rate of compensation for various categories of land brought under acquisition his award cannot be faulted. It is significant that the purpose of acquisition for all categories of land is common to each of them. Therefore, when each of the categories/classifications of land came to be subjected to acquisition for a common and single purpose the classification borne by each of the categories of land subjected to acquisition, pales into insignificance or is irrelevant, as well as fades into oblivion especially on theirs being acquired or brought under acquisition. For reiteration such classification loses its relevance as the lands on their acquisition besides on their being ultimately subjected to use for the purpose for which they stood acquired, acquire a uniform potentiality or a uniform classification. Consequently assessment of compensation at a uniform rate for different classifications/categories of land as done by the learned Additional District Judge, Mandi while upsetting the award rendered by the Land Acquisition Collector, impugned before it, who had awarded variant rates of compensation for different categories/classifications of land, does not constitute any palpable or manifest legal error necessitating interference by this Court.

9. In view of above discussion, there is no merit in these appeals which are dismissed accordingly and the award passed by the learned Additional District Judge, Mandi is upheld.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Mahipal & anr. .....Respondents.

Cr. Appeal No.544 of 2015.
Reserved on: 18.12.2015.
Decided on: 19.12.2015.

Indian Penal Code, 1860- Section 302, 325 and 34- Husband of the complainant, deceased and his brother were sitting in their house - the accused came and started abusing them in a state of intoxication – husband of the complainant and PW-2 had also consumed alcohol - when husband of the complainant asked the accused not to abuse them, accused started beating him - co-accused also came at the spot and started beating the husband of the complainant- accused took a wooden plank and hit the head of the deceased – the co-accused gave beating with a stick- when PW-2 tried to intervene, he was also beaten-complainant called PW-3 who saved the complainant and her family members from the accused- deceased died in the incident- complainant turned hostile - PW-2 also did not support prosecution version- there were contradictions in the testimony of complainant regarding the time of the incident and the manner in which the incident had taken place-held, that in these circumstances, prosecution case is not proved beyond reasonable doubt and the accused was rightly acquitted. (Para-6 to 11)

For the appellant: Mr. P.M.Negi, Dy. AG.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal has been instituted at the instance of the State against the judgment dated 27.6.2015, rendered by the learned Addl. Sessions Judge, Sirmaur at Nahan, H.P. in Sessions Trial No. 61-N/7 of 2013, whereby the respondents-accused, who were charged with and tried for offences punishable under Sections 302, 325 read with Section 34 IPC have been acquitted.

2. The case of the prosecution, in a nut shell, is that PW-1 Guddu Devi was married to Brij Pal. On 9.7.2013 at about 9:00 PM, the husband of complainant Guddu Devi, deceased Brij Pal alias Sonu and his brother PW-2 Surender were sitting in their house. In the meantime, accused Mahi Pal came there in drunken condition. He started abusing them. Her husband and PW-2 Surinder Singh had also consumed liquor. When her husband asked accused Mahi Pal not to abuse, accused started beating him. In the meantime, co-accused Beena also came there. She also started beating the husband of PW-1 Guddu Devi. Accused Mahi Pal took a wooden plank Ext. P-1 and hit on the head of deceased Brij Pal. Accused Beena beat her husband Brij Pal with danda Ext. P-9. When PW-2 Surender Singh, brother-in-law of complainant tried to intervene he was also given blow of wooden plank Ext. P-1 by accused Mahi Pal. Accused Mahi Pal also gave the blow of brick Ext. P-10 to Brij Pal. Thereafter, PW-1 complainant Guddu Devi called PW-3 Jawahar Singh from his house who saved them from the clutches of accused persons. The police was telephonically informed by PW-3 Jawahar Singh. The police reached the spot. The statement of complainant Guddu Devi was recorded under Section 154 Cr.P.C. vide Ext. PW-1/A. FIR Ext. PW-17/A was also registered at PS Paonta Sahib. The statement of Guddu Devi was also recorded under Section 164 Cr.P.C. vide Ext. PW-1/D. Surinder Singh was also examined. The post mortem of body of deceased Brij Pal was conducted by PW-12 Dr. K.L.Bhagat at Civil Hospital, Paonta Sahib. The post mortem report is Ext. PW-12/D. The medical certificate of Surinder Singh is Ext. PW-13/B. The accused were also medically examined. Their MLCs are Ext. PW-12/C and PW-12/D. The site plan was prepared. The entire case property alongwith viscera was deposited with the Malkhana Incharge, PW-9 HHC Narayan Singh. The samples were sent to FSL Junga vide RC No. 87/13. The

investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 18 witnesses to prove its case. The accused were also examined under Section 313 Cr.P.C to which they pleaded not guilty. The learned Trial Court acquitted the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. P.M.Negi, learned Dy. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused.

5. We have gone through the impugned judgment and records of the case carefully.

6. According to PW-1 Guddu Devi, Brij Pal deceased was her husband. Her husband, accused Mahi Pal and Surinder were taking drinks in their house. At about 9:00 PM, Mahi Pal hurled abuses to them. They started quarrelling. Thereafter, she went to the house of Vinod and then Gurcharan for help. She also informed the police through mobile that quarrel has taken place. She was declared hostile and cross-examined by the learned Public Prosecutor.

7. PW-2 Surinder Singh is another eye witness. According to him, his brother Brij Pal and accused Mahi Pal were drinking. Accused Mahi Pal had started abusing Brij Pal along with him. Guddo Devi asked the accused Mahi Pal to leave the place and as such, accused Mahi Pal left the place. In his presence, accused Mahi Pal has not beaten up his brother. He also deposed that accused Mahi Pal had not come back from his house on the spot. He was also declared hostile. In his cross-examination by the learned defence counsel, he deposed that he saw 8-10 persons coming to the spot but he could not identify those persons on account of darkness. All those persons had given beatings to him and deceased and thereafter all of them ran away. He has denied that accused had given beatings to him and his brother with danda or wooden plank.

8. PW-12 Dr. K.L.Bhagat has conducted the post mortem examination. According to him, the deceased died due to head injury. He has also examined accused Mahi Pal and Beena Devi and issued MLCs Ext. PW-12/C and PW-12/D, respectively.

9. The statement of PW-1 Guddu Devi was also recorded under Section 164 Cr.P.C. In her statement recorded under Section 164 Cr.P.C., she deposed that the incident has taken place in the morning at 8:30 AM. However, in the statement recorded under Section 154 Cr.P.C. and statement before the Court as PW-1, she deposed that the incident has taken place on 9.7.2013 at 9:00 PM at night. According to the version given in statement recorded under Section 164 Cr.P.C., the accused Mahi Pal had come on the spot and asked them to vacate the room. The accused started beating her. Thereafter her husband came on the spot and accused and Beena also came there. They both beat them. The statement recorded under Section 164 Cr.P.C, the manner in which the incident has taken place, is in variance with statement recorded before the Court, while she appeared as PW-1 and her statement recorded under Section 154 Cr.P.C. The version given in the FIR is that Mahi Pal was drunk. He came there and started abusing her husband and thereafter her husband told him not to abuse. The accused and his wife Beena gave beatings.

10. PW-1 Guddo Devi, in her statement deposed that she had gone to the house of Vinod and thereafter to the house of Gurcharan for help. However, PW-3 Jawahar Singh deposed that Guddo Devi came to his house at about 9:20/25 PM. He came to the spot alongwith Guddo Devi. He has not seen the accused giving any beating to the deceased.

PW-1 Guddo Devi, as per her statement recorded before the Court as PW-1, has not deposed that she has seen the accused giving beatings. Her statement is that her husband and accused started quarrelling with each other and thereafter, she went to seek help and when she came back, she saw that her husband has died.

11. PW-2 Surinder Singh is brother of the deceased. He has also not supported the case of the prosecution. In his cross-examination by the learned Public Prosecutor, he deposed that the accused had left the place and thereafter 8-10 persons came who had given beatings to them. There are contradictions in the statement of PW-1 Guddo Devi vis-à-vis statement recorded under Section 164 Cr.P.C. Thus, the prosecution has failed to prove the case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 27.6.2015.

12. Accordingly, there is no merit in this appeal and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of Himachal Pradesh ..... Appellant
Versus
Ronu Chauhan .....Respondent

Cr. Appeal No. 536/2015
Reserved on: 18.12.2015
Decided on: 19.12.2015

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police party- his bag was searched during which 600 grams charas was recovered- accused was given option to be searched before Magistrate, Gazetted Officer or police party present at the post- held, that option to be searched before Gazetted Officer or Magistrate had to be given to the accused and any third option is contrary to law- there was violation of Section 50 of N.D.P.S. Act- in these circumstances, accused was rightly acquitted. (Para-9 and 10)

Case referred:
State of Rajasthan v. Parmanand, (2014) 5 SCC 345

For the appellant : Mr. Ramesh Thakur, Assistant Advocate General.
For the respondent : Nemo.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 27.4.2015 rendered by learned Special Judge-II, Solan, District Solan, Himachal Pradesh in Sessions Trial No. 3-NL/7 of 2014, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as 'Act' for convenience sake) has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 23.9.2013, at about 12.30 pm, HC Amit Thakur (PW-10), alongwith HHC Kishore (PW-1), C. Onkar Singh (PW-2) and C. Teja Singh (PW-5) proceeded on patrolling, traffic checking and detection of excise cases towards Barotiwala. At about 5.10 pm, when police officials were coming from Jharmajri and they were present at Lakkar Depot, accused came on the spot from SSF Company. He tried to runaway. He was nabbed. He was carrying a bag in his right hand. One independent witness namely Chain Singh was associated. PW-10 Amit Thakur apprised the accused of his right to have personal search either in the presence of a Magistrate or a Gazetted Officer. The accused consented to be searched by the police vide memo Ext. PW-1/A. HC Amit Thakur carried out the search of the bag. Bag contained stick and ball shaped brown coloured substance. It was found to be Charas. It weighed 600 gms. The polythene bag containing Charas was put back in the carry bag and it was put in a cloth parcel by putting three seals of 'V'. NCB form Ext. PW-10/A in triplicate was prepared by PW-10 and seal 'V' was embossed on it. Sample seal Ext. PW-1/B was taken separately. HC Amit Thakur prepared Rukka Ext. PW-10/B and sent it to the Police Station through C. Onkar Singh for registration of FIR. FIR Ext. PW-9/A was registered. Investigating Officer PW-10 Amit Thakur brought the case property alongwith accused to the Police Station. Case property was handed over to the ASI Manmohan Singh PW-12. He resealed the same with two seals of 'Y' and seal 'Y' was taken on NCB form. He filled up relevant columns and issued resealing certificate Ext. PW-12/B. He handed over sample seal Ext. PW-12/C and case property to MHC Randhir Singh, who entered the same in Malkhana Register at Sr. No. 535. Abstract of Malkhana Register is Ext. PW-3/A. Special report was also prepared and case property was sent to the FSL Junga. Through HHC Dalel Singh PW-4 vide RC No. 54/13-14, Ext. PW-3/B. Investigation was completed and Challan was put up in the Court after completing all codal formalities..

3. Prosecution has examined as many as 13 witnesses to prove its case against the prosecution. Accused was also examined under Section 313 CrPC. He pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. Ramesh Thakur, Assistant Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. Case of the prosecution, precisely, is that at 5.10 pm, accused was noticed coming from SSF company. He tried to run away. He was nabbed. His consent was taken vide Ext. PW-1/A. Thereafter search of the bag was conducted. Bag contained Charas. Search, seizure and sealing proceedings were completed at the spot. Rukka was sent to the Police Station. Case property was handed over to ASI Manmohan Singh PW-12. It was entered in the Malkhana Register at Sr. No. 535. Case property was sent to the FSL Junga. Consent memo is Ext. PW-1/A.

7. According to PW-2 HC Onkar Singh, Investigating Officer PW-10 HC Amit Thakur asked the accused whether he wanted to give personal search to the police or not. Accused consented to be searched by the police officials.

8. PW-1 HC Kishore Kumar did not know who was the driver of the vehicle, in which they went on patrolling duty. He did not remember the number of the vehicle. There is another interesting feature in this case. PW-10 Amit Thakur deposed that the statement of Teja Singh D-3 was recorded by Teja Singh himself and statement of Onkar Singh Mark D-4 was recorded by Onkar Singh himself. It shows that the police has not carried out proper

investigation of the case. According to Ext. PW-10/A, time and place of seizure of case property is 23.9.2013 at 5.45 pm. However, according to PW-5, Teja Singh he has gone to bring weighing scale at about 5.30 pm. According to the independent witness PW-13 Chain Singh, he was sitting in his shop at Lakkar Depot. He was declared hostile. He did not support the case of the prosecution. He has denied that personal search of accused was carried out. According to him, bag was taken to the Police Station. There it was opened. Charas was found. Thus, the statements of PW-1 Kishore Kumar, PW-2 Onkar Singh, PW-5 Teja Singh and PW-10 Amit Thakur have not been corroborated by PW-13 Chain Singh.

9. PW-5 Teja Singh also deposed that the Investigating Officer apprised the accused that he can have his search in the presence of some officer or by the police officer. Accused consented to be searched by the police. Trial Court, after perusal of consent memo Ext. PW-1/A noticed that accused was asked whether he wanted to give personal search and search of bag at the spot or at Nalagarh before a Magistrate or a Gazetted police Officer or to be done by HC Amit Thakur at the spot. It is settled law by now that there are only two options which are required to be given to the accused to be personally searched either before a Magistrate or a Gazetted Officer. In the present case, as far as Ext. PW-1/A is concerned, IO has given him three options. It is contrary to law. Thus there is violation of Section 50 of the Act. We have verified from Ext. PW-1/A of the record produced by the learned Assistant Advocate General to see whether Section 50 of the Act has been complied or not. According to Section 50 of the Act, there are only two options available to the accused either to be searched before a gazetted officer or a Magistrate. There is no third option to be searched before a police officer, as has been done in the present case. Section 50 of the Act is mandatory and its non-compliance has vitiated the entire case of the prosecution.

10. Their Lordships of the Hon'ble Supreme Court in **State of Rajasthan v. Parmanand** reported in (2014) 5 SCC 345, have held that there is a need for individual communication to each accused and individual consent by each accused under Section 50 of the Act. Their lordships have also held that Section 50 does not provide for third option. Their lordships have also held that if a bag carried by the accused is searched and his personal search is also started, Section 50 would be applicable. Their lordships have held as under:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs, Section 50 of the NDPS Act will have application.
>
> 16. It is now necessary to examine whether in this case, Section 50 of the NDPS Act is breached or not. The police witnesses have stated that the respondents were informed that they have a right to be searched before a nearest gazetted officer or a nearest Magistrate or before PW-5 J.S. Negi, the Superintendent. They were given a written notice. As stated by the Constitution Bench in Baldev Singh, it is not necessary to inform the accused person, in writing, of his right under Section 50(1) of the NDPS Act. His right can be orally communicated to him. But, in this case, there was no individual communication of right. A common notice was given on which

only respondent No.2 – Surajmal is stated to have signed for himself and for respondent No.1 – Parmanand. Respondent No.1 Parmanand did not sign.

19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated.

20. We have, therefore, no hesitation in concluding that breach of Section 50(1) of the NDPS Act has vitiated the search. The conviction of the respondents was, therefore, illegal. The respondents have rightly been acquitted by the High Court. It is not possible to hold that the High Court's view is perverse. The appeal is, therefore, dismissed."

11. The prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

12. There is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of Himachal Pradesh ..... Appellant

Versus

Rupali Chauhan .....Respondent

Cr. Appeal No. 535/2015
Reserved on: 18.12.2015
Decided on: 19.12.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 320 grams of charas- she was acquitted by the trial Court- it was specifically stated in the consent memo that police had a prior information regarding the possession- however, police had not complied

with provision of Section 42- testimonies of police officials were not satisfactory – held, that acquittal of the accused by trial Court was justified and proper- appeal dismissed.

(Para-15 to 18)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondent : Nemo.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 6.6.2015 rendered by learned Special Judge, Shimla, Himachal Pradesh in S. Trial No. 33-S/7 of 2013, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as 'Act' for convenience sake) has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 31.5.2013, ASI Mahesh Kumar alongwith Lady Constable Anjana was present at Forest Check Post, Dhalli to collect information regarding offences under Narcotic Drugs & Psychotropic Substances Act. At about 12.30 in the noon, ASI Surender Singh, HC Munish Kumar, HC Suresh Kumar from Narcotic Cell, State CID also reached there. They were associated in the team by the Investigating Officer Mahesh Kumar. At about 12.45 pm, when Mahesh Kumar alongwith other police officials reached there, they started moving towards Mashobra. When they had crossed 200 metres on foot, Investigating Officer Mahesh Kumar noticed a girl coming from Mashobra side. She was having a black coloured bag in her right hand and she was having a ladies purse on her left shoulder. Mahesh Kumar introduced himself as well as members of the police. Name of the girl was ascertained. Girl disclosed her name to be Rupali Chauhan. In the meantime, a vehicle bearing registration No. HP-01A-4401 bearing driven by its driver came there. ASI Mahesh Kumar stopped the vehicle. Driver of the vehicle was Mohinder Singh. Other person was Mustaq. They were associated as independent witnesses. Thereafter, accused was apprised of her legal right under Section 50 of the Act. Thereafter, Mahesh Kumar gave his personal search to the accused. Mahesh Kumar, with the help of Lady Constable, started the search proceedings. Accused was found carrying a black coloured bag in her right hand. Bag was searched. It contained Charas. It weighed 320 grams. The charas was put in a cloth parcel and sealed with seal impression 'R', five in number. NCB form in triplicate, was filled in. Rukka was prepared and sent to the Police Station. FIR was registered. Other codal formalities were completed. Sample was sent for chemical examination. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 14 witnesses to prove its case against the prosecution. Accused was also examined under Section 313 CrPC. She pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. PW-1 Mohinder deposed that on 31.5.2013, accused Rupali had hired taxi for Narkanda from Lakkar Bazaar. When they reached Dhalli, police stopped their vehicle. Accused was carrying a black coloured bag. Police told him to search the vehicle. Nothing was recovered from the vehicle. Thereafter police stated that they have to search the accused Rupali. Thereafter, a black coloured bag was searched. It contained a mobile and 2-3 SIM cards, one laptop, some cash and black coloured substance was recovered. It was found to be charas. It weighed 320 grams. Charas was packed in a cloth parcel. Police prepared seizure memo Ext. PW-1/B and gave personal search to the accused. Charas was taken into possession vide seizure memo Ext. PW-1/C.

7. PW-2 L.C. Anjana deposed that she was a member of the police party in the case. However, in her cross-examination she could not disclose about the time when she left the Police Station Bharari. According to her, they had gone to the spot on foot. She could not depose about the exact distance between Bharari and spot. She searched the accused. She did not know when the accused was arrested.

8. PW-3 Munish Kumar deposed that Investigating Officer handed over Rukka to him alongwith parcel, NCB form, sample seals. He produced the same before the SHO. FIR was registered. They reached the spot at 12.30 pm. There were four persons who reached the spot. Police party was on patrolling duty.

9. PW-4 HC Govind Ram deposed that they reached the spot at about 12.30 pm. Investigating Officer and police party was on patrolling duty. Police had gone to Sanjauli bye-pass and from there started moving on foot.

10. PW-5 Mustaq deposed that on the relevant day, he was driving taxi No. HP-01A-1824. On 31.5.2013, he was coming from Mashobra to Shimla. At Dhalli bifurcation, police party stopped the vehicle. Another vehicle was also stopped.

11. PW-6 HC Parkash Chand, deposed that he was posted as MHC Police Station CID Bharari. Inspector Kamal Chand handed over Rukka to him at 4.30 pm. FIR Ext. PW-6/B was registered. Thereafter, case file was sent back by Investigating Officer through HC Munish Kumar. Inspector/ SHO deposited with him one parcel which was resealed with 5 seals of seal impression 'N'. He gave another parcel containing laptop, NCB form in triplicate, copy of seizure memo, resealing certificate, which was deposited by him. He entered the same in Malkhana Register at Sr. No. 125. He proved abstract of Malkhana Register Ext. PW-6/C. He also filled up column No. 12. He sent the case property on 1.6.2013 alongwith NCB form in triplicate, seizure memo, reseal certificate, copy of FIR vide RC No. 33/13 through Constable Dhani Ram to FSL Junga.

12. PW-7 Dhani Ram deposed that he has taken case property to FSL Junga.

13. PW-9 LC Sarita has brought special report of FSL.

14. PW-14 Mahesh Kumar deposed that on 31.5.2013, he alongwith Lady Constable Anjana was present at Forest Check Post Dhalli. At about 12.30 pm ASI Surender, HC Govind, HC Munish Kumar and Constable Suresh of Narcotic Cell also reached there at Forest Barrier Dhalli. They were associated by the Investigating Officer. At about 12.35 pm, he alongwith other police officials started moving towards Mashobra for patrolling, on foot and after about 200 metres distance, he noticed a girl coming from Mashobra side carrying a black coloured bag in right hand and ladies purse on her left shoulder. When he asked the girl why she was going alone she was scared and turned back and tried to run. Police officials apprehended her and asked her name. In the meantime, a vehicle bearing No. HP-01A-4401 came from Mashobra side. It was stopped. Driver disclosed

his name as Mohinder and other occupant was Mustaq. They were associated as independent witnesses. Consent Memo Ext. PW-1/A was prepared. Bag was searched. It contained Charas. It weighed 320 grams. Search, seizure and sealing proceedings were completed at the spot. NCB form was filled in. Rukka was prepared and sent to the Police Station. He also prepared site map.

15. Case of the prosecution, precisely, is that when police officials were at the forest barrier Dhalli, they have started towards Mashobra. Accused was coming from Mashobra side. She tried to run away. She was nabbed. She was apprised of her right to be searched before a gazetted officer or a Magistrate. She was searched by PW-2 Lady Constable Anjana. Bag was searched. It contained Charas. All codal formalities were completed on the spot. However PW-1 Mohinder deposed that on 31.5.2013, accused had hired taxi for Narkanda from Lakkar Bazaar. When they reached Dhalli, police stopped their vehicle. There is variance in the statements of independent witnesses and other witnesses. This casts doubt whether accused was apprehended while coming from Mashobra or in fact she was going towards Narkanda in the taxi being driven by PW-1 Mohinder on 31.5.2013.

16. Consent memo is Ext. PW-1/A. It is a typed form. In this document, it has been specifically mentioned that an authentic information was received that accused was carrying illegal psychotropic substance. It is stated in Hindi, thus, मैं सहायक उप निरीक्षक महेश कुमार आई/सी थाना स्टेट सी आई डी भराड़ी में तैनात हूं। /महिला आ0 अंजना 380 की सहायता से मुझे आप श्रीमति रूपाली चौहान ूध्व रोहित चौहान तध्व भ्ण छवण् 1ध्150 ठज्ञऋएप ैंसपउंत ठंही क्मसीपण् के पास से अवैध मादक पदार्थ होने की विश्वसनीय सूचना प्राप्त हुई है जिसके लिए आपकी व आपके कब्जा में /उठाये लैपटॉप बैग की तलाशी लेना आवश्यक है। आप अपनी तलाशी किसी मैजिस्ट्रैट /राजपत्रित अधिकारी के पास करवा सकते है जो कि आपका कानूनी अधिकार है। अतः आपको इस सम्बन्ध में आपके अधिकार से सूचित किया जाता है। कृप्या आप बताएं कि आप अपनी व अपने सामान/ लैपटॉप बैग की तलाशी मैजिस्ट्रैट/राजपत्रित अधिकारी में से किसके सामने करवाना चाहते है-------"

17. Thus, the police had prior information that the accused was carrying some contraband and despite that Section 42 of the Act has not been complied with. It was not a 'chance recovery'. It was necessary for the Investigating Officer to write down the gist of information and send to the immediate superior officer. Section 42 is mandatory. Non-compliance of section 42 has vitiated the trial. Interestingly, PW-1 Mohinder was not declared hostile. PW-14 Mahesh Kumar could not disclose the manner in which they reached the spot. In his cross-examination he testified that he did not know whether he hired vehicle to reach the spot or went in bus. Similarly, PW-2 Anjana did not disclose abut the time of her departure from Bharari.

18. The prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

19. There is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of Himachal Pradesh ..... Appellant

Versus

Sunita Devi .....Respondent

Cr. Appeal No. 547/2015
Reserved on: 16.12.2015
Decided on: 19.12.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 400 grams of charas- she was acquitted by the trial Court- independent witnesses did not support the prosecution version- it was proved on record that family members of the accused were residing with her- therefore, exclusive possession of the accused was not proved- held, that accused was rightly acquitted by the trial Court. (Para-14 to 16)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondent : Nemo.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 18.6.2015 rendered by learned Special Judge-II, Kangra at Dharamshala in Session (RBT) Case No. 17-I/VII/13/2007, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as 'Act' for convenience sake) has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 20.4.2007, ASI Harpal Singh PW-15 of Police Station Indora alongwith HC Budhi Singh, HHC Rashpal Singh, Constable Jeewan Singh, Lady Constable Sneh Lata and Anjana, and Driver Narender Sood was present on patrolling duty at Indora Mod Damtal and Constable Kartar Singh of CIA Staff alongwith Constable Upender Singh met police party. Constable Kartar Singh got recorded statement under Section 154 CrPC to the effect that he alongwith Upender Singh was present at Damtal and at about 3.30pm, he received a secret information to the effect that accused Sunita Devi, wife of Som Raj resident of village Sirat is dealing in sale and purchase of Charas and has kept Charas in her house. Accordingly, the Investigating Officer reduced the information into writing and sent a Rukka Ext PW-1/C through HHC Rashpal Singh to Police Station, Indora for Registration of case. FIR Ext PW-10/A was registered. Special information under Section 42 (1)(2) of the Act was sent through Constable Jeewan to SDPO Nurpur. Two independent witnesses, Ved Parkash and Desh Bandhu were also associated in the raiding party. Accused was found present in the house. Accused was informed that she had a right to be searched before a gazetted officer or a Magistrate. Accused opted for her being searched by the raiding party. Police party gave search to the accused and searched the upper floor of the house of the accused. Some material was found in the bed room which had been kept in black coloured polythene bag. It was found to be charas. It weighed 400 grams. Two samples of 25 grams each were separated and samples and bulk charas were put in three separate parcels, which were sealed with seal impression 'H'. Specimen of seal was taken on a separate cloth. Seal after use was handed over to witness Ved Parkash and contraband was taken into possession vide Ext PW-1/E. Investigating Officer filled NCB forms in triplicate. Case property was handed over to MHC Rajinder Singh in the Police Station. Arrest memo Ext. PW-15/B was prepared. Investigating Officer also obtained copy of Jamabandi vide Ext. PW-1/B. Contraband was sent to Forensic Science Laboratory Junga. FSL report is Ext. PA. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 20 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. She pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. PW-1 Kartar Singh deposed that he alongwith Constable Upender Singh was present in civil dress at Damtal on patrolling duty. At about 3.30 pm, they received a secret information that accused was indulging in sale and purchase of Charas and had kept charas in her house for that purpose. Police party met them and information Ext. PW-1/A was reduced into writing. Investigating Officer sent the information through Constable Jeewan to SDPO Nurpur. Thereafter he recorded statement under Section 154 CrPC and prepared Rukka Ext. PW-1/C and sent the same through HHC Rashpal for registration of case. They went to the house of accused alongwith police party. At Motli pump Ved Parkash and Desh Bandhu met them. They were associated in the raiding party. Accused was given option to be searched either before a Magistrate or a Gazetted Officer. She opted to be searched by the Police. Memo Ext. PW-1/D was prepared to this effect. Some material in a polythene bag was found in the upper storey of the house. On checking, it was found to be charas. It weighed 400 grams. Two samples of 25 grams each were separated and sealed with seal impression 'H' and remaining bulk was sealed in a parcel with seal impression 'H'. Charas was taken into possession vide memo Ext. PW-1/E. He has admitted in his cross-examination by the defence counsel that accused Sunita Devi might be residing at her house with three sons. All the sons were married. There were four rooms in ground floor and one room in upper floor. Ground floor has not been searched.

7. PW-2 Ved Parkash deposed that he remained present at GP Motli. On 20.4.2007, he was present at Motli. Police party took him to the house of Sunita Devi. The search party told him qua the packet recovered. He remained standing in the ground floor of the house and did not go upstairs. He was declared hostile and cross-examined by the learned Public Prosecutor. He specifically denied the suggestion that police officials have given personal search and upper room was searched and from the double bed, a packet containing charas was recovered. He has admitted his signatures on memo Ext. PW-1/D. He denied that Charas was recovered and that he had gone to first floor of house and there alleged recovery was effected. He admitted that sons and daughters of the accused were also staying in the same house.

8. PW-4 Desh Bandhu has not supported the case of the prosecution. According to him, on 20.4.2007, at 4.00 pm, he alongwith Ved Parkash was present at Motli petrol pump. Police party came to the spot. Search was not conducted in his presence. However, he saw some material recovered /lying therein. He was declared hostile and cross-examined by the learned Public Prosecutor. He has admitted his signatures on Ext. PW-1/E. Police has not disclosed him about the contents of Ext. PW-1/E. He denied that the personal search of the accused was conducted. He denied that in his presence, from the room of first floor, from double bed a packet containing Charas was found. During cross-examination by defence counsel, he stated that he had not gone through the papers. No charas was recovered in his presence from the upper floor of the house.

9. PW-7 HC Budhi Singh deposed that he had arranged for weights and scale. In his cross-examination, he has admitted that no person from the locality was associated.

10. PW-9 Rashpal Singh has deposed that on 22.4.2007 MHC Rajinder Singh of PS Indora handed over a sealed parcel sealed with seal impression 'H' for depositing in FSL Junga alongwith NCB form in triplicate. He deposited the same at FSL Jung.

11. PW-10 ASI Rajinder Singh has deposed that on 20.4.2007 at about 8.45 he received some parcel weighing 350 grams alongwith two parcels of sample weighing 25 grams each, sample seal and NCB form and other documents. He entered the case property in Malkhana Register. He sent one of the sample parcel alongwith NCB forms through Constable Rashpal Singh for depositing in FSL Junga vide RC No. 60/21 on 22.4.2007.

12. PW-14 Anjana Randhawa deposed the manner in which search, sealing and seizure proceedings were completed at the spot including preparing Rukka Ext. PW-1/C. In her cross-examination, she admitted that sons and daughters-in-law and daughters of accused were residing in the same house. Her signatures were not obtained on Ext. PW-1/E.

13. PW-15 Harpal Singh is the Investigating Officer of the case. He deposed the manner in which search, sealing and seizure proceedings were completed at the spot. In his cross-examination, he has admitted that three sons of the accused were residing in the same house alongwith family members. However, according to him, they were living in separate rooms.

14. Case of the prosecution has not been supported by independent witnesses PW-2 Ved Parkash and PW-4 Desh Bandhu. According to PW-2, Ved Parkash and he went to the house of the accused Sunita Devi. Raiding party told that one packet was recovered from the house. He remained standing on the ground floor and did not go to upper floor. PW-4 Desh Bandhu has denied that upper storey of house of accused was searched and from double bed a packet was found.

15. PW-2 Ved Parkash has categorically admitted in his cross-examination by the defence counsel that sons and daughters-in-law of the accused were also residing in the same house with the accused. PW-1 Kartar Singh has admitted in his cross-examination that accused Sunita Devi might be residing with three sons and all the sons were married. PW-14 Anjana has admitted in her cross-examination that sons and daughters-in-law were residing in the same house and their signatures were not obtained. PW-15 Harpal Singh admitted in his cross-examination that three sons of the accused were also residing in the same house alongwith family members. They were living in separate rooms. It was necessary for the prosecution to establish that the house was in exclusive possession of the accused. It has come on record that she was residing with her sons and daughters. It was necessary for the prosecution to establish that room was in exclusive possession of the accused from where recovery was effected. There is no evidence on record to show exclusive and conscious possession of accused. Independent witnesses have not supported the prosecution case. Prosecution has not examined any person from the neighbourhood. PW-7 Budhi Singh during cross-examination admitted that no person of the locality was associated.

16. The prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

17. There is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of Himachal Pradesh ..... Appellant
Versus
Puran Chand .....Respondent

Cr. Appeal No.558/2015
Reserved on: 16.12.2015
Decided on: 21.12.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 248 grams of charas- independent witnesses have not supported the prosecution version- he was acquitted by the trial Court- there were contradictions in the testimonies of the police officials- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt- accused acquitted. (Para-11 and 12)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondent : Nemo.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 20.4.2015 rendered by learned Special Judge (Additional Sessions Judge-II), Shimla, HP in Sessions Trial No. 31-S/7 of 2014, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20-61-85 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as 'Act' for convenience sake) has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 4.3.2013 at 12.00 noon, at Mashobra Bifurcation, Dhalli, police party headed by ASI Ajeet Singh (PW-8) alongwith police officials LHC Sarita, C. Govind Singh PW-3, C. Manoj Kumar PW-9, HHG Sansar Chand was on patrolling duty. At about 12.00 noon, when police party was present at Mashobra Bifurcation, one person was seen coming from Mashobra side. He tried to run away. He was nabbed. He disclosed his name. He was carrying a *Khaki* bag in his right hand. Black coloured substance was recovered from poly pack which was found to be charas. It weighed 248 grams. Recovered charas was kept in poly pack and put in a sealed parcel sealed with seal impression 'K' (three in number) Rukka Ext PW-3/A was prepared. FIR No. 32/13 was registered. Case property was resealed with three seal impressions of 'P'. Resealing certificate Ext PW-10/D was prepared. NCB form in triplicate was filled in. Columns No. 9 to 11 were filled up by SHO/Inspector Madan Lal PW-10. Case property was deposed with MHC Police Station Dhalli vide entry No. 677. Abstract of Malkhana register is Ext PW-7/A. Case property was sent for chemical examination to FSL Junga. Chemical examination report is Ext PW-8/F. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 11 witnesses to prove its case against the prosecution. Accused was also examined under Section 313 CrPC. He pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. PW-1 Ranjeet testified that on 4.3.2013, he was called by police. One person was made to sit by the police. He has not supported the case of the prosecution. He was declared hostile and cross-examined by the learned Public Prosecutor. He testified that there were 3-4 shops situate at Dhalli bifurcation.

7. PW-2 Manoj Kumar deposed that he was working at Green Tax Barrier Dhalli bifurcation. In the year 2013, nothing had happened in his presence. He was also declared hostile.

8. PW-3 Govind Singh deposed that at 12.00 noon, one person carrying a carry bag came at Dhalli Bifurcation. On checking of bag, another poly pack was recovered. It contained stick and ball shaped black substance. It was found to be charas. It weighed 248 grams. Charas was kept in poly pack and carry bag and taken into possession in a sealed packet sealed with seal impression 'K' five in number. He handed over rukka to MHC police station Dhalli.

9. PW-8 Ajeet Singh has deposed the mode and manner in which investigation was conducted by him. Constable Manoj Kumar PW-9, deposed that on 15.3.2013 he had gone to FSL Junga in connection with official work. He was handed over FSL report alongwith one sealed packet containing charas bearing five seal impressions 'P' and FSL each in case FIR No. 32 of 2013.

10. PW-10 Inspector Madan Lal deposed that on 4.3.2013, constable Govind Singh produced one Rukka before him. On the basis of which FIR was registered. Thereafter, case property i.e. one sealed parcel bearing 5 seal impressions of 'K' alongwith NCB form was produced before him. He resealed the same by putting three seal impressions of 'P'. He also filled in columns No. 9 to 11 of NCB form Ext. PW-10/C. He issued reseal certificate vide Ext. PW-10/D. Case property was handed over to MHC Om Parkash.

11. Case of the prosecution has not been supported by the independent witnesses PW-1 Ranjeet and PW-2 Manoj Kumar. They were declared hostile. PW-1 Ranjeet has admitted in his cross-examination that 3-4 shops were situated at Dhalli Bifurcation. According to PW-3 Govind Singh, police remained on the spot for a period of 1 ½ hours. However, PW-8 Ajeet Singh deposed that they remained at the spot for about 6 and ½ hours. According to Govind Singh PW-3, all the police officials nabbed the accused. However, PW-8 Ajeet Singh deposed that he nabbed the accused. Prosecution should have examined independent witnesses from the spot where accused was nabbed. Office of Chief Engineer was situate near the spot. 3-4 shops were also situate near the spot. According to PW-1 Ranjeet and PW-2 Manoj Kumar, nothing was recovered in their presence. They deposed that their signatures were obtained by the police. They have denied categorically that the accused was found in possession of black articles in the shape of sticks (charas) which weighed 248 grams. PW-2 Manoj Kumar also deposed that police called him inside the Check post and asked to put his signatures. PW-4 Joginder Sharma feigned ignorance about the alleged occurrence. Prosecution has failed to prove that the Charas was recovered from the conscious and exclusive possession of the accused. Now so far as recovery memos etc. are concerned these were signed by PW-1 Ranjeet and PW-2 Manoj Kumar but they have not supported the prosecution case.

12. The prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

13. There is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Raj Kumar .....Respondent.

Cr. Appeal No.555 of 2015.
Reserved on: 18.12.2015.
Decided on: 21.12.2015.

Indian Penal Code, 1860- Section 435 and 436- PW-1 had left to Village 'S'- his wife informed him telephonically that fire had broken out in the house - he noticed that his house was burnt- civil litigation was pending with the accused- a case was filed against the accused- trial Court acquitted the accused- PW-1 and PW-2 admitted that FIR was lodged against them- PW-1 to PW-4 had not seen the accused putting the house on fire- PW-5, an eye witness had not deposed before the police that he had seen accused putting the house on fire- hence, his testimony cannot be accepted- held, that in these circumstances, trial Court had rightly acquitted the accused. (Para-14 to 17)

Case referred:
Munesh vrs. State of U.P., 2004 Cr. L.J. 1529

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal has been instituted at the instance of the State against the judgment dated 8.7.2015, rendered by the learned Sessions Judge (Forests), Shimla, H.P. in Sessions Trial RBT No. 23-S/7 of 2015/14, whereby the respondent-accused, who was charged with and tried for offences punishable under Sections 435 and 436 IPC has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 1.6.2013 at about 6:00 AM, PW-1 Khem Chand left to Seri village. His wife also came to village Seri after sending children to the school. At about 1:15 PM, Bimla, wife of Jagat Ram telephonically informed that a fire has broken out in his house. He alongwith other family members came to village Makdog on foot. He noticed that outside his house at a distance of 40 meters, two stacks of fuel wood were burnt and smoke was coming out from inside his house. When he opened the lock of the door, he noticed that the door was bolted from inside. He came to the back side of his house. The window of the middle room was completely burnt. Godrej Almirah

was also on fire. The fire was extinguished. He found household articles lying scattered in burnt condition. He suspected that accused Raj Kumar was responsible for the same. A civil litigation was already pending with the accused. The police recorded the statement of PW-1 Hukam Chand under Section 154 Cr.P.C, vide Ext. PW-1/A. It was sent to Police Station Boileauganj and FIR Ext. PW-7/A was registered. The police visited the spot. The photographs were clicked. The investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 15 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. He denied the prosecution case. The learned Trial Court acquitted the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused.

5. We have gone through the impugned judgment and records of the case carefully.

6. PW-1 Khem Chand deposed that on 1.6.2013, he left for village Seri at about 6:00-6:15 AM. His wife Meena Devi also came to village Seri after sending the children to the school. He received a telephonic call from Bimla Devi that fire has broken out in his house. He along with his wife rushed to his house. On reaching, he found that two stacks of fuel wood were burnt. He found smoke coming out from inside the room. The room was bolted from inside. He went to the back side of the house and found that the window was burnt. After entering the house, he found various domestic articles kept inside the almirah and trunks burnt. According to him, this incident was committed by accused Raj Kumar. He was having civil litigation with the accused which is pending in the civil courts. His statement Ext. PW-1/A was recorded. During cross-examination, he deposed that he reached village Makdog by 2:00 PM. The villagers had also gathered on the spot by the time he reached. No one from the village tried to extinguish the fire. The fire was broken out only in the middle room. He has not seen the accused in the village. Self stated that he saw him while boarding a bus, by which he travelled from village Makdog to Seri. He admitted that he had not seen the accused with his own eyes putting fire in his house. He also admitted that accused got registered FIR No. 221/12 against him and his family members.

7. PW-2 Meena Devi is the wife of the complainant. In her cross-examination, she also admitted it to be correct that she had not seen the accused Raj Kumar at village Makdog. She admitted that there was FIR against her at Police Station (West).

8. PW-3 Bimla Devi deposed that on 1.6.2013, Smt. Laxmi came to her house and asked for the mobile number of Khem Chand as fire had broken in his house. She supplied the number. Khem Chand and his wife reached on the spot at 2:00 PM. There was fire inside the middle room of the house. The villagers had also gathered on the spot. She also admitted that she has not seen the accused putting the house on fire.

9. PW-4 Laxmi Devi deposed that on 1.6.2013, at about 12:00-12:30 PM, she detected the smoke coming out from the house of Khem Chand. She informed Bimla Devi telephonically about the same. Sh. Khem Chand along with his wife reached on the spot at about 2:00-2:30 PM. The witness was declared hostile by the prosecution.

10. PW-5 Baldev deposed that he is mason by profession. On 1.6.2013, at about 12:00 noon, he came to his house for lunch. When he was about to leave for his work, at about 12:30, he noticed that accused was going towards the house of Khem Chand. The

accused went nearby the place where the two fuel wood stacks were lying. He lit the fire. Khem Chand and his wife reached the spot at 1:45 PM. The fire broke out inside the house of the complainant. The clothes and other articles of the complainant were kept in a heap and put to the fire in the middle room. The police visited the spot. The seizure memo Ext.PW-5/A was prepared.

11. PW-6 Asha Chauhan, deposed that she was Pradhan of Gram Panchayat Kohbag since 1995. Makdog village is in her Panchayat. She visited the spot. The whereabouts of the accused could not be traced w.e.f 1.6.2013 to 3.6.2013.

12. FIR was registered by PW-7 ASI Mast Ram vide Ext. PW-7/A, on the basis of the statement recorded under Section 154 Cr.P.C.

13. PW-15 S.I. Harish Kumar visited the spot on 2.6.2013. He prepared the spot map vide Ext. PW-15/A. The case property was taken into possession.

14. According to the case of the prosecution, accused Raj Kumar had put the stack of wood on fire and also the house of the complainant. PW-1 Hukam Chand has admitted that he has not seen the accused in the village. No one from the village has tried to extinguish the fire. It was expected from the villagers to put off the fire when they had gathered on the spot. PW-1 Hukam Chand also admitted that accused had got registered FIR No. 221/12 against him and his family members. Similarly, PW-2 Meena Devi has admitted that FIR was registered against her at Police Station (West). She had also not seen accused at village Makdog. PW-3 Bimla Devi has also not seen the accused putting house of the complainant on fire. According to her, Laxmi Devi came to her house to get the phone number of Hukam Chand. However, PW-4 Laxmi Devi deposed that on 1.6.2013 at about 12:00-12:30 PM, she detected smoke coming out from the house of Khem Chand. She informed Bimla Devi telephonically about the same.

15. PW-5 Baldev is the material witness. According to him, he has seen accused Raj Kumar putting the house on fire. However, in his statement under Section 161 Cr.P.C., he has not stated so. He has made improvement from his earlier statement. PW-15 SI Harish Kumar has not ascertained as to whether the house of Hukam Chand was visible from the house of PW-5 Baldev or not. In case the accused was seen putting fire on the house of complainant, it would have been stated so in the statement recorded under Section 161 Cr.P.C. PW-5 Baldev Singh, for the first time, has made such a version when his statement was recorded in the Court as PW-5.

16. The Division Bench of the Allahabad High Court in the case of ***Munesh vrs. State of U.P.,*** reported in ***2004 Cr. L.J. 1529,*** has held that the evidence of witnesses can only be accepted if on core or substratum of prosecution case their statement in trial Court is consistent with their statement under Section 161 Cr.P.C. and where it is not, the Court would have no compunction in rejecting it. It has been held as follows:

> "[16] We have no reservations in observing that if witnesses do not state about the core/substratum of the prosecution case in their statements under Section 161, Cr.P.C. and when during the course of their cross examination, in the trial Court, confronted with the omission, fail to give a plausible explanation for it, as is the case with Madan Lal P.W. 2 and Suresh Chandra P.W. 3, it would be extremely hazardous to accept their testimony, for there is always the lurking fear in the mind of the Court that in order to fill the lacuna in their evidence, they have made improvements. We make no bones in observing that in Criminal cases, evidence of witnesses can only be accepted, if on the core/substratum of the prosecution case their statement

in the trial Court is consistent with their statement under Section 161, Cr.P.C. and where it Is not, as is the case here, the Court would have no compunction in rejecting it."

17. Thus, the prosecution has failed to prove the case against the accused that the accused has put the house of complainant on fire. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 8.7.2015.

18. Accordingly, there is no merit in this appeal and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Sunil Kumar .....Appellant.
Versus
State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 425 of 2015
Reserved on: December 16, 2015.
Decided on: December 21, 2015.

Indian Penal Code, 1860- Section 302- Deceased and accused were engaged as labourers- deceased was found dead- complainant suspected that deceased was murdered by the accused as accused had been picking up quarrels with the deceased- accused was arrested and he got recovered a shovel- PW-15 was declared hostile- the version of the prosecution that accused was intoxicated was corroborated by medical evidence- no motive was attributed to the accused – PW-14 subsequently stated that no quarrels had taken place in his presence which falsifies the version of the prosecution that accused used to have quarrels with the deceased- held, that in these circumstances, prosecution version is not proved- accused acquitted. (Para-14 to 29)

Cases referred:
Dandu Jaggaraju vrs. State of Andhra Pradesh, (2011) 14 SCC 674,
Sathya Narayan vrs. State rep. by Inspector of Police, (2012) 12 SCC 627
Majenderan Langeswaran vrs. State (NCT of Delhi) and another, (2013) 7 SCC 192
Rishipal vrs. State of Uttarakhand, r (2013) 12 SCC 551
State of Rajasthan vrs. Kashi Ram, (2006) 12 SCC 254
Ajay Singh vrs. State of Maharashtra, (2007) 12 SCC 341
Munesh vrs. State of U.P., 2004 Cr. L.J. 1529

For the appellant: Mr. Y.P.S. Dhaulta, Advocate.
For the respondent: Mr. P.M.Negi, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 1.7.2015, rendered by the learned Addl. Sessions Judge-II, Shimla, H.P., in Sessions Trial No. 36-S/7 of 2014,

whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 302 IPC, has been convicted and sentenced to undergo rigorous imprisonment for life with specific direction that he shall be without parole for initial 10 years and shall also pay a fine of Rs. 2,00,000/- for the offence punishable under Section 302 IPC. In lieu of default of payment of fine, he was further ordered to undergo simple imprisonment for five years in addition to the life imprisonment.

2. The case of the prosecution, in a nut shell, is that on 27.9.2013, information was received in the Police Station Dhalli to the effect that one Dhani Ram has died at place Purani Kothi Mashobra. On this information, in order to verify the facts, SHO Madan Lal along with HHG Rajinder Kumar visited the spot. On the spot HC Ashish and Const. Geeta Ram were already present. Sh. Duni Chand brought the matter to the notice of the police that deceased Dhani Ram and accused Sunil Kumar were engaged as labourers with Contractor Subhash Kaushal for construction of residential house of Paramjeet Kaur at Purani Kothi. On 27.9.2013, at about 8:30 AM, complainant Duni Chand was informed by Subhash Kaushal that his uncle Dhani Ram has died. On reaching the spot, he found that the deceased was lying on the upper storey and had sustained injury on his head with blunt weapon. The complainant had raised suspicion that the accused might have murdered the deceased as he had been picking up quarrel with the deceased. The investigation was carried out. The statement of Duni Chand was recorded under Section 154 Cr.P.C. vide Ext. PW-13/A. FIR Ext. PW-11/A dated 27.9.2013 was registered. The medical examination of accused was got conducted. MLC is Ext. PW-18/J. Accused made the disclosure statement vide Ext. PW-13/C that he has kept the shovel inside the newly constructed house of Param Jeet Kaur. It was taken into possession vide Ext. PW-13/D. The post mortem was got conducted at IGMC, Shimla. It was opined that the deceased died of ante mortem head injury. The case property was deposited with MHC, PS Dhalli. The same was sent to FSL, Junga vide RC No. 145/13 and 148/13. On completion of the investigation, challan was put up after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 24 witnesses. The accused was also examined under Section 313 Cr.P.C. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Y.P.S.Dhaulta, Advocate, for the accused has vehemently argued that the prosecution has failed to prove the case against the accused. On the other hand, Mr. P.M.Negi, Dy. Advocate General, appearing on behalf of the State, has supported the judgment of the learned trial Court dated 1.7.2015.

5. We have heard learned counsel for both the sides and gone through the judgment and records of the case carefully.

6. PW-4 Mane Ram deposed that he received telephonic call from Duni Chand who informed that Sh. Dhani Ram was found murdered at place Purani Kothi, Mashobra. Sh. Dhani Ram along with the accused and others were working as labourers. On this information, he alongwith Kamla Devi, Hukam Chand and others reached the place Ghendi. He came to know that Dhani Ram and Sunil were residing together and had altercation with each other oftenly. He also came to know that Sunil murdered Dhani Ram.

7. PW-6 Dr. Sangeet Dhillon has conducted the post mortem examination. She has noticed the following injuries on the person of the deceased:

> "<u>Head and face.</u>
>
> 1. A lacerated wound on the left temporal side of scalp with clotted blood present 5 cm x 3.5 cm x bone deep.

2. A vertical LW on the left parietocopital region 6 x .25 x bone deep.
3. 4 x .25 x bone deep horizontal LW on the right eye brow and other vertical LW 1 x 1 cm.
4. Red contusion on the lower and the right cheek 2 x .5, another contusion 1 x 1 cm near the right lower lip.
5. Red abraded contusion on the right posterior pat of right shoulder.
6. Neck Red contusion .5 x .5, 2cm from mid line.
7. Lower limb. Red abraded contusion on the right gluteal region 1 x 1 cm."

The probable time that elapsed between injury and death was immediate and probable time between death and post mortem was around 36 hours.

8. PW-12 Kamla Devi deposed that her husband Dhani Ram was working as labourer at place Ghairi. On 27.9.2013, she received telephonic call from Mane Ram, her brother-in-law that her husband had been found murdered. On this, she went to place Ghairi, where she came to know that accused Sunil murdered him. She was told by her husband that accused had been picking up quarrel with him on many occasions. Both accused and her husband were residing together. In her cross-examination, she admitted that she has not informed her husband to report the matter with the police regarding the quarrel picked up by the accused. She also admitted that the occurrence has not taken place in her presence.

9. PW-13 Duni Chand deposed that on 27.9.2013, he received a telephonic call from Subhash Kaushal that his uncle had expired. He rushed to the spot where he found the dead body of deceased on the upper storey of the newly constructed house of Param Jeet Kaur. He had sustained injuries on his head and backside of the head. The injuries were caused with blunt weapon. The blood was found on the spot. His uncle had been residing with accused Sunil Kumar. Accused picked up quarrel with his uncle on many occasions. The police arrived on the spot. His statement under Section 154 Cr.P.C. Ext. PW-13/A was recorded as per her version. The police prepared the inquest papers. Accused made disclosure statement vide Ext. PW-13/C that shovel with which he had murdered the deceased was kept by him in newly constructed room of the house of Param Jeet Kaur. It was also signed by Subhash Kaushal. The shovel was taken into possession vide memo Ext. PW-13/D. In his cross-examination, he admitted that the murder did not take place before him. He did not know as to who had murdered the deceased. Volunteered that the deceased and accused were residing together. Later on, he stated that it was the accused who murdered Dhani Ram.

10. PW-14 Subhash Kaushal was the contractor. He was raising construction of the house of Param Jeet Kaur. He had engaged 5-6 labourers. They were residing together in temporary shed constructed on the spot. On 27.9.2013, he received a telephonic call from Bhag Chand that Dhani Ram had sustained injury on his person and probably he has died. He informed Duni Chand. Thereafter, he informed the police. He went to the spot and found the dead body lying on the first floor of the newly constructed house. The deceased had sustained deep cut injury on the back of his head. The police visited the spot. On interrogation, accused admitted his guilt and narrated to the police that he inflicted a blow of shovel on the person of deceased. He also revealed that the shovel had been kept by him in the newly constructed house. He was having the knowledge and could recover the same. On disclosure statement Ext. PW-13/C, the shovel Ext. P-15 was got recovered by the accused. It was taken into possession vide memo Ext. PW-13/D. In his cross-examination, he stated that the accused admitted the guilt on the spot but he could not say

affirmatively as to who murdered Dhani Ram. Before him, no quarrel took place between Dhani Ram and accused.

11. PW-15 Bhag Singh is the most material witness. According to him, Dhani Ram and Sunil, both labourers were residing in the building. They were dining and residing together. He was residing in an old house which was about 50 meters away from the spot. On 26.9.2013 at about 1:00 PM, accused Sunil knocked his door and stated that Dhani Ram had fallen down from the stairs. Accused was under the influence of liquor and was frightened. He rushed to the spot and found that Dhani Ram was dead. The blood was oozing out from his head. He informed Subhash Kaushal of the occurrence. However, he could not be contacted because of night hours. He called him in the morning at 6:00 AM. The contractor made a telephonic call to him at 8:00 AM. Thereafter, the contractor informed the police. The family members of Dhani Ram also appeared on the spot. He was declared hostile and cross-examined by the learned Public Prosecutor. According to him, portion A to A of his statement mark-B was not recorded as per his version. Then, he admitted that his statement was recorded by the police as per his version.

12. PW-18 Insp. Madan Lal is the I.O. He recorded the statement of Duni Chand under Section 154 Cr.P.C. vide Ext. PW-13/A. FIR was registered on the basis of *rukka* Ext. PW-18/A. Photographs were taken on the spot. The clothes of the accused were also taken into possession. The accused made disclosure statement that shovel with which he has committed the murder of the deceased was hidden by him in the newly constructed house vide Ext. PW-13/C. The demarcation of the spot was also carried out. The blood stained earth was also taken into possession. The post mortem was got conducted. The statements of the witnesses were also recorded on the spot. The report from the FSL Ext. W-18/G alongwith report Ext. PW-3/A and PW-9/A were received in the Police Station.

13. PW-20. Dr. H.R.Rahi, deposed that the police had moved an application on 28.9.2013 at about 1:30 PM. He examined Sunil Kumar. He was found conscious and oriented. He issued MLC Ext. PW-18/J.

14. The case of the prosecution is entirely based on circumstantial evidence. It is necessary for the prosecution to prove the entire chain of events and the evidence must point exclusively towards the guilt of the accused.

15. The most material statement is of PW-15 Bhag Singh. According to him, the accused was residing with Sunil Kumar. They were dining and residing together. He was residing in an old house which was about 50 meters away from the spot. On 26.9.2013 at about 1:00 PM, accused Sunil knocked his door and stated that Dhani Ram had fallen down from the stairs. Accused was under the influence of liquor and was frightened. He rushed to the spot and found that Dhani Ram was dead. The blood was oozing out from his head. He informed Subhash Kaushal of the occurrence. Subhash Kaushal in turn informed the police. His statement was recorded under Sec. 161 Cr.P.C, vide mark-B. In his statement recorded under Sec. 161 Cr.P.C, he deposed that he went to the spot alongwith the accused but when he appeared as PW-15 before the Court, he has not stated that he has gone to the spot with accused. Portion A to A of his statement Mark-B recorded under Sec. 161 Cr.P.C. is to the effect that when the police interrogated the accused sternly, then he confessed that he had killed the deceased with shovel and the shovel was hidden below the heap of timber and he could get it recovered. The police also took into possession his clothes which were worn by him. Thus, according to the statement of PW-15 Bhag Singh recorded under Sec. 161 Cr.P.C., accused himself has taken out the shovel from the wood and also handed over his clothes worn by him and despite that the police has recorded his disclosure statement under Section 27 of the Evidence Act, vide Ext. PW-13/C, on the basis of which recovery of shovel

was made. PW-15 Bhag Singh was declared hostile and in his cross-examination by the learned Public Prosecutor, he has deposed that portion A to A of his statement mark-B was not recorded as per his version.

16. PW-4 Mane Ram deposed that he received a telephonic call from Duni Chand to the effect that Sh. Dhani Ram was found murdered at place Purani Kothi, Mashobra. Sh. Dhani Ram along with the accused and others were working as labourers. On this information, he alongwith Kamla Devi, Hukam Chand and others reached the place Ghendi. PW-12 Kamla Devi deposed that she received telephonic call from Mane Ram to the effect that her husband was found murdered. PW-4 Mane Ram has not stated that he informed Kamla Devi on 27.9.2013.

17. The case of the prosecution is also that the accused went to the house of PW-15 Bhag Singh and informed him that deceased had fallen down from the stairs. According to PW-15 Bhag Singh, the accused was under the influence of liquor and was frightened. It has come on record that the accused and deceased used to dine and reside together. In case, the accused had killed Dhani Ram, his first impulse would have been to run away from the spot instead of informing PW-15 Bhag Singh that deceased had fallen down from the stairs.

18. PW-15 Bhag Singh deposed that accused was under the influence of liquor. He was examined by PW-20 Dr. H.R.Rahi. According to the doctor, the accused was found conscious and oriented. He has not noticed that the accused was under the influence of liquor.

19. In the cases based upon circumstantial evidence, the motive plays a very important role. In the present case, the police has not attributed any motive to the accused as to why he would kill Dhani Ram (deceased).

20. Their lordships of the Hon'ble Supreme Court in the case of ***Dandu Jaggaraju vrs. State of Andhra Pradesh,*** reported in ***(2011) 14 SCC 674,*** have held that in a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution. It is this circumstance which often forms the fulcrum of prosecution story. It has been held as follows:

> "9. It has to be noticed that the marriage between P.W. 1 and the deceased had been performed in the year 1996 and that it is the case of the prosecution that an earlier attempt to hurt the deceased had been made and a report to that effect had been lodged by the complainant. There is, however, no documentary evidence to that effect. We, therefore, find it somewhat strange that the family of the deceased had accepted the marriage for about six years more particularly, as even a child had been born to the couple. In this view of the matter, the motive is clearly suspect. In a case relating to circumstantial evidence, motive is often a very strong circumstance which has to be proved by the prosecution and it is this circumstance which often forms the fulcrum of the prosecution story."

21. Their lordships of the Hon'ble Supreme Court in the case of ***Sathya Narayan vrs. State rep. by Inspector of Police,*** reported in ***(2012) 12 SCC 627,*** have held that in the case of circumstantial evidence, motive also assumes significance since absence of motive would put Court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omissions or conjectures do not take place of proof. It has been held as follows:

> "42) In the case of circumstantial evidence, motive also assumes significance for the reason that the absence of motive would put the court on its guard and cause it to scrutinize each piece of evidence closely in order to ensure that suspicion, omission or conjecture do not take the place of proof. In the case on hand, the prosecution has demonstrated that initially, the deceased entered the Ashram in order to assist the devotees and subsequently became one of the Trustees of the Trust and slowly developed grudge with the appellants. PWs 35 and 36, sister and brother of the deceased Leelavathi deposed that since then she became a Trustee, there was a dispute with regard to the Management of the said Trust."

22. Their lordships of the Hon'ble Supreme Court in the case of ***Majenderan Langeswaran vrs. State (NCT of Delhi) and another,*** reported in ***(2013) 7 SCC 192,*** have held that onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court and all the circumstances must lead to the conclusion that accused is the only one who has committed crime and none else. It has been held as follows:

> "3. On 30th November, 1996, an altercation is stated to have taken place between the accused and the deceased L. Shivaraman. As the accused had sustained some cut injuries on his hands, he reported the matter to the officials. On 1st December, 1996 when the ship was on high seas, the appellant took off from his duty as helmsman on the ground of pain in his hands due to cut injuries and another helmsman Baria was asked to do the duty as replacement. As the accused and the deceased were staying in Cabin No. 25, the accused was temporarily shifted from that cabin to Cabin No. 23 due to the above incident of assault. At about 1510 hours, the accused allegedly approached IInd Officer Kalyan Singh (PW-6) with a blood- stained knife in his hand and his hands smearing in blood and is alleged to have confessed before him that he had killed L. Shivaraman. On being asked by Kalyan Singh (PW-6), the appellant handed over the blood-stained knife to him which he placed in a cloth piece without touching the same. Kalyan Singh (PW-6) then intimated the Captain and other officers. The body of L. Shivaraman was found lying in Cabin No. 23 in such a way that half of it was inside the cabin and half of it outside. The officials of Shipping Corporation of India were informed. On incident being reported, pursuant to an instruction from concerned quarter, the ship was diverted to Hongkong. On being so directed by the Captain of the ship (PW-5), Kalyan Singh (PW-6) got the body of the deceased cleaned up for being preserved in the fish room with the help of Manjeet Singh Bhupal (PW-4) and Chief Officer V.V. Muralidharan (PW-18) took photographs. The blood-stained knife was kept in the safe custody of PW-5. The accused was then apprehended, tied and disarmed before being shifted to the hospital on board. Since the ship was having Indian Flag, as per the International Treaty of which India was a signatory, the act of the accused was subject to Indian laws. Accordingly, a case bearing R.C. No. 10(S) of 1996 was registered by the Central Bureau of Investigation (CBI) against the accused on 6th December, 1996.
>
> 16. Now, we have to consider whether the judgment of conviction passed by the trial court and affirmed by the High court can be sustained in law. As noticed above, the conviction is based on circumstantial evidence as no one has seen the accused committing murder of the deceased. While dealing with the said conviction based on circumstantial evidence, the circumstances

from which the conclusion of the guilt is to be drawn should in the first instance be fully established, and all the facts so established should also be consistent with only one hypothesis i.e. the guilt of the accused, which would mean that the onus lies on the prosecution to prove that the chain of event is complete and not to leave any doubt in the mind of the Court.

17. In the case of Hanumant Govind Nargundkar vs. State of M.P., AIR 1952 SC 343, this Court observed as under:

"It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused. …."

18. In the case of Padala Veera Reddy vs. State of A.P., 1989 Supp (2) SCC 706, this Court opined as under:

"10. Before adverting to the arguments advanced by the learned Counsel, we shall at the threshold point out that in the present case there is no direct evidence to connect the accused with the offence in question and the prosecution rests its case solely on circumstantial evidence. This Court in a series of decisions has consistently held that when a case rests upon circumstantial evidence such evidence must satisfy the following tests:

(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;

(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;

(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and (4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence. (See Gambhir v. State of Maharashtra, (1982) 2 SCC 351)"

19. In the case of C. Chenga Reddy & Ors. vs. State of A.P., (1996) 10 SCC 193, this Court while considering a case of conviction based on the circumstantial evidence, held as under:

"21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence. In the present case the courts below have overlooked

these settled principles and allowed suspicion to take the place of proof besides relying upon some inadmissible evidence."

20. In the case of Ramreddy Rajesh Khanna Reddy vs. State of A.P., (2006) 10 SCC 172, this Court again considered the case of conviction based on circumstantial evidence and held as under:

"26. It is now well settled that with a view to base a conviction on circumstantial evidence, the prosecution must establish all the pieces of incriminating circumstances by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than one of guilt of the accused. The circumstances cannot be on any other hypothesis. It is also well settled that suspicion, however grave it may be, cannot be a substitute for a proof and the courts shall take utmost precaution in finding an accused guilty only on the basis of the circumstantial evidence. (See Anil Kumar Singh v. State of Bihar, (2003) 9 SCC 67 and Reddy Sampath Kumar v. State of A.P., (2005) 7 SCC 603)."

21. In the case of Sattatiya vs. State of Maharashtra, (2008) 3 SCC 210, this Court held as under:

"10. We have thoughtfully considered the entire matter. It is settled law that an offence can be proved not only by direct evidence but also by circumstantial evidence where there is no direct evidence. The court can draw an inference of guilt when all the incriminating facts and circumstances are found to be totally incompatible with the innocence of the accused. Of course, the circumstances from which an inference as to the guilt is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances." This Court further observed in the aforesaid decision that:

"17. At this stage, we also deem it proper to observe that in exercise of power underArticle 136 of the Constitution, this Court will be extremely loath to upset the judgment of conviction which is confirmed in appeal. However, if it is found that the appreciation of evidence in a case, which is entirely based on circumstantial evidence, is vitiated by serious errors and on that account miscarriage of justice has been occasioned, then the Court will certainly interfere even with the concurrent findings recorded by the trial court and the High Court—Bharat v. State of M.P., (2003) 3 SCC 106. In the light of the above, we shall now consider whether in the present case the prosecution succeeded in establishing the chain of circumstances leading to an inescapable conclusion that the appellant had committed the crime."

22. In the case of State of Goa vs. Pandurang Mohite, (2008) 16 SCC 714, this Court reiterated the settled law that where a conviction rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any person. The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances.

23. It would be appropriate to consider some of the recent decisions of this Court in cases where conviction was based on the circumstantial evidence. In the case of G. Parshwanath vs. State of Karnataka, (2010) 8 SCC 593, this Court elaborately dealt with the subject and held as under:

"23. In cases where evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should, in the first instance, be fully established. Each fact sought to be relied upon must be proved individually. However, in applying this principle a distinction must be made between facts called primary or basic on the one hand and inference of facts to be drawn from them on the other. In regard to proof of primary facts, the court has to judge the evidence and decide whether that evidence proves a particular fact and if that fact is proved, the question whether that fact leads to an inference of guilt of the accused person should be considered. In dealing with this aspect of the problem, the doctrine of benefit of doubt applies. Although there should not be any missing links in the case, yet it is not essential that each of the links must appear on the surface of the evidence adduced and some of these links may have to be inferred from the proved facts. In drawing these inferences, the court must have regard to the common course of natural events and to human conduct and their relations to the facts of the particular case. The court thereafter has to consider the effect of proved facts.

24. In deciding the sufficiency of the circumstantial evidence for the purpose of conviction, the court has to consider the total cumulative effect of all the proved facts, each one of which reinforces the conclusion of guilt and if the combined effect of all these facts taken together is conclusive in establishing the guilt of the accused, the conviction would be justified even though it may be that one or more of these facts by itself or themselves is/are not decisive. The facts established should be consistent only with the hypothesis of the guilt of the accused and should exclude every hypothesis except the one sought to be proved. But this does not mean that before the prosecution can succeed in a case resting upon circumstantial evidence alone, it must exclude each and every hypothesis suggested by the accused, howsoever, extravagant and fanciful it might be. There must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused, where various links in chain are in themselves complete, then the false plea or false defence may be called into aid only to lend assurance to the court."

24. In the case of Rajendra Pralhadrao Wasnik vs. State of Maharashtra, (2012) 4 SCC 37, while dealing with the case based on circumstantial evidence, this Court observed as under:

"12. There is no doubt that it is not a case of direct evidence but the conviction of the accused is founded on circumstantial evidence. It is a settled principle of law that the prosecution has to satisfy certain conditions before a conviction based on circumstantial evidence can be sustained. The circumstances from which the conclusion of guilt is to be drawn should be fully established and should also be consistent with only one hypothesis i.e. the guilt of the accused. The circumstances should be conclusive and proved by the prosecution. There must be a chain of events so complete as not to leave any substantial doubt in the mind of the court. Irresistibly, the

evidence should lead to the conclusion which is inconsistent with the innocence of the accused and the only possibility is that the accused has committed the crime.

13. To put it simply, the circumstances forming the chain of events should be proved and they should cumulatively point towards the guilt of the accused alone. In such circumstances, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person."

25. Last but not least, in the case of Brajendrasingh vs. State of M.P., (2012) 4 SCC 289, this Court while reiterating the above principles further added that:

"28. Furthermore, the rule which needs to be observed by the court while dealing with the cases of circumstantial evidence is that the best evidence must be adduced which the nature of the case admits. The circumstances have to be examined cumulatively. The court has to examine the complete chain of events and then see whether all the material facts sought to be established by the prosecution to bring home the guilt of the accused, have been proved beyond reasonable doubt. It has to be kept in mind that all these principles are based upon one basic cannon of our criminal jurisprudence that the accused is innocent till proven guilty and that the accused is entitled to a just and fair trial. (Ref. Dhananjoy Chatterjee v. State of W.B., (1994) 2 SCC 220; Shivu v. High Court of Karnataka, (2007) 4 SCC 713 and Shivaji v. State of Maharashtra, (2008) 15 SCC 269)"

26. As discussed hereinabove, there is no dispute with regard to the legal proposition that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence as laid down by this Court. In such a case, all circumstances must lead to the conclusion that the accused is the only one who has committed the crime and none else."

23. Their lordships of the Hon'ble Supreme Court in the case of ***Rishipal vrs. State of Uttarakhand,*** reported in ***(2013) 12 SCC 551,*** have held that motive does not have a major role to play in cases based on eye witnesses account of incident but it assumes importance in cases that rest entirely on circumstantial evidence. Their lordships have further held that circumstances sought to be proved against accused be established beyond reasonable doubt, but also that such circumstances form so complete a chain, as leaves no option for court, except to hold that accused is guilty of offences with which he is charged. It has been held as follows:

"15. The second aspect to which we must straightaway refer is the absence of any motive for the appellant to commit the alleged murder of Abdul Mabood. It is not the case of the prosecution that there existed any enmity between Abdul Mabood and the appellant nor is there any evidence to prove any such enmity. All that was suggested by learned counsel appearing for the State was that the appellant got rid of Abdul Mabood by killing him because he intended to take away the car which the complainant-Dr. Mohd. Alam had given to him. That argument has not impressed us. If the motive behind the alleged murder was to somehow take away the car, it was not necessary for the appellant to kill the deceased for the car could be taken away even without physically harming Abdul Mabood. It was not as though Abdul

> Mabood was driving the car and was in control thereof so that without removing him from the scene it was difficult for the appellant to succeed in his design. The prosecution case on the contrary is that the appellant had induced the complainant to part with the car and a sum of Rs.15,000/-. The appellant has been rightly convicted for that fraudulent act which conviction we have affirmed. Such being the position, the car was already in the possession and control of the appellant and all that he was required to do was to drop Abdul Mabood at any place en route to take away the car which he had ample opportunity to do during all the time the two were together while visiting different places. Suffice it to say that the motive for the alleged murder is as weak as it sounds illogical to us. It is fairly well-settled that while motive does not have a major role to play in cases based on eye-witness account of the incident, it assumes importance in cases that rest entirely on circumstantial evidence. [See Sukhram v. State of Maharashtra (2007) 7 SCC 502, Sunil Clifford Daniel (Dr.) v. State of Punjab (2012) 8 SCALE 670, Pannayar v. State of Tamil Nadu by Inspector of Police (2009) 9 SCC 152]. Absence of strong motive in the present case, therefore, is something that cannot be lightly brushed aside.
>
> 19. It is true that the tell-tale circumstances proved on the basis of the evidence on record give rise to a suspicion against the appellant but suspicion howsoever strong is not enough to justify conviction of the appellant for murder. The trial Court has, in our opinion, proceeded more on the basis that the appellant may have murdered the deceased-Abdul Mabood. In doing so the trial Court over looked the fact that there is a long distance between 'may have' and 'must have' which distance must be traversed by the prosecution by producing cogent and reliable evidence. No such evidence is unfortunately forthcoming in the instant case. The legal position on the subject is well settled and does not require any reiteration. The decisions of this Court have on numerous occasions laid down the requirements that must be satisfied in cases resting on circumstantial evidence. The essence of the said requirement is that not only should the circumstances sought to be proved against the accused be established beyond a reasonable doubt but also that such circumstances form so complete a chain as leaves no option for the Court except to hold that the accused is guilty of the offences with which he is charged. The disappearance of deceased-Abdul Mabood in the present case is not explainable as sought to be argued before us by the prosecution only on the hypothesis that the appellant killed him near some canal in a manner that is not known or that the appellant disposed of his body in a fashion about which the prosecution has no evidence except a wild guess that the body may have been dumped into a canal from which it was never recovered."

24. Though the case of the prosecution is also that the deceased and accused used to quarrel, but PW-14 Subhash Kaushal has categorically stated in his examination-in-chief that no quarrel had ever taken place before him between Dhani Ram (deceased) and the accused and he could not say affirmatively as to who had murdered Dhani Ram. Thus, extra-judicial confession has not been made before any authority. It is a weak piece of evidence.

25. Their lordships of the Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Kashi Ram,*** reported in ***(2006) 12 SCC 254,*** have held that extra judicial

confession is a weak piece of evidence and must be proved like any other fact. It has been held as follows:

> "14. On appeal, the High Court reversed the findings of fact recorded by the trial court and acquitted the respondent. Before adverting to the other incriminating circumstances we may at the threshold notice two of them namely - the circumstance that the respondent made an extra-judicial confession before PWs 3 and 4, and the circumstance that recoveries were made pursuant to his statement made in the course of investigation of the waist chord used for strangulating Kalawati (deceased) and the keys of the locks which were put on the two doors of his house. The High Court has disbelieved the evidence led by the prosecution to prove these circumstances and we find ourselves in agreement with the High Court. There was really no reason for the respondent to make a confessional statement before PWs 3 and 4. There was nothing to show that he had reasons to confide in them. The evidence appeared to be unnatural and unbelievable. The High Court observed that evidence of extra-judicial confession is a weak piece of evidence and though it is possible to base a conviction on the basis of an extra- judicial confession, the confessional evidence must be proved like any other fact and the value thereof depended upon the veracity of the witnesses to whom it was made. The High Court found that PW-3 Dinesh Kumar was known to Mamraj, the brother of deceased Kalawati. PW-3 was neither a Sarpanch nor a ward member and, therefore, there was no reason for the respondent to repose faith in him to seek his protection. Similarly, PW-4 admitted that he was not even acquainted with the accused. Having regard to these facts and circumstances, we agree with the High Court that the case of the prosecution that the respondent had made an extra-judicial confession before PWs-3 and 4 must be rejected."

26. Their lordships of the Hon'ble Supreme Court in the case of ***Ajay Singh vrs. State of Maharashtra,*** reported in ***(2007) 12 SCC 341,*** have held that extra-judicial confession must be voluntary and the person to whom confession is made should be unbiased and not inimical to the accused. It is for the Court to judge credibility of the witness' capacity and thereafter to decide whether his or her evidence has to be accepted or not. Their lordships have also explained the terms "confession" and "statement" as under:

> "8. We shall first deal with the question regarding claim of extra judicial confession. Though it is not necessary that the witness should speak the exact words but there cannot be vital and material difference. While dealing with a stand of extra judicial confession, Court has to satisfy that the same was voluntary and without any coercion and undue influence. Extra judicial confession can form the basis of conviction if persons before whom it is stated to be made appear to be unbiased and not even remotely inimical to the accused. Where there is material to show animosity, Court has to proceed cautiously and find out whether confession just like any other evidence depends on veracity of witness to whom it is made. It is not invariable that the Court should not accept such evidence if actual words as claimed to have been spoken are not reproduced and the substance is given. It will depend on circumstance of the case. If substance itself is sufficient to prove culpability and there is no ambiguity about import of the statement made by accused, evidence can be acted upon even though substance and not actual words have been stated. Human mind is not a tape recorder which records what has been spoken word by word. The witness should be

able to say as nearly as possible actual words spoken by the accused. That would rule out possibility of erroneous interpretation of any ambiguous statement. If word by word repetition of statement of the case is insisted upon, more often than not evidentiary value of extra judicial confession has to be thrown out as unreliable and not useful. That cannot be a requirement in law. There can be some persons who have a good memory and may be able to repost exact words and there may he many who are possessed of normal memory and do so. It is for the Court to judge credibility of the witness's capacity and thereafter to decide whether his or her evidence has to be accepted or not. If Court believes witnesses before whom confession is made and is satisfied confession was voluntary basing on such evidence, conviction can be founded. Such confession should be clear, specific and unambiguous.

10. The expression 'confession' is not defined in the Evidence Act, 'Confession' is a statement made by an accused which must either admit in terms the offence, or at any rate substantially all the facts which constitute the offence. The dictionary meaning of the word 'statement' is "act of stating; that which is stated; a formal account, declaration of facts etc." The word 'statement' includes both oral and written statement. Communication to another is not however an essential component to constitute a 'statement'. An accused might have been over-heard uttering to himself or saying to his wife or any other person in confidence. He might have also uttered something in soliloquy. He might also keep a note in writing. All the aforesaid nevertheless constitute a statement. It such statement is an admission of guilt, it would amount to a confession whether it is communicated to another or not. This very question came up for consideration before this Court in Sahoo v. State of Uttar Pradesh, AIR 1966 SC 40: (1966 Cr1 U 68). After referring to some passages written by well known authors on the "Law of Evidence" Subba Rao, J. (as he then was) held that "communication is not a necessary ingredient to constitute confession". In paragraph 5 of the judgment, this Court held as follows:

> "...Admissions and confessions are exceptions to the hearsay rule. The Evidence Act places them in the category of relevant evidence presumably on the ground that as they are declarations against the interest of the person making them, they are probably true. The probative value of an admission or a confession goes not to depend upon its communication to another, though, just like any other piece of evidence, it can be admitted in evidence only on proof. This proof in the case of oral admission or confession can be offered only by witnesses who heard the admission pr confession. as the case may be.... If, as we have said, statement is the genus and confession is only a sub-species of that genus, we do not see any reason why the statement implied in the confession should be given a different meaning. We, therefore, hold that a statement, whether communicated or not, admitting guilt is a confession of guilt (Emphasis supplied)"

27. PW-15 Bhag Singh, though in his statement recorded under Section 161 Cr.P.C., as noticed by us hereinabove, has deposed that the accused has made extra-judicial confession, but he has not stated so while appearing as PW-15 before the Court. There is

contradiction in the statement recorded under Section 161 Cr.P.C and statement recorded in the Court as PW-15.

28. The Division Bench of the Allahabad High Court in the case of ***Munesh vrs. State of U.P.,*** reported in ***2004 Cr. L.J. 1529,*** has held that the evidence of witnesses can only be accepted if on core or substratum of prosecution case their statement in trial Court is consistent with their statement under Section 161 Cr.P.C. and where it is not, the Court would have no compunction in rejecting it. It has been held as follows:

> "[16] We have no reservations in observing that if witnesses do not state about the core/substratum of the prosecution case in their statements under Section 161, Cr.P.C. and when during the course of their cross examination, in the trial Court, confronted with the omission, fail to give a plausible explanation for it, as is the case with Madan Lal P.W. 2 and Suresh Chandra P.W. 3, it would be extremely hazardous to accept their testimony, for there is always the lurking fear in the mind of the Court that in order to fill the lacuna in their evidence, they have made improvements. We make no bones in observing that in Criminal cases, evidence of witnesses can only be accepted, if on the core/substratum of the prosecution case their statement in the trial Court is consistent with their statement under Section 161, Cr.P.C. and where it Is not, as is the case here, the Court would have no compunction in rejecting it."

29. The prosecution has failed to prove the motive attributed to the accused person. The chain of events is incomplete. Thus, the prosecution has failed to prove the case against both the accused beyond reasonable doubt.

30. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment and order of conviction and sentence dated 1.7.2015, rendered by the learned Addl. Sessions Judge-II, Shimla, H.P., in Sessions trial No. 36-S/7 of 2014, is set aside. Accused is acquitted of the charges framed against him. Fine amount, if any, already deposited by the accused is ordered to be refunded to him. Since the accused is in jail, he be released forthwith, if not required in any other case.

31. The Registry is directed to prepare the release warrant of the accused and send the same to the Superintendent of Jail concerned, in conformity with this judgment forthwith.

****

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

Sushil Sharma .....Petitioner.

Versus

J.S. Rana .....Respondent.

COPC No. 527/2015

Date of decision: 21st December, 2015.

Contempt of Courts Act, 1971- Section 2- Court had issued direction to the third respondent to take steps to dispose of the property and settle the dues to the retired and serving employees- a CMP was filed which was allowed and interest @ 10% p.a. was granted

to the petitioner filing the CMP - no such direction was granted in favour of other petitioners- held, that Executing Court cannot pass any direction which is not contained in the judgment- interest @ 7% p.a. originally granted in the judgment has already been paid- respondent has complied with the direction issued by the Court. (Para-2 to 6)

For the petitioner: Mr. J.P. Sharma, Advocate.
For the respondent: Mr. Sanjeev Bhushan, Sr. Advocate, with Mr. Vinod Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

Learned counsel for the petitioner stated at the Bar that respondent has complied with the directions issued by this Court and made the payments with interest @ 7% as awarded and recorded in the judgment but the respondent had to pay interest @10% per annum which is recorded in the order made by this Court in CWP No. 455 of 2011 titled Rajinder Singh Jishtu versus State of HP and others, and further in the order made by this Court in Execution Petition No. 147 of 2014 titled Sushil Sharma versus State of HP and others dated 27.10.2014.

2. The core question involved in this Contempt Petition is whether any Court can direct the judgment-debtor-respondent in the writ petition to comply with the judgment in a contempt petition or in an Execution petition adding and subtracting the judgment? The answer is in the negative for the following reasons.

3. This Court has passed the judgment in CWP No. 455 of 2011, and directed as under.

> *"2. It is also seen from the reply that the Government, however, has permitted the Corporation to dispose of its property at Jachh, Amb, Nalagarh and Pesticide Unit at Parwanoo at market value and get revenue to meet the financial requirements of the Corporation. Learned counsel for the Corporation submits that steps have already been taken to dispose of one such property and others are in process. There will be a direction to the 3rd respondent to take expeditious steps to dispose of the property as permitted by the Government and settle the dues to the retired and serving employees. The needful shall be done within a period of four months from today; if not, the dues will carry interest @ 7% from the date of retirement and officers responsible for the delay in the Corporation shall be personally liable for the same. Needless to say that the proper procedure under the law in the matter of disposal of the public property, shall be strictly adhered to"*

4. One of the petitioners filed CMP No. 9871 of 2011 in CWP No. 455 of 2011, and the Court was pleased to direct the respondent to pay interest @10% only to the petitioner. It is apt to reproduce order dated 2.12.2011, passed in CMP No. 9871 of 2011 herein.

> ***"CMP No. 9871 of 2011.***
>
> *The application is allowed, as prayed for. It is made clear that there shall be no further extension of time. Still further it is made clear that in case the judgment passed by this Court on 27.4.2011 in CWP NO. 455 of 2011 is not complied with, within the time as prayed for in the application, the petitioner*

shall be entitled to the interest at the rate of 10% and the official responsible for the delay shall be liable for the same. The application stands disposed of."

5. This order was made applicable to the petitioner/applicant in CMP No. 9871 of 2011 in CWP No. 455 of 2011 and not for others. The Executing Court in Contempt Petition cannot pass any direction which is not contained in the judgment sought to be executed due to the violation, as alleged.

6. Having said so, the respondent has complied with the directions issued by this Court in CWP No. 455 of 2011 titled Rajinder Singh Jishtu versus State of HP and others. If the petitioner still feel aggrieved, he is at liberty to seek appropriate remedy.

7. With the aforesaid observations, the Contempt Petition stands disposed of accordingly.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Nand Lal Bhardwaj .....Appellant.

Versus

State of H.P. and others .....Respondents.

LPA No.55 of 2011
Decided on: December 22, 2015.

Constitution of India, 1950- Article 226- Petitioner obtained Government employment on the basis that he belonged to IRDP family- a complaint was made against him on which his services were terminated- the termination order was made without hearing the petitioner- petitioner obtained documents under Right to Information Act showing that he belongs to IRDP family- Writ petition allowed and the termination order set aside. (Para-5 to 11)

For the Appellant: Mr.P.P. Chauhan, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General, with Mr.Anup Rattan, Addl.A.G., Mr.Vivek Singh Attri and Mr.Vikram Thakur, Dy.A.Gs.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This appeal is directed against the judgment and order, dated 21st February, 2011, titled Nand Lal Bhardwaj vs. State of H.P. and others, passed by a learned Single Judge of this Court, whereby the writ petition filed by the petitioner came to be dismissed, (for short, the impugned judgment).

2. Facts of the case, in brief, are that the writ petitioner (appellant herein) had questioned the termination order made by the respondents/State, on the grounds taken in the memo of writ petition. The petitioner was belonging to IRDP family and on that basis, had obtained government employment. It appears that thereafter, a complaint was made

against the writ petitioner, which found favour with the respondents and the services of the petitioner were terminated vide order, dated 29th October, 2004 (Annexure A-1).

3. Feeling aggrieved, the petitioner filed the writ petition challenging the said order of termination Annexure A-1.

4. We have heard the learned counsel for the parties and have gone through the record.

5. At the very outset, we may record that the termination order Annexure A-1 had been made by the respondents without affording opportunity of hearing to the petitioner.

6. The writ Court has overlooked the said fact and has virtually traveled beyond the pleadings and held that the IRDP certificate was false, which was not the scope of the writ Court and the writ petition came to be dismissed.

7. Feeling aggrieved, the writ petitioner has questioned the impugned judgment by the medium of instant appeal, which came to be admitted and the appellant/writ petitioner was allowed to continue vide order 21st March, 2011. This Court also arrayed the Block Development Officer, Theog as respondent No.5 and directed the said respondent to file affidavit indicating whether the appellant was belonging to IRDP family during April, 2003. Respondent No.5 filed the affidavit in which he has stated as follows:

> *"2. That in this behalf it is respectfully submitted that as per the verification of record of G.P. Kaleend as well as per entries of latest pariwar register, the family of appellant Shri Nand Lal Bhardwaj does not belong to IRDP family during April, 2003 having been shown separated during the year, 1997-98. However, Shir Udi Ram elder brother of Shri Nand Lal Bhardwaj has been shown to belong to IRDP family during the year, 2003 under IRDP No.03-0156."*

8. From the affidavit filed by respondent No.5, it is clear that in one breath the said respondent has stated that the appellant did not belong to IRDP family in the year 2003, but, in case the affidavit is read as a whole, it can also be inferred that the appellant was belonging to IRDP family.

9. During the pendency of the instant Letters Patent Appeal, the writ petitioner had obtained information under the Right to Information Act and placed the documents on record. A perusal of the said documents prima facie shows that the petitioner belonged to the IRDP category at the relevant point of time.

10. In view of the above discussion, the termination order Annexure A-1 is not sustainable in the eyes of law keeping in view the fact that the termination order was made without affording opportunity of hearing to the writ petitioner and also taking in account the fact that the affidavit and the documents, prima facie, do disclose that the writ petitioner belonged to IRDP family at the relevant point of time.

11. Having said so, the impugned judgment is set aside and the termination order Annexure A-1 is quashed and set aside. Consequently, the writ petition is allowed.

12. The appeal stands disposed of accordingly, so also the pending CMPs, if any.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Raj Kumar ...Petitioner.

Versus

The State of H.P. and others ...Respondents.

CWP No. 4487 of 2015
Reserved on: 16.12.2015
Decided on: 23.12.2015

Constitution of India, 1950- Article 226- Petitioner sought directions to the respondent to conduct the recruitment tests through Institute of Banking Personnel Selection and not through Himachal Board of School Education, Dharamshala-held that, the writ petitioner is just a candidate and has to sit in examination and it is for the concerned employer to decide the agency through which the tests are to be conducted- It cannot lie in the mouth of the petitioner before sitting in the examination that the test should be conducted through some particular agency-further held that, even otherwise, no breach of Act, Rules or Regulations has been alleged- the Bank is meant primarily for business and cannot be said to be performing the public duties or public functions or functions akin to which are performed by the Government- writ petition dismissed.(Para 15 & 25)

Cases referred:

S.S. Rana versus Registrar, Co-operative Societies & Anr., 2006 AIR SCW 3723

Vikram Chauhan versus The Managing Director and others, Latest HLJ 2013 (HP) 742 (FB)

Pradeep Kumar Biswas versus Indian Institute of Chemical Biology & Ors., (2002) 5 SCC 111

Gayatri De versus Mousmi Co-operative Housing Society Ltd. & Ors., (2004) 5 SCC 90

Madhya Pradesh Rajya Sahakari Bank Maryadit versus State of M.P. & Ors., 2007 AIR SCW 1533

Jatya Pal Singh and Ors. versus Union of India and Ors., r 2013 AIR SCW 2545

T.M. Sampath & Ors. versus Secretary, Ministry of Water Resources & Ors.,2015 AIR SCW 998

Radhey Shyam and another versus Chhabi Nath and others with Jagdish Prasad versus Iqbal Kaur and others, 2015 AIR SCW 1849,

Laxmi Narain & ors. versus Kuldeep Singh & ors., I L R 2014 (IX) HP 149

Federal Bank Ltd. versus Sagar Thomas and others, (2003) 10 Supreme Court Cases 733

For the petitioner: Mr. Ankush Dass Sood, Senior Advocate, with Mr. Tarun K. Sharma, Advocate.

For the respondents: Mr. V.S. Chauhan, Additional Advocate General, with Mr. J.K. Verma & Mr. Vikram Thakur, Deputy Advocate Generals, for respondent No. 1.

Mr. Shrawan Dogra, Senior Advocate, with Mr. Umesh Kanwar, Advocate, for respondent No. 2.

Mr. Lovneesh Kanwar, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

By the medium of this writ petition, the writ petitioner has sought writ of mandamus commanding the respondents to conduct the recruitment tests through Institute

of Banking Personnel Selection (for short "IBPS") and writ of prohibition restraining the respondents from directing respondent No. 3- Himachal Board of School Education, Dharamshala (for short "the Board") for conducting the examinations on the grounds taken in the memo of the writ petition.

2. The respondents have resisted the writ petition by filing replies and have raised preliminary objection that the Kangra Central Cooperative Bank Limited, Dharamshala, District Kangra, Himachal Pradesh (for short "the Bank") is neither a State nor the instrumentality of the State as per the mandate of Article 12 of the Constitution of India.

3. The respondents have questioned the very basis of the writ petition because the writ petitioner has based the foundation of his writ petition on the premise that the respondent-Bank is an instrumentality of the State, thus, amenable to the writ jurisdiction of this Court.

4. Learned Senior Counsel for the writ petitioner argued that even if it is admitted that the respondent-Bank is not a State or instrumentality of the State, yet writ will lie against it on the ground that Bank is performing/discharging the public duty akin to the duties and functions of the Government, thus, writ is maintainable.

5. Before we deal with the argument addressed by the learned Senior Counsel, it has to be seen whether such a ground has been taken in the writ petition.

6. While going through the writ petition one comes to an inescapable conclusion that no such ground has been projected. Only, it has been stated that the Bank is a State/instrumentality of the State and is legally bound to ask IBPS to conduct the recruitment tests.

7. Perusal of the writ petition does disclose that precisely, the case of the writ petitioner is that the respondent-Bank has to conduct the examination through IBPS and entrustment of the said work to the respondent-Board is a wrong decision for the reason that the respondent-Board is not having the competence to conduct such tests and has not conducted such tests so far.

8. The respondents have refuted the said contentions. The respondent-Board has given details in para 6 to 8 of the reply that the Board is competent to conduct the examination.

9. The question whether Bank is a State or instrumentality of the State has been set at rest by the Apex Court in a case titled as **S.S. Rana versus Registrar, Co-operative Societies & Anr.,** reported in **2006 AIR SCW 3723.** It is apt to reproduce para 11 of the judgment herein:

> *"11. The respondent No.1-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.] "*

10. The same question has again arisen before this Court and after noticing the pleadings, the Division Bench referred the matter to the Full Bench and the Full Bench of this Court in **Vikram Chauhan versus The Managing Director and others,** reported in

Latest HLJ 2013 (HP) 742 (FB), also following the ratio laid down by the Apex Court in **S.S. Rana's case (supra),** held that the Cooperative Banks are not a State or instrumentalities of the State, but in the same breath, held that whether writ would lie against such Banks is to be determined in view of the facts of each case read with the attending factors. Virtually, it has been held that writ can lie against a Cooperative Society/Bank of the Society, but, whether the same should be issued by the High Court, would depend on the facts of each case.

11. The Apex Court in **S.S. Rana's case (supra)** has specifically held that the Kangra Central Co-operative Bank Ltd., i.e. the respondent-Bank herein, cannot be characterized as a public authority and it is not performing public functions. It is worthwhile to reproduce para 10 of the judgment herein:

> *"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?"*

12. While replying para 10 (supra), the Apex Court has specifically held in para 11 (supra) that the Cooperative Bank-Society does not answer any of the aforesaid tests, thus, writ will not lie.

13. The Apex Court in **S.S. Rana's case (supra)** has also held that the Bank does not satisfy any of the tests laid down in **Pradeep Kumar Biswas versus Indian Institute of Chemical Biology & Ors.,** reported in **(2002) 5 SCC 111.** However, a question was raised that still writ will lie if the Bank-Society is discharging duties/functions as a public authority. The Apex Court held that Bank is not having any such trappings and accordingly held that decision in the case titled as **Gayatri De versus Mousmi Co-operative Housing Society Ltd. & Ors.,** reported in **(2004) 5 SCC 90,** was of no assistance to the Bench while recording the judgment. It is apt to reproduce paras 14 and 15 of the judgment in **S.S. Rana's case (supra)** herein:

> *"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.*
>
> *15. We are, however, not oblivious of a three judge Bench decision in Gayatri De vs. Mousumi Cooperative Housing Society Ltd. & Ors. 2004 (5) SCC 90, wherein this Court held a writ petition to be maintainable against the cooperative society only stating:*
>
> > *"We have, in paragraphs supra, considered the judgments for and against on the question of maintainability of writ petition. The judgments cited by the learned Senior Counsel appearing for the*

respondents are distinguishable on facts and on law. Those cases are not cases covered by the appointment of a Special Officer to manage the administration of the Society and its affairs. In the instant case, the Special Officer was appointed by the High Court to discharge the functions of the Society, therefore, he should be regarded as a public authority and hence, the writ petition is maintainable."

The said decision, therefore, is of no assistance to us. "

14. Another question has also arisen in **S.S. Rana's case (supra)** as to whether any mandatory act or rules framed have been violated. The answer recorded in para 19 is that the Bank/Society is not a creation of any statute or has not violated any provisions of the Act or any Rules governing the Bank. It is apt to reproduce paras 18 and 19 of the judgment herein:

"18. We may notice in some decisions, some High Courts have held wherein that a writ petition would be maintainable against a society if it is demonstrated that any mandatory provision of the Act or the rules framed thereunder, have been violated by it. [See Bholanath Roy & Ors. vs. State of West Bengal & Ors. reported in (1996) Vol.1 Calcutta Law Journal 502.]

19. The Society has not been created under any statute. It has not been shown before that in terminating the services of the appellant, the Respondent has violated any mandatory provisions of the Act or the rules framed thereunder. In fact, in the writ petition no such case was made out."

15. Applying the test to the instant case, what the writ petitioner is seeking that the tests be conducted through IBPS and not by the Board. He is just a candidate and has to sit in examination. It is the baby of the concerned employer as to where to conduct the tests and which agency is to be involved. It cannot lie in the mouth of the writ petitioner before sitting in the examination that the test should be conducted through some particular agency. Even otherwise, no breach of Act, Rules or Regulations has been alleged.

16. While going through the writ petition, we are not in a position to understand as to which right of the writ petitioner is infringed, not to speak of Fundamental Right, and what is his locus.

17. The words 'public duty', 'public functions' and 'functions akin to Government' have been discussed by the Apex Court in various judgments.

18. In the case titled as **Madhya Pradesh Rajya Sahakari Bank Maryadit versus State of M.P. & Ors.,** reported in **2007 AIR SCW 1533,** the Apex Court has held that when it is determined that Society is not a State, then there is no need to discuss other aspects. It is apt to reproduce para 10 of the judgment herein:

"10. Learned counsel for the respondents has also submitted that the Co-operative society is not a State within the meaning of Article 12 of the Constitution Of India, 1950, therefore, the writ petition is not maintainable. We need not go into this aspect as in view of the recent decision of this Act in Supriyo Basu & Ors. v. W.B. Housing Board & Ors., [(2005) 6 SCC 289] their Lordships have laid down what are the

parameters for challenging the orders passed by the Co- operative Societies. It has been held that writ would be maintainable against a Co-operative society if it is established that a mandatory statutory provision of a statute has been violated. Therefore, nothing turns on this aspect of the matter."

(Emphasis added)

19. The Apex Court in the case titled as **Jatya Pal Singh and Ors. versus Union of India and Ors.,** reported in **2013 AIR SCW 2545,** has laid down the tests how a Society can be said to be State or instrumentality of the State, which stand already discussed and held in **S.S. Rana's case (supra),** applicable to the case in hand. The Apex Court has also discussed whether a writ will lie against the company/ society and held that it is not performing any public functions, no rule is violated and no writ will lie, though the prayer was to safeguard the Fundamental Rights of the members of the appellant therein. It is apt to reproduce paras 52, 54 and 57 of the judgment herein:

"52. These observations make it abundantly clear that in order for it to be held that the body is performing a public function, the appellant would have to prove that the body seeks to achieve some collective benefit for the public or a section of public and accepted by the public as having authority to do so. In the present case, as noticed earlier, all telecom operators are providing commercial service for commercial considerations. Such an activity in substance is no different from the activities of a bookshop selling books. It would be no different from any other amenity which facilitates the dissemination of information or DATA through any medium. We are unable to appreciate the submission of the learned counsel for the appellants that the activities of TCL are in aid of enforcing the fundamental rights under Article 21(1)(a) of the Constitution. The recipients of the service of the telecom service voluntarily enter into a commercial agreement for receipt and transmission of information. The function performed by VSNL/TCL cannot be put on the same pedestal as the function performed by private institution in imparting education to children. It has been repeatedly held by this Court that private education service is in the nature of sovereign function which is required to be performed by the Union of India. Right to education is a fundamental right for children upto the age of 14 as provided in Article 21A. Therefore, reliance placed by the learned counsel for the appellants on the judgment of this Court in Andi Mukta (AIR 1989 SC 1607) (supra) would be of no avail. In any event, in the aforesaid case, this Court was concerned with the non-payment of salary to the teachers by the Andi Mukta Trust. In those circumstances, it was held that the Trust is duty bound to make the payment and, therefore, a writ in the nature of mandamus was issued. Mr. C.U.Singh, senior counsel relied on Binny Ltd. in support of the submissions that VSNL/TCL is not performing a public function. In our opinion, the observations made by this Court in the aforesaid judgment are fully applicable in the facts and circumstances of this case.

53. .....

54. A perusal of the aforesaid documents, however, would show that VSNL had merely promised not to retrench any employee who had

> *come from OCS for a period of two years from 13th February, 2002. Such a condition, in our opinion, would not clothe the same with the characteristic of a public duty which the employer was bound to perform. The employees had individual contacts with the employer. In case the employer is actually in breach of the contract, the appellants are at liberty to approach the appropriate forum to enforce their rights.*
>
> *55. .....*
>
> *56. .....*
>
> *57. The prayer in this writ petition is inter alia for the issuing a writ in the nature of mandamus directing the official respondents to safeguard the fundamental rights of the members of the appellant as per the undertaking given on 16th March, 2001, 9th October, 2001 and 30th April, 2002. For the reasons already stated in the earlier part of the judgment relating to the civil appeals, we are unable to entertain the present writ petition. In our opinion, it is not maintainable and accordingly dismissed."*

20. The Apex Court in the latest judgment in the case titled as **T.M. Sampath & Ors. versus Secretary, Ministry of Water Resources & Ors.,** reported in **2015 AIR SCW 998,** has also discussed the same concept and held that writ will not lie.

21. In an another judgment in the case titled as **Radhey Shyam and another versus Chhabi Nath and others** with **Jagdish Prasad versus Iqbal Kaur and others,** reported in **2015 AIR SCW 1849,** the Apex Court has discussed whether writ will lie against the persons not discharging any public duty and held that writ will not lie. It is apt to reproduce para 23 of the judgment herein:

> *"23. Thus, we are of the view that judicial orders of civil courts are not amenable to a writ of certiorari under Article 226. We are also in agreement with the view of the referring Bench that a writ of mandamus does not lie against a private person not discharging any public duty. Scope of Article 227 is different from Article 226."*

22. This Court in **CWP No. 6709 of 2013-A,** titled as **Sanjeev Kumar & ors. versus State of H.P. and ors.,** decided on 04.08.2014, while discussing all the judgments, has also held that H.P. State Cooperative Bank is not a State, thus, writ will not lie because the relief claimed was against the Bank. It is apt to reproduce para 20 of the judgment herein:

> *"20. In view of the aforesaid clear exposition of law not only of this court but also the Hon'ble Supreme Court, we find merit in the preliminary objection raised by respondent No. 3 regarding the maintainability of the petition against the H.P. State Cooperative Bank and uphold the same and accordingly declare this petition to be not maintainable against the H.P. State Cooperative Bank. Since the relief in this petition is primarily claimed against the said bank, therefore, the petition itself is not maintainable and accordingly the same is dismissed leaving the parties to bear their own costs."*

23. This question again arose before this Court in a batch of LPAs, **LPA No. 236 of 2011, titled as Laxmi Narain & ors. versus Kuldeep Singh & ors.,** being the lead case, decided on 17.09.2014 and after discussing the Act, Rules, Bye-laws, Regulations and other

laws applicable, held that primary function of the Bank is to conduct business and the functions discharged by the Bank are not public duties/public functions and are not akin to the functions of the State. It would be profitable to reproduce relevant portion of para 16 and para 18 of the judgment herein:

> *"16. Now, we proceed to determine as to whether the respondent bank is discharging any public duties closely related to the government function. In our considered view, the duties and functions of the respondent bank can best be compared with the H.P. State Co operative Bank Ltd since as observed earlier, both are Co operative societies and at the same time are also conducting banking business.*
>
> *xxx xxx xxx*
>
> *18. It would thus be seen that while considering the same objects, similar functions and similar Bye-laws, learned Division Bench of this court had clearly opined that the nature of business being carried out by it could not be termed as functions impregnated with government character or tied or entwined with government and it did not satisfy the 5th test enunciated in Ajay Hasia's case (supra).*

24. It is also apt to record herein that the Apex Court in the case titled as **Federal Bank Ltd. versus Sagar Thomas and others,** reported in **(2003) 10 Supreme Court Cases 733,** has specifically and without any ambiguity dealt with this question. It would be profitable to reproduce paras 27 and 29 of the judgment herein:

> *"27. Such private companies would normally not be amenable to the writ jurisdiction under Article 226 of the Constitution. But in certain circumstances a writ may issue to such private bodies or persons as there may be statutes which need to be complied with by all concerned including the private companies. For example, there are certain legislations like the Industrial Disputes Act, the Minimum Wages Act, the Factories Act or for maintaining proper environment say Air (Prevention and Control of Pollution) Act, 1981 or Water (Prevention and Control of Pollution) Act, 1974 etc. or statutes of the like nature which fasten certain duties and responsibilities statutorily upon such private bodies which they are bound to comply with. If they violate such a statutory provision a writ would certainly be issued for compliance of those provisions. For instance, if a private employer dispense with the service of its employee in violation of the provisions contained under the Industrial Disputes Act, in innumerable cases the High Court interfered and have issued the writ to the private bodies and the companies in that regard. But the difficulty in issuing a writ may arise where there may not be any non-compliance or violation of any statutory provision by the private body. In that event a writ may not be issued at all. Other remedies, as may be available, may have to be resorted to.*
>
> *28. .....*
>
> *29. There are a number of such companies carrying on the profession of banking. There is nothing which can be said to be close to the governmental functions. It is an old profession in one form or the other carried on by individuals or by a group of them. Losses incurred in the business are theirs as well as the profits. Any business or*

commercial activity, may be banking, manufacturing units or related to any other kind of business generating resources, employment, production and resulting in circulation of money are no doubt, are such which do have impact on the economy of the country in general. But such activities cannot be classified one falling in the category of discharging duties, functions of public nature. Thus the case does not fall in the fifth category of cases enumerated in the case of Ajay Hasia (supra). Again we find that the activity which is carried on by the appellant is not one which may have been earlier carried on by the Government and transferred to the appellant company. For the sake of argument even if it may be assumed that one or the other test as provided in the case of Ajay Hasia (supra) may be attracted that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature. In this connection, observations made in the case of Pradeep Kumar Biswas (supra) quoted earlier would also be relevant." *(Emphasis added)*

25. Applying the tests to this case, the Bank is meant primarily for business and it cannot be said that it is performing the public duties or public functions or functions akin to which are performed by the Government.

26. Having said so, the writ petition is dismissed alongwith all pending applications.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

LPA No. 146 of 2009, with LPA No.170 & 172 of 2013, 157 of 2014, CWP Nos.6680 of 2010, 10045 of 2013 and 2870 of 2014.

Reserved on: 15th December, 2015.

Pronounced on: **December 23, 2015.**

LPA No.146 of 2009:

State of H.P. and another .....Appellants.

versus

V.D. Saraswati and others .....Respondents.

LPA No.170 of 2013:

State of H.P. and another .....Appellants.

versus

Piara Lal and others .....Respondents.

LPA No.172 of 2013:

State of H.P. and another .....Appellants.

versus

Kirpa Ram and others .....Respondents.

LPA No.157 of 2014:
State of H.P. and another .....Appellants.
versus
Ram Nath Sharma and others .....Respondents.

CWP No.6680 of 2010:
D.R. Chauhan and others .....Appellants.
versus
State of H.P. and another .....Respondents.

CWP No.10045 of 2013:
Nishant Sharma and others .....Appellants.
versus
State of H.P. and another .....Respondents.

CWP No.2870 of 2014:
Nirmla Devi and others .....Appellants.
versus
State of H.P. and another .....Respondents.

Constitution of India, 1950- Article 226- Writ petitions filed by the petitioners were allowed and the respondents were directed to pay the pay scale as per annexure appended with the writ petitions- a letter was issued by the State, whereby higher pay scale was granted to some senior-most Assistant Librarians- the remaining Assistant Librarians challenged the action of the State on the ground of discrimination pleading that petitioners and senior-most Assistant Librarians who were given higher pay scale formed one class and they were discharging same and similar duties- writ petitions were transferred to the Administrative Tribunal who allowed the same and issued a direction to revise the pay scale of petitioners and the similarly placed Assistant Librarians working in the Education Department- this decision was never challenged but was also not implemented in its letter and spirit- Department issued a letter granting the higher pay scale only to Senior Assistant Librarians- Assistant Librarian filed an application which was transferred to High Court and was allowed- State filed LPA which was dismissed- subsequently, U.G.C. Scale was granted to only 20 senior Assistant Librarians- a writ petition was filed and a direction was issued to extend the benefit to all- held, that once it was held by the Tribunal, writ Court and the Appellate Court that all the Assistant Librarians constituted one homogenous class, which was upheld by Apex Court, it is not permissible for the State to question the foundation of the reasoning in subsequent writ petition as well- petition dismissed. (Para-5 to 7)

Presence for the parties:

Mr.Shrawan Dogra, Advocate General, with Mr.V.S. Chauhan, Addl.A.G., Mr.J.K. Verma and Mr.Vikram Thakur Dy.A.Gs., for the State in all the cases.

Mr.K.D. Shreedhar, Senior Advocate, with Ms.Shreya Chauhan, Advocate, Mr.Dushyant Dadwal, Mr.M.L. Sharma, Ms.Vidushi Sharma and Mr.Vikas Rajput, Advocates, for the respondents in respective appeals and for the petitioners in respective writ petitions.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

By the medium of LPA No.146 of 2009, the appellants-State, (respondents before the writ Court), have challenged the judgment and order, dated 18th May, 2009, passed by a learned Single Judge of this Court in CWP(T) No.4436 of 2008, titled V.D. Saraswati and others vs. State of H.P. and another, whereby the writ petition filed by the petitioners (respondents herein) came to be allowed and the writ respondents were directed to pay to the petitioners the pay scales in terms of Annexure A-12, appended with the writ petition.

2. LPAs No.170 of 2013 and 157 of 2014 are the outcome of common judgment and order, dated 30th May, 2012, passed by a learned Single Judge of this Court in CWP No.5118 of 2010, titled Piare Lal and others vs. State of H.P. and another, and CWP No.5262 of 2010, titled Ram Nath Sharma and others vs. State of H.P. and another, respectively, while LPA No.172 of 2013, lays the challenge to the judgment and order, dated 19th June, 2012, passed in CWP No.5762 of 2010, titled Kirpa Ram and others vs. State of H.P. and another. Vide the judgments, impugned in the aforesaid Letters Patent Appeals, the learned Single Judge has allowed the writ petitions and passed the similar directions as were given in CWP(T) No.4436 of 2008, titled V.D. Saraswati and others vs. State of H.P. and another, (subject matter of LPA No.146 of 2009).

3. The writ petitioners, by the medium of CWP Nos.6680 of 2010, 10045 of 2013 and 2870 of 2014, have also prayed for the similar relief as has been granted in favour of the writ petitioners vide judgments impugned in the above Letters Patent Appeals.

4. This is how all the appeals and the writ petitions came to be clubbed together and are being disposed of together by this common judgment.

5. At the very outset, it may be placed on record that the dispute rotates around the grant of one pay scale to the entire cadre of Assistant Librarians serving in the Education Department of the State.

6. The genesis of the whole dispute appears to be the letter dated 7th July, 1981, issued by the State, whereby higher scale of pay of Rs.300-600 was granted to some senior-most Assistant Librarians. Feeling aggrieved, the remaining Assistant Librarians challenged the said action of the State by the medium of writ petitions before this Court on the ground of discrimination since the petitioners and the senior-most Assistant Librarians who were given the higher pay scale, formed one class and were discharging same and similar duties.

7. The said writ petitions, on the founding of the State Administrative Tribunal, (hereinafter referred to as the Tribunal), came to be transferred to the Tribunal. The Tribunal, vide order dated 26th July, 1993, allowed the said writ petitions and directed the State to revise the pay scale of the writ petitioners and the similarly placed Assistant Librarians working in the Himachal Pradesh Education Department. It is apt to reproduce the operative portion of the said order as under:

> *"Following the ratio of the above judgments, we direct the respondents to revise the pay scale of the applicants and other similarly situate Assistant Librarians in Schools/Colleges/Public Libraries and Community Centre Libraries under the Himachal Pradesh Education Department to Rs.300-600 in consonance with the Office order dated July 7, 1981 Annexure PB, within a*

period of two months and they be allowed all further consequential benefits to which they are found entitled subsequently consequent upon this revised pay scale. We further direct that the arrears found due and payable as a result of such revision be paid to them within a period of three months after such revision."

8. Indisputably, the said decision of the Tribunal was never challenged by the State and as such has attained finality. It is also a fact that the said decision of the Tribunal was never implemented by the respondent-Department in its letter and spirit. Rather, the respondent-Department issued a letter, dated 16th June, 1994, whereby the respondent-Department granted the higher pay scale only to the Senior Assistant Librarians.

9. Faced with such discrimination, the Assistant Librarians approached the Tribunal by filing the Original Applications and on abolition of the Tribunal, the said Original Applications were transferred to this Court and one such Original Application was diarized as writ petition, being CWP(T) No.6018 of 2008, titled Madan Lal Tomar and others vs. State of H.P. and others.

10. The said writ petition was allowed by the learned Single Judge vide judgment dated 22nd March, 2010, against which the State filed the Letters Patent Appeal, being LPA No.237 of 2010, titled State of H.P. and another vs. Madan Lal Tomar and others.

11. The Division Bench of this Court heard the said Letters Patent Appeal (LPA No.237 of 2010) alongwith LPA No.98 of 2011, titled State of H.P. and another vs. Mrs.Ashwani Kumari and CWP No.6680 of 2010, titled D.R. Chauhan and others vs. State of H.P. and another. The Letters Patent Appeals were dismissed while the writ petition was allowed by the Division Bench of this Court, vide judgment, dated 22nd November, 2011. It is apt to reproduce paragraphs 6, 7 and 8 of the said judgment hereunder:

"6. On the constitution of the H.P. State Administrative Tribunal, the aforesaid writ petitions were transferred to the said Tribunal. All the writ petitions were heard and decided together vide order dated 26th July, 1993. The Tribunal by its order decided the following question:

"Whether the State is justified in granting the revised pay-scale of `300-600 to only a few Assistant Librarians on the basis of seniority, when there is only one cadre of Assistant Librarians in Schools/Colleges/Public Libraries, maintained by the Education Department and all the Assistant Librarians are performing the same and similar functions and duties?"

The Tribunal, after detailed discussion, held as follows:

"Following the ratio of the above judgments, we direct the respondents to revise the pay scale of the applicants and other similarly situate Assistant Librarians in Schools/Colleges/Public Libraries and Community Centre Libraries under the Himachal Pradesh Education Department to Rs.300-600 in consonance with the Office order dated July 7, 1981 Annexure PB, within a period of two months and they be allowed all further consequential benefits to which they are found entitled subsequently consequent upon this revised pay scale. We further direct that the arrears found due and payable as a result of such revision be paid to them within a period of three months after such revision."

7. A bare perusal of the operative portion of the order of the Tribunal clearly shows that the Tribunal directed the State to revise the pay-scales of the petitioners and other similarly situated Assistant Librarians to `300-600. It is not disputed before us that

this order of the Tribunal attained finality and was never challenged by the State before any higher forum.

8. Unfortunately, the State did not comply with the aforesaid directions, insofar as other similarly situated persons are concerned. It issued a letter on 16th June, 1994 and in this letter it directed that the pay scale of `300-600 would be granted only to the senior Assistant Librarians as a measure personal to the existing incumbents. To say the least, this letter was in total violation of the directions issued by the Tribunal. The stand of the State that the higher pay-scale of `300-600 was payable only to the senior Assistant Librarians is totally contrary to the orders passed by the Tribunal. At this stage, we are not going into the validity of the orders passed by the Tribunal since they had attained finality. If the State was aggrieved by the orders of the Tribunal, it had the right to challenge the said orders in the appropriate forum. It chose not to challenge the orders and, therefore, was bound to comply with the same. The order, the operative portion of which has been quoted hereinabove, in no uncertain terms states that all Assistant Librarians, i.e. the petitioners as well as other similarly situated were to be granted the pay-scale of `300-600. The judgment was a judgment "in rem and not in personam". The State could not have set at naught the judicial pronouncement of the Tribunal."

12. During the course of hearing, it was informed that the aforesaid judgment passed by this Court in Madan Lal Tomar's case was assailed by the State before the Apex Court by filing Special Leave Petition and the said Special Leave Petition was dismissed by the Apex Court.

13. It is pertinent to note that the aforesaid judgment in Madan Lal Tomar's case supra was recalled so far as it related to CWP No.6680 of 2010, vide order dated 29th March, 2012, passed in Civil Review No.183 of 2011. In this backdrop, the said writ petition has been taken up with the instant cases for final disposal.

14. Thereafter, subsequent development had taken place and the cadre of Assistant Librarians was granted U.G.C. Scale. However, the Government issued a letter dated 31st March,1995, in the same manner as had been issued earlier (subject matter of aforesaid writ petitions, Letters Patent Appeals and Special Leave Petition), whereby U.G.C. Grade and revised pay scale was granted to only 20 senior Assistant Librarians, who were working in District/Public and Central State Library, Solan, which action was assailed by the petitioners by filing CWP(T) No.4436 of 2008, titled V.D. Saraswati and others vs. State of H.P. and another. The said writ petition was allowed by the learned Single Judge, vide judgment dated 18th May, 2009 (subject matter of LPA No.146 of 2009), and the benefit of the letter dated 31st March, 1995 was ordered to be extended to all the petitioners, which judgment was followed by the learned Single Judge in other writ petitions (subject matter of LPA Nos.170 of 2013, 172 of 2013 and 157 of 2014).

15. The question is - Whether, in the given circumstances, the State can now question the judgments made by the learned Single Judge by the medium of Letters Patent Appeals in hand? The answer is in the negative for the simple reason that, admittedly, the principle has been discussed and the findings stand returned by the State Administrative Tribunal, the Writ Court and the Appellate Court that all the Assistant Librarians constituted one homogeneous class, which findings stand upheld by the Apex Court. Virtually, the State, by the medium of instant appeals, has questioned the foundation of the reasoning, on the basis of which the earlier judgments, referred to above, were made, which is not permissible.

16. Having said so, the judgments, impugned in the Letters Patent Appeals, require no interference and the same are upheld. Consequently, the appeals in hand are dismissed.

CWP Nos.6680 of 2010, 10045 of 2013 and 2870 of 2014:

17. In view of the above discussion, all the writ petitions are allowed in terms of the judgment passed in LPA No.237 of 2010 and connected matters. However, the benefit of arrears shall be restricted to three years prior to filing of the respective writ petitions.

18. All the appeals and the writ petitions stand disposed of accordingly, alongwith pending CMPs, if any.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

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

Cr. Appeal No. 259/2009
Reserved on: 16.12.2015
Decided on: 23.12.2015

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 4 kg. of charas- he was acquitted after trial – it was admitted by PW-1 that place was heavily populated- there were many shops and many people were residing in the vicinity– however, no independent witness was associated- rukka was prepared at 11:30 P.M but was sent at 12:30 P.M- delay was not explained- samples were not taken homogenously- held, that in these circumstances, prosecution version was not proved beyond reasonable doubt- accused was rightly acquitted by the trial Court. (Para-14 to 17)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondent : Mr. G.R. Palsra, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 11.2.2009 rendered by learned Special Judge, Mandi, HP, in Sessions Trial No. 34 of 2008, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act (hereinafter referred to as 'Act' for convenience sake) has been acquitted.

2. Case of the prosecution, in a nutshell, is that on 10.3.2008 at about 9.45 pm, HC Kishan Chand alongwith Constable Padam Singh, LHC Balbir Singh, HHC Padam Singh, HHC Prem Pal and Constable Hitender Kumar was on patrolling and detection of excise and narcotics near Bhiuli bridge. Police party noticed accused with a *Pithu* on his back coming on the road. Accused tried to turn back. He was apprehended. Accused told them that the *Pithu* contained charas. Constable Hitender Kumar was sent to call for

independent witnesses from the houses Khad side. HC Kishan Chand after offering his search and of other police officials, carried out the search of the bag of the accused in presence of LHC Padam Singh and LHC Balbir Singh. Bag contained four poly packs bearing 'East Park' label. Packs contained Charas in the shape of sticks and balls. Charas of poly packs was mixed and it weighed 4.00 kgs. From the mixture, two samples of 25 gms each were taken and sealed with seal impression 'D'. Bulk of Charas was also sealed in a parcel sealed with seal 'D' and specimen of seal impression 'D; was drawn and NCB forms in triplicate were updated and seal was handed over to HHC Padam Singh. Charas and samples were taken into possession vide Ext. PW-1/E. Rukka, Ext. PW-12/B was prepared and sent to the Police Station. FIR Ext. PW-10/ was registered. Case property was handed over to SHO Hari Ram and he resealed the same with seal 'H' and deposited with MHC Police Station Sadar vide Ext. PW-12/A. Report of FSL Junga is Ext. PW-11/A. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 12 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. He examined two witnesses in his defence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. PW-1 HHC Padam Singh deposed that they noticed a person coming from Sauli Khad towards Mandi side on foot having a bag on his left shoulder. On seeing the police party, said person tried to run away. Police party apprehended the accused. No person was available at that time on the spot and as such IO Kishan Chand deputed Constable Hitender Kumar towards Sauli Khad in search of independent witnesses. They alongwith accused came towards Bhiuli bridge. Hitender Kumar came back and reported that all the shops were closed. He could not find any independent witnesses. IO asked for the consent of the accused whether he wanted the personal search and search of his bag before a Magistrate or a Gazetted Officer. Consent memo is Ext. PW-1/A. Accused consented in writing to be searched by the police vide consent memo Ext. PW-1/A. Police gave their personal search to the accused. Bag of accused was searched. It contained charas in the shape of sticks and balls. It weighed 4.00 kgs. Out of recovered charas, two samples of 25 grams each were separated and sealed with sead 'D' (7 in number). Remaining charas was sealed in separate parcel with the same seal impression at 7 places. Specimen seal impression was taken separately. Seal, after use was handed over to him. He did not bring the same since it was lost. IO filled up NCB form in triplicate. Parcel and bag were taken into possession vide Ext. PW-1/E. Samples were produced during the examination-in-chief of this witness. In his cross-examination, he has admitted that on the spot there are so many shops, petrol pump, historical Gurdwara etc. Area is within Municipal Corporation limits Mandi. There remains hustle and bustle from Paddal to Bhiuli bridge and Sauli river and Bhiuli colony throughout day and night. He has admitted that after crossing the bridge there are government staff quarters, Housing Board colony, private residences, Bhima Kali temple, Telephone exchange and so many shops and thousands of people are living there.

7. PW-2 Constable Hitender Kumar also deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. He deposed that the IO asked him to bring independent witnesses from Sauli Khad side and accordingly, he started traveling towards Sauli Khad whereas rest of the police party

alongwith accused started towards Bhiuli bridge. He searched for independent witnesses but none was found. Shops were closed. He came back and informed the IO about the non-availability of independent witnesses. In his cross-examination, he has admitted that they stopped at so many places i.e. ITI Chowk, Bus Stand, Vegetable Market, Gurdwara and ITI hostel. He admitted that there are so many shops and houses on both the sides of the road from CIA staff office to Bhiuli bridge. He admitted that due to there being National Highway, there is frequency of vehicles from Mandi to Manali and towards Pathankot round the clock. He also admitted that on right side of road near Bhiuli bridge there is ITI hostel, Gurdwara and locality and so many people are residing there. It is stated by him that by the side of Bhiulu bridge towards left side there is workshop of HRTC and by its side there is building of Surender Kumar abutting National Highway. In his cross-examination, he has admitted that in order to bring independent witnesses from the houses and shops from Sauli river side, he simply travelled 100 metres but nobody met him and he did not go to bring independent witnesses from Bhiuli or ITI hostel side which are adjacent to the lace of occurrence because IO specifically asked him to arrange the same from Sauli river side where he had to travel log distance. There was no population. He came back to the spot in 10 minutes. He also carried Rukka to the Police Station. He also deposed that memo Ext. PW-1/A was not prepared in his presence. Ext. PW-1/B also was not prepared in his presence.

8. PW-3 Nand Lal deposed that on 11.3.2008, Hari Ram at 2.15 am, deposited two sample parcels and one bulk parcel sealed with seal impression 'D' at 7 places and four seals of 'H' and sample parcels sealed with seal impression 'D' and 'H' were marked as A1 and A2 alongwith NCB form in triplicate, seizure memo and specimen seal impressions of 'D' and 'H'. He entered the case property in Malkhana Register at Serial No. 860 and kept the same in safe custody. One sample parcel marked A1 alongwith specimen seal impression and NCB form and necessary documents were handed over to HHC Dharampal vide RC No. 72/08 for depositing with FSL Junga for chemical analysis.

9. PW-4 Dharam Pal deposed that on 13.3.2008, MHC Nand Lal handed over to him sample parcel of the case sealed with seal 'D' and 'H' at four places with NCB form, specimen seal impression and other necessary documents vide RC No. 72/08 for delivering at FSL Junga. He handed over the receipt to MHC.

10. PW-10 SI Hari Ram was posted as SHO Police Station Sadar. On 10.3.2008 at 11.45 pm Rukka was brought by Hitender Kumar on the basis of which he got registered FIR Ext. PW-10/A. On 11.3.2008, at 1.45 pm, HC Kishan Chand produced the case property which was sealed with seal impression 'D' alongwith NCB form and specimen seal impression. He resealed two sample parcels and bulk parcel with seal impression 'H' and filled up necessary columns of NCB form and took specimen seal impression on piece of cloth. After resealing the case property, he handed over the same to MHC Nand Lal for keeping in safe custody in Malkhana. Resealing certificate is Ext. PW-10/B**.**

11. PW-12 Kishan Chand is the Investigating Officer in the present case. He deposed the manner in which accused was apprehended and search, sealing and seizure proceedings were completed at the spot. He has sent Hitender Kumar towards Sauli Khad for bringing independent witnesses since the place where accused was apprehended was isolated. After about 10 minutes, Hitender Kumar came back. He could not find any independent witness. In his cross-examination, he has admitted that after proceeding from SIU office they patrolled Paddal ground, vegetable market, Gurdwara and ITI hostel. He has admitted that from Paddal police station upto Bhiuli bridge, tehre are shops and residential houses on both sides of the road. He admitetd that at Bhiuli bridge, there is crossing of the roads towards Jogindernagar and Manali and in the middle of crossing at Bhiuli bridge there

is a big street light under which he conducted search of accused and other proceedings. He admitted that the place of occurrence is thickly populated area. He also admitted that there was frequency of vehicles throughout at the point of crossing. He also admitted that he has not sent Hitender Kumar to bring witnesses from nearest places Bhiuli and ITI Hostel side.

12. DW-1 Sanjay Sharma deposed that he was running a travel agency. Accused came to him at Patli Kuhal on 10.3.2008 to book one seat in Bus No. UP-22-T-0689 from Mohal to Delhi. He was supposed to board the bus at Mohal at 6.00 pm on 10.3.2008. He has produced the original booking book.

13. DW-2 Raghubir Singh was driver of Bus No. UP-22-T-0689. He was driving the bus on 10.3.2008 from Manali to Delhi. It left Manali at 4.00 pm. There was booking of seat No. 3 from Mohal to Delhi. At about 6.15 pm, accused boarded the bus at Mohal and occupied seat No. 3 from Mohal. He was moderately drunk and had an altercation with the conductor. When bus reached Bhiuli Forest Check post, at 9.30 pm, bus was stopped on seeing the police officials as the conductor requested the bus to stop where police party was present. When bus stopped, conductor asked the police to get down the accused from the bus as he was creating nuisance in the bus. He also requested accused to alight from the bus. Police took accused with them. Bhiuli bridge at Mandi is about ½ kms from Bindravani forest check post where accused alighted from the bus.

14. Case of the prosecution, precisely, is that accused was apprehended on 10.3.2008 at 9.45 pm. He was carying a bag. He disclosed that he was carrying charas. IO sent PW-2 Hitender Kumar to search for independent witnesses. He came back in 10 minutes. No independent witnesses were available. Search and seizure proceedings were completed at the spot. NCB form was filled in. Rukka was sent to Police Station on the basis of which FIR was registered. Resealing was completed by SHO. He deposited the case property with MHC.

15. PW-1 Padam Singh has stated, as noticed herein above, in his cross-examination that there remains hustle and bustle from Paddal to Bhiuli bridge and Sauli river and Bhiuli colony throughout day and night. He has admitted that after crossing the bridge there are government staff quarters, housing board colony, private residences, Bhima Kali temple, Telephone exchange and so many shops and thousands of people are living there. Similarly, PW-2 Hitender Kumar has also admitted that after crossing Bhiuli bridge there are government staff quarters, housing board colony, private residences, Bhima Kali temple, Telephone exchange and so many shops. He admitted that due to National Highway, there is vehicular traffic at Bhiuli bridge. He also admitted that near the spot, there is ITI hostel, Gurdwara and so many people are residing there. He also admitted that there is workshop of HRTC. He also admitted that at the spot there is building of one Surender Kumar. He did not try to bring witnesses from houses. He has gone 100 metres in search of independent witnesses. He has not tried to arrange for independent witnesses from ITI hostel which was adjacent to the place of occurrence. He was rather sent to opposite area which was not populated at all. He came back after 10 minutes. PW-12 Kishan Chand (IO) has also admitted about shops and residential houses and HRTC workshop. He also admitted that there was frequency of vehicles throughout at the point of crossing. However, fact of the matter is that despite the area where accused was apprehended had vehicular traffic but no steps have been taken to associate independent witnesses. PW-12 Kishan Chand (IO) should have asked PW-2 Hitender Kumar to go towards Bhiuli side which was very thickly populated or there were shops and houses, HRTC workshop, Petrol Pump, Gurdwara and Kali Temple near the place where accused was apprehended.

16. We have not understood why IO has sent PW-2 Hitender Kumar to an area which was not thickly populated instead of sending towards an area which was thickly populated to call independent witnesses. Case of the prosecution is that accused was given option to be searched before a gazetted officer or a Magistrate. He opted to be searched by the police. Consent memo is Ext. PW-1/A. According to the prosecution case, PW-2 Hitender Kumar was present on the spot and he was the person who has taken Rukka to Police Station. However, in his cross-examination he has denied that Ext. PW-1/A was prepared in his presence. He has also admitted that Ext. PW-1/E was also not prepared in his presence. Thus, the presence of PW-2 Hitender Kumar at the spot is doubtful. Rukka was prepared at 11.30 pm by IO PW-12 Kishan Chand but was sent at 12.30 pm. According to HHC Padam Singh, samples were not taken homogenously. Few sticks were taken. According to PW-12 Kishan Chand from all the four packets, samples were drawn. There is variance in the statements of PW-1 Padam Singh, PW-2 Hitender Kumar and PW-12 Kishan Chand whether sample was prepared homogenously or not.. Entire contraband was required to be mixed homogenously for preparing samples to be sent for chemical examination to FSL

17. The prosecution has failed to prove its case against the accused. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

18. There is no merit in the present appeal and the same is dismissed, so also the pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No.575 of 2015 a/w CWP No. 580 of 2015.
Judgment reserved on 16.12.2015
Date of decision: 23rd December, 2015.

1. CWP No. 575 of 2015.	
Vijay Sood	.....Petitioner.
Versus	
Central University of HP, Dharamshala	.....Respondent
2. CWP No. 580 of 2015.	
Mohan Kumar and others	.....Petitioners.
Versus	
Central University of HP, Dharamshala	.....Respondent

Constitution of India, 1950- Article 226- Petitioners were appointed on various posts on short term arrangement basis- Executive Council revised their salaries but their services were not regularised - they sought a direction for regularization of the services- respondent pleaded that the petitioner No. 1 had participated in the selection process for regular post but could not qualify- petitioners No. 2 and 3 had also applied for appointment on regular post but the Selection Committee had not been constituted- the appointment order specifically provided that short term arrangement shall not entitle the petitioners for appointment on regular basis- petitioners had also participated in the selection process but had failed to make the grade- held, that a person who was appointed for a fixed tenure cannot claim the regularization- petition dismissed. (Para-3 to 23)

Cases referred:
Institute of Management Development, U.P. versus Smt. Pushpa Srivastava AIR 1992 SC 2070
State of U.P. versus Neeraj Awasthi & Ors. i 2006 AIR SCW 123.
Nagendra Chandra etc. etc vs. State of Jharkhand and Ors., 2007 AIR SCW 7666
State of Jharkhand & others versus Manshu Kumbhkar, 2008 AIR SCW 488
Mg. Dir., Bangalore Metroloplitan Tpt. Corpn. Versus Sarojamma & Anr. 2008 AIR SCW 5480.
Sate of Haryana & Ors. vs. Shakuntla Devi 2008 AIR SCW 8180.
State of Orissa & Anr. V. Mamata Mohanti 2011 AIR SCW 1332
Bhupendra Nath Hazarika and Anr. v. State of Assam and Ors., 2013 AIR SCW 401
State of Bihar and others v. Chandreshwar Pathak 2014 AIR SCW 5182

For the petitioner(s): Mr. Sanjeev Bhushan, Sr. Advocate with Mr. Rajesh Kumar, Advocate.
For the respondent(s): Mr. Ashok Sharma, Assistant Solicitor General of India with Mr. Angrez Kapoor, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief justice.

These two writ petitions involve common questions of law and fact, hence taken up together for disposal by this common judgment.

2. The writ petitioners, by the medium of these writ petitions, have invoked the jurisdiction of this Court for the grant of a writ of mandamus commanding the respondents to regularize their services, on the grounds taken in the memo of the writ petitions.

3. Precisely, the case, as projected by the writ petitioners, is that the respondent-University came to be established in the year 2010 in the State of H.P. On the establishment of the University, it was in the dire need of the staff for running its affairs. It is stated that the respondent-University invited applications for filling-up the various posts, such as Data Entry Operator, driver and office attendant/peon. The petitioners were interviewed along with other persons and as such were offered appointment on the terms and conditions as contained in their appointment orders on short term arrangement basis. It is contended that the Executive Council of the respondent-University in 2013 revised the salaries of such type of employees and thereafter petitioners are being given some higher salary. It is further averred in the writ petitions that respondent-University has now appointed some persons on outsourcing and they are getting higher pay than the petitioners but the services of the petitioners have not been regularized till date despite the fact that they have put their efforts and lost their prime youth while serving the respondent-University. They are stated to have made several requests to the respondent-University for their regularization, but in vain. Hence the writ petitions in hand.

4. The respondent has filed the replies in both the petitions and has contested the writ petitions on the ground that the writ petitioners came to be appointed without following due process of law and their services came to be extended from time to time on their requests. Some of the persons, who came to be appointed after them, have been appointed on regular posts because they have participated in the selection process and they made the grade. It is stated that the petitioners have also participated in the selection

process but they have failed to make a grade. It is apt to reproduce para 7 of the reply filed in CWP No. 575 of 2015 herein.

> *"7.That the University vide advertisement No.002/2011 dated 17.4.2011 (Annexure R-9) advertised various Non-Teaching positions on regular basis wherein the last date of receipt of applications was 15th May, 2011. The petitioner while working with the above mentioned project applied for the post of Lower Division Clerk against the same advertisement. The petitioner was not short listed for the post of Lower Division Clerk due to 'overage'. Copy of screening Committee proceedings are placed at Annexure R-10. This very fact has deliberately not been brought to the notice of the Hon'ble Court by the petitioner due to the reasons best known to her."*

5. It is also profitable to reproduce paras 9 and 10 of the reply filed in CWP No. 580 of 2015 herein.

> *"9.That University vide advertisement No. 002/2011 dated 17.4.2011 advertised various Non-Teaching positions on regular basis and the petitioner No. 1 applied for the post of Lower Division Clerk against the same advertisement. The petitioner was not short listed for the post of Lower Division Clerk due to 'less scores' in 10+2. Cop of Screening Committee proceedings are placed at Annexure R-13. The very fact has not been brought to the notice of the Hon'ble Court by the petitioner due to the reasons best known to him."*
>
> *10.That the petitioner No. 2 and 3 have also applied for the posts of Driver and Office Attendant respectively in response to advertisement No. 002/2011 dated 17.4.2011 but the Selection Committee for these positions have not been convened. This very fact has not been brought the notice of the Hon'ble Court by the petitioners due to the reasons best known to them."*

6. The petitioners have filed common rejoinder to both the writ petitions and have tried to carve out a case that other similarly situated persons have been appointed on regular basis.

7. The point germane for consideration in these writ petitions is whether a person/employee who came to be appointed for a fixed period and thereafter extension in service was granted from time to time can claim regularization, without following due process of law? The answer is in negative for the following reasons.

8. While issuing the appointment letters, it was made clear that they shall not be entitled for any other allowances or service benefits admissible to regular employees and this short term arrangement shall not entitle them for appointment on regular basis. The appointment was initially for a period of three months and thereafter the respondents kept on extending such appointment from time to time. Writ petitioners have participated in the selection process but failed to make grade and other similarly situated persons made the grade thus they cannot claim regularization.

9. In case, Director***, Institute of Management Development, U.P. versus Smt. Pushpa Srivastava*** reported in ***AIR 1992 SC 2070***, the apex Court has held as under.

> *"22. In dealing with this, at page 577 (of 1990 (1) Supp SCR 562) : (at p. 2238 of AIR 1990 SC 2228), the Court observed*
>
> > *"If any person who does not possess the requisite qualifications is appointed under the said clause, he will be liable to be replaced by a*

qualified person. Clause (iii) of Rule 9 states that a person appointed under clause (i) shall, as soon as possible, be replaced by a member of the service or an approved candidate qualified to hold the post. Clause (e) of Rule 9, however, provided for regularisation of service of any person appointed under clause (1) of sub-rule (a) if he had completed continuous service of two years on December 22, 1973, notwithstanding anything contained in the rules. This is a clear indication that in the past the Government also considered it Just and fair to regularise the services of those who had been in continuous service for two years' period to the cut-off date. The spirit underlying this treatment clearly shows that the Government did not consider it just, fair or reasonable to terminate the services of those who were in employment for a period of two or more years'period to the cut-off date. 'This approach is quite consistent with the spirit of the rule which was intended to be invoked to serve emergent situations which could not brook delay. Such appointments were intended to be stop-gap temporary appointments to serve the stated purpose and not long term ones. The rule was not intended to fill a large number of posts in the service but only those which could not be kept vacant till regular appointments were made in accordance with the rules. But once the appointments continuted for long, the services had to be regularised if the incumbent possessed the requisite qualifications as was done by subrule (e). Such an approach alone would be consistent with the constitutional philosophy adverted to earlier. Even otherwise, the rule must be so interpreted, if the language of the rule permits, as will advance this philosophy of the Constitution. If the rule is so interpreted it seems clear to us that employees who have been working on the establishment since long, and who possess the requisite qualifications for the job as obtaining on the date of their employment, must be allowed to continue on their jobs and their services should be regularised."

10. It is apt to reproduce paras 50 to 69 of the judgment delivered by the apex Court in case ***State of U.P. versus Neeraj Awasthi & Ors.*** reported in ***2006 AIR SCW 123.***

"50. An attempt to induct an employee without following the procedure would be a backdoor appointment. Such backdoor appointments have been deprecated by this court times without number. [see for example delhi Development Horticulture Employees' union v. Delhi Admn. (1992) 4 SCC 99, para 23].

51. Even in State of Haryana v. Piara singh [(1992) 4 SCC 118], whereupon the learned counsel for the parties relied upon, it is stated:"ordinarily speaking, the creation and abolition of a post is the prerogative of the Executive. It is the Executive again that lays down the conditions of service subject, of course, to a law made by the appropriate legislature. This power to prescribe the conditions of service can be exercised either by making rules under the proviso to Article 309 of the constitution or (in the absence of such rules) by issuing rules/instructions in exercise of its executive power. The court comes into the picture only to ensure observance of fundamental rights, statutory provisions, rules and other instructions, if any, governing the conditions of service. The main concern of the court in such matters is to

ensure the rule of law and to see that the Executive acts fairly and gives a fair deal to its employees consistent with the requirements of articles 14 and 16. . "

52. A 3 Judge Bench of this Court upon taking into consideration a large number of decision in A. Umarani v. Registrar, Cooperative Societies and Others [(2004) 7 SCC 112] held that illegal appointments cannot be regularised. It was further held: "no regularisation is, thus, permissible in exercise of the statutory power conferred under Article 162 of the Constitution if the appointments have been made in contravention of the statutory rules. "

53. The power to frame regulations is expressly conferred on the Board in terms of section 26 of the Act. Such regulations are to be made with the previous approval of the State government. Indisputably, the State Government by its letter dated 17.3.1999 refused to accord permission in relation thereto.

54. If no appointment could be made by the State in exercise of its power under Article 162 of the Constitution of India as the same would be in contravention of the statutory rules, there cannot be any doubt whatsoever that the board or for that matter the Market Committees cannot make an appointment in violation of the Act and the Regulations framed thereunder.

55. In Executives Engineer, ZP Engg. Divn. And Another v. Digambara Rao and others [(2004) 8 SCC 262], it was held:"it may not be out of place to mention that completion of 240 days of continuous service in a year may not by itself be a ground for directing an order of regularisation. It is also not the case of the respondents that they were appointed in accordance with the extant rules. No direction for regularisation of their services, therefore, could be issued. (See A. Umarani v. Registrar, Coop. Societies and Pankaj Gupta v. State of Jandk) submission of Mr. Maruthi Rao to the effect that keeping in view the fact that the respondents are diploma-holders and they have crossed the age of 40 by now, this Court should not interfere with the impugned judgment is stated to be rejected. "[see also Madhyamik Shiksha Parishad, u. P. v. Anil Kumar Mishra and Others, (2005) 5 SCC 122]

56. In Mahendra L. Jain and Others v. Indore Development Authority and Others [(2005) 1 SCC 639, it was categorically held:"the question, therefore, which arises for consideration is as to whether they could lay a valid claim for regularisation of their services. The answer thereto must be rendered in the negative. Regularisation cannot be claimed as a matter of right. An illegal appointment cannot be legalised by taking recourse to regularisation. What can be regularised is an irregularity and not an illegality. The constitutional scheme which the country has adopted does not contemplate any back-door appointment. A state before offering public service to a person must comply with the constitutional requirements of Articles 14 and 16 of the Constitution. All actions of the State must conform to the constitutional requirements. A daily-wager in the absence of a statutory provision in this behalf would not be entitled to regularisation. (See State of U. P. v. Ajay kumar and Jawaharlal Nehru Krishi vishwa Vidya/aya v. Bal Kishan Soni.) "

57. In Manager, Reserve Bank of India, bangalore v. S. Mani and Others [(2005) 5 scc 100], Umarani (supra) was followed holding that in law 240 days of continuous service by itself give rise to permanence which reason has weight with the opinion of learned single Judge of the High Court.

58. It is, therefore, not correct to contend that only because in the correspondences between the State and the Board the appointments of such

persons have been described to be irregular, the same would not mean that they are not illegal.

59. In any event, no temporary or permanent status can be granted to an employee by way of regularisation. [see Union of India v. Gagan Kumar (2005) 5 SCC 70 and State of Maharashtra and Another v. R. S. Bhonde and Others (2005) 5 SCC 751].

60. Mr. Chaudhary has relied upon a large number of decisions to contend that this Court has directed framing of such schemes.

61. In Surya Narain Yadau and Others v. Bihar State Electricity Board and Others [(1985) 3 SCC 38], the writ petitioners were appointed as trainee engineers pursuant to an advertisement issued therein. Representations have been made to them that after their training was completed, they would be absorbed in regular employment of the Board. Some employees who were getting age-barred for government employment and had left the Board were told to come back under the temptation of getting permanently employed under the board. When the Board was reeling under a strike of its employees, these trainee engineers stood by the Board to keep up the generation and distribution of electricity and had been assured of absorption. The Board had decided to absorb them on permanent basis but initially on a probation of two years without conducting any further examination. It was in aforementioned situation, this Court applied the principles of promissory estoppel and observed that the Board should have regularized the services of the trainee engineers. The Court did not lay down any law that regularization would be directed despite the fact appointments had been made in violation of the rules,

62. In Piara Singh (supra) , this Court was beset with the scheme framed by the State to regularize the services of its employees. The bench did not go into the question of validity or otherwise of such a scheme. We have, however, noticed hereinbefore that even such a scheme would be impermissible in law.

63. In Madan Singh and Others etc. v. State of Haryana and Others [air 1988 SC 2133], this Court was dealing with a matter where the State Government had come forward with orders from time to time for absorption of work charged employees. The Court was of the opinion that the benefits conferred thereunder were available to them.

64. In Raj Narain Prasad and Others v. State of U. P. and Others [(1998) 8 SCC 473] yet again no law has been laid down. No decision other than Piara Singh (supra) has been referred to. Before this Court, a scheme was submitted in terms whereof the scheme had undertaken to regularize work-charged employees employed prior to 19.9.1985. This Court besides the proposals made therein issued certain other directions.

65. Strong reliance has been placed by mr. Chaudhary on R. N. Nanjundappa v. T. Thimmiah and Anr. [(1972) 2 SCR 799] for the proposition that irregular employees can be regularized. Therein it was held :"the contention on behalf of the State that a rule under Article 309 for regularisation of the appointment of a person would be a form of recruitment read with reference to power under Article 162 is unsound and unacceptable. The executive has the power to appoint. That power may have its source in Article 162. In the present case the rule which regularised the appointment of the respondent with effect from February 15, 1958, notwithstanding any rules cannot be said to be in exercise of power under article 162. First, Article 162 does not speak of rules whereas

Article 309 speaks of rules. Therefore, the present case touches the power of the State to make rules under Article 309 of the nature impeached here. Secondly when the government acted under Article 309 the government cannot be said to have acted also under Article 162 in the same breath. The two articles operate in different areas. Regularisation cannot be said to be a form of appointment. Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did dot mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules. "

66. The said decision has been noticed in various judgments referred to hereinbefore. It instead of helping the Respondents goes directly against them.

67. In AH Manipur Regular Posts Vacancies Substitute Teachers' Association v. State of Manipur [1991 Supp (2) SCC 643], this Court was confronted with various interim orders passed by the High Court from time to time in several writ petitions. It was observed that if the direct recruitment takes place on one hand and substituted teachers are also directed to be regularized subsequently, it would create an enormous problem for the department to accommodate both the categories of persons and in the aforementioned situation, in exercise of its power under Article 142 of the Constitution of India, this Court with a view to avoid further litigation and also to avoid seemingly conflicting interim orders issued by the High Court gave certain directions. Such directions having evidently been issued by this court in exercise of its power under Article 142 of the Constitution of India do not constitute a binding precedent. Even therein, the scope and ambit of this Court's jurisdiction under Article 142 vis-a-vis existence of the statute and statutory rules and the constitutional mandate contained in Articles 14 and 16 of the Constitution of India had not been taken into consideration.

68. On the other hand, in a series of decisions, which we have noticed hereinbefore, this Court has now firmly laid down the law that regularization cannot be a mode of appointment.

69. Mr. Chaudhari has placed strong reliance upon the provisions of the U. P. Regularisation of Adhoc Appointments (on Posts outside the Purview of the Public Service commission) Rules, 1979 purported to have been framed by the State in pursuance of the provisions of clause (3) of Article 348 of the Constitution of India. Rule 4 of the said Rules reads, thus :"4. Regularisation of ad hoc appointments- (1) Any person who (i) was directly appointed on ad hoc basis on or before June 30, 1998 and is continuing in service as such on the date of commencement of the Uttar Pradesh Regularisation of Ad hoc Appointments (On Posts outside the Purview of the Public service Commission) (Third amendment) Rules, 2001. (ii) possessed requisite qualifications prescribed for regular appointment as the time of such ad hoc appointment;

and (iii) has completed or, as the case may be, after he has completed three years service shall be considered for regular appointments in permanent or temporary vacancy, as may be available, on the basis of his record and suitability before any regular appointment is made in such vacancy in accordance with the relevant rules or orders. (2) In making regular appointments under these rules reservations for the candidates belonging to the Scheduled castes, Scheduled Tribes, Backward classes and other categories shall be made in accordance with the orders of the Government in force at the time of recruitment. (3) For the purpose of sub-rule (1) the appointing authority shall constitute a selection Committee. (4) The appointing authority shall prepare an eligibility list of the candidates, arranged in order of seniority, as determined from the date of order of appointment and if two or more persons are appointed together from the order in which their names are arranged in the said appointment order, the list shall be placed before the Selection Committee along with the character rolls and such other records of the candidates as may be considered necessary to assess their suitability. (5) The Selection Committee shall consider the cases of the candidates on the basis of their records referred to in sub-rule (4). (6) The Selection Committee shall prepare a list of the selected candidates, the names in the list being arranged in order of seniority and forward it to the appointing authority. "

11. The apex court in ***Nagendra Chandra etc. etc vs. State of Jharkhand and Ors.,*** reported in ***2007 AIR SCW 7666*** has laid down the same principles of law. It is apt to reproduce para 9 of the said judgment herein.

"9. In view of the foregoing discussion, we have no option but to hold that if an appointment is made in infraction of the recruitment rules, the same would be violative of Articles 14 and 16 of the Constitution and being nullity would be liable to be cancelled. In the present case, as the vacancies were not advertised in the newspapers, the appointments made were not only in infraction of Rule 663(d) of the Bihar Police Manual but also violative of Articles 14 and 16 of the Constitution, which rendered the appointments of the appellants as illegal; as such the competent authority was quite justified in terminating their services and the High Court, by the impugned order, was quite justified in upholding the same."

12. It is also apposite to reproduce para 9 of the judgment delivered by the apex Court in ***State of Jharkhand & others versus Manshu Kumbhkar***, reported in ***2008 AIR SCW 488.***

"9 In Ashwani Kumar and Ors. v. State of Bihar and Ors. (1997 (2) SCC 1), it was noted in paras 13 and 14 as follows:

"13. So far as the question of confirmation of these employees whose entry itself was illegal and void, is concerned, it is to be noted that question of confirmation or regularisation of an irregularly appointed candidate would arise if the candidate concerned is appointed in an irregular manner or on ad hoc basis against an available vacancy which is already sanctioned. But if the initial entry itself is unauthorised and is not against any sanctioned vacancy, question of regularising the incumbent on such a non-existing vacancy would never survive for consideration and even if such purported regularisation or confirmation is given it would be an exercise in futility. It would amount to decorating a still-born baby. Under these circumstances there was no occasion to

regularise them or to give them valid confirmation. The so-called exercise of confirming these employees, therefore, remained a nullity."

13. The apex Court has laid down the similar principles of law in case ***Mg. Dir., Bangalore Metroloplitan Tpt. Corpn. Versus Sarojamma & Anr.*** reported in ***2008 AIR SCW 5480.***

"5. It may be mentioned that there is no principle of law that a person appointed in a temporary capacity has a right to continue till a regular selection Rather, the legal position is just the reverse, that is, that a temporary employee has no right to the post vide State of U.P. v. Kaushal Kishore, (1991) 1 SCC 691. Hence, he has no right to continue even for a day as of right, far from having a right to continue till a regular appointment.

6. On this sole ground we set aside both the orders of the learned Single Judge and the Division Bench of the High Court. This appeal is allowed. No costs."

14. It is apt to reproduce para 24 of the judgment delivered by the apex Court in ***Sate of Haryana & Ors. vs. Shakuntla Devi*** reported in ***2008 AIR SCW 8180***.

"24. The very fact that a regularization scheme was framed by the State is a clear pointer to show that the concerned employees were not regularly employed. They had sought for regularization of their service and at least in one case, as noticed hereinbefore, for one reason or the other, the said request was turned down. The validity thereof was not questioned. It attained finality.

In the case of Rama Devi, a contention was raised in the writ petition that the offer of appointment in law was not for a period of six months but for an indefinite period. Such a contention cannot be upheld. If the initial appointment was for a fixed period and the appointment could be terminated without any notice and without assigning any reason, such appointment cannot be said to be an appointment on a permanent post or a temporary sanctioned post. Unless and until the post itself is a permanent or a temporary one, the same would not answer the description of a substantive and permanent employment. In this case, it had been shown that the services of Karan Singh was being renewed for a period of six months on the expiry of the original or extended tenure."

15. Similar principles of law have been laid down by the apex Court in ***State of Orissa & Anr. V. Mamata Mohanti*** reported in ***2011 AIR SCW 1332***. It is apposite to reproduce paras 19 and 20 of the said judgment herein.

"19. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the Employment Exchange or putting a note on the Notice Board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance of the said Constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit.

ORDER BAD IN INCEPTION:

20. It is a settled legal proposition that if an order is bad in its inception, it does not get sanctified at a later stage. A subsequent action/development cannot validate an action which was not lawful at its inception, for the reason that the illegality strikes at the root of the order. It would be beyond the competence of any authority to validate such an order. It would be ironic to permit a person to rely upon a law, in violation of which he has obtained the benefits. If an order at the initial stage is bad in law, then all further proceedings consequent thereto will be non est and have to be necessarily set aside. A right in law exists only and only when it has a lawful origin. (vide: Upen Chandra Gogoi v. State of Assam & Ors., 1998 AIR(SC) 1289; Mangal Prasad Tamoli (Dead) by L.Rs. v. Narvadeshwar Mishra (Dead) by L.Rs. & Ors., 2005 AIR(SC) 1964; and Ritesh Tiwari & Anr. v. State of U.P. & Ors., 2010 AIR(SC) 3823).

The concept of adverse possession of lien on post or holding over are not applicable in service jurisprudence. Therefore, continuation of a person wrongly appointed on post does not create any right in his favour. (Vide Dr. M.S. Patil v. Gulbarga University & Ors., 2010 AIR(SC) 3783)."

16. In another judgment, the apex Court in case ***Bhupendra Nath Hazarika and Anr. v. State of Assam and Ors.,*** reported in ***2013 AIR SCW 401***, has laid down the similar principles.

17. In a latest judgment delivered by the apex Court in ***State of Bihar and others v. Chandreshwar Pathak*** reported in ***2014 AIR SCW 5182***, following principles of law have been laid down. It is apt to reproduce paras 13 to 16 of the said judgment herein.

"13. It is clear from the above order that the appointment has been given only on the asking of the Inspector General of Police. There is nothing to show that any advertisement was issued giving opportunity to all eligible candidates to compete or any selection process was undertaken before appointment of the respondent.

14. In State of Orissa & Anr. vs. Mamata Mohanty, 2011 3 SCC 436, it was observed as under:

"APPOINTMENT / EMPLOYMENT WITHOUT ADVERTISEMENT:

35. At one time this Court had been of the view that calling the names from employment exchange would curb to certain extent the menace of nepotism and corruption in public employment. But, later on, came to the conclusion that some appropriate method consistent with the requirements of Article 16 should be followed. In other words there must be a notice published in the appropriate manner calling for applications and all those who apply in response thereto should be considered fairly. Even if the names of candidates are requisitioned from employment exchange, in addition thereto it is mandatory on the part of the employer to invite applications from all eligible candidates from the open market by advertising the vacancies in newspapers having wide circulation or by announcement in radio and television as merely calling the names from the employment exchange does not meet the requirement of the said article of the Constitution.

(Vide: Delhi Development Horticulture Employees Union v. Delhi Admn., State of Haryana v. Piara Singh, Excise Supdt. v. K.B.N. Visweshwara Rao, Arun Tewari. v. Zila Mansavi Shikshak Sangh, Binod Kumar Gupta v. Ram Ashray

Mahoto, National Fertilizers Ltd. v. Somvir Singh, Telecom District Manager v. Keshab Deb, State of Bihar v. Upendra Narayan Singh and State of M.P. v. Mohd. Ibrahim).

> *36. Therefore, it is a settled legal proposition that no person can be appointed even on a temporary or ad hoc basis without inviting applications from all eligible candidates. If any appointment is made by merely inviting names from the employment exchange or putting a note on the notice board etc. that will not meet the requirement of Articles 14 and 16 of the Constitution. Such a course violates the mandates of Articles 14 and 16 of the Constitution of India as it deprives the candidates who are eligible for the post, from being considered. A person employed in violation of these provisions is not entitled to any relief including salary. For a valid and legal appointment mandatory compliance with the said constitutional requirement is to be fulfilled. The equality clause enshrined in Article 16 requires that every such appointment be made by an open advertisement as to enable all eligible persons to compete on merit."*

15. No contrary view of this Court has been cited on behalf of the respondent. Moreover, another Division Bench of the same High Court has upheld termination in similar matter as noted earlier against which S.L.P. has been dismissed by this Court as mentioned earlier.

16. Accordingly, it has to be held that in the absence of any advertisement or selection process, the appointment of the respondent is not protected and could be validly terminated. Learned single Judge was justified in dismissing the writ petition while the Division Bench erred in interfering with the same."

18. Applying the test in these cases, the petitioners have failed to make out a case. The apex Court has gone further while laying down the ratio that even if a person has spent 14 or 20 years of service in an institution, came to be appointed without due process of law, is a back-door entry and cannot claim regularization. The termination of such employee has been held valid even without issuing a notice, as discussed hereinabove.

19. This question arose before the Division Bench of this Court in a batch of ***LPAs and CWPs,*** lead case of which is ***LPA No. 107 of 2014*** titled ***Amit Attri and others versus Anil Verma and others,*** and this Court, after discussing the entire facts and law applicable, laid down the same proposition of law. It is apt to reproduce para 16 to 21 and 24 of the said judgment herein.

"16.It is worthwhile to record herein that the petitioners have accepted the terms and conditions, as contained in their appointment orders, one of which stands reproduced supra. They have been appointed purely on lecturer/hourly basis for one hour lecturer basis, cannot claim regularization.

17.The apex Court in ***Indu Shekhar Singh & Ors. vs. State of U.P. & Ors reported in 2006 AIR SCW 2582*** *in para 24 held as under:*

> *"24. The State was making an offer to the Respondents not in terms of any specific power under Rules, but in exercise of its residuary power (assuming that the same was available). The State, therefore, was within its right to impose conditions. The Respondents exercised their right of election. They could have accepted the said offer or rejected the same. While making the said offer, the State categorically stated that for the purpose of fixation of seniority, they would not be obtaining the*

benefits of services rendered in U.P. Jal Nigam and would be placed below in the cadre till the date of absorption. The submission of Mr. Verma that for the period they were with the Authority by way of deputation, should have been considered towards seniority cannot be accepted simply for the reason that till they were absorbed, they continued to be in the employment of the Jal Nigam. Furthermore, the said condition imposed is backed by another condition that the deputed employee who is seeking for absorption shall be placed below the officers appointed in the cadre till the date of absorption. The Respondent Nos.2 to 4 accepted the said offer without any demur on 3.9.87, 28.11.91 and 6.4.87 respectively.

25. They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions are illegal. [See R.N. Gosain vs. Yashpal Dhir (1992) 4 SCC 683, Ramankutty Guptan vs. Avara (1994) 2 SCC 642 and Bank of India & Ors. vs. O.P. Swarnakar & Ors. (2003) 2 SCC 721.] Further more, there is no fundamental right in regard to the counting of the services rendered in an autonomous body. The past services can be taken into consideration only when the Rules permit the same or where a special situation exists, which would entitle the employee to obtain such benefit of past service."

18.In ***University of Rajasthan and Anr. v. Prem Lata Agarwal*** *alongwith other connected matters reported in* ***2013 AIR SCW 989****, the apex Court in para 34 held as under:*

"34. In view of the aforesaid, the irresistible conclusion is that the continuance after the fixed duration goes to the root of the matter. That apart, the teachers were allowed to continue under certain compelling circumstances and by interdiction by courts. Quite apart from the above, this Court had categorically declined to accede to the prayer for regularization. In such a situation, we are afraid that the reliance placed by the High Court on paragraph 53 of the pronouncement in Uma Devi, (AIR 2003 SC 1806) can be said to be justified. In this regard, another aspect, though an ancillary one, may be worth noting. Prem Lata Agarwal and B.K. Joshi had retired on 31.3.2001 and 31.1.2002, and by no stretch of imagination, Uma Devi (supra) lays down that the cases of any category of appointees who had retired could be regularized. We may repeat at the cost of repetition that the protection carved out in paragraph 53 in Uma Devi (supra) could not be extended to the respondents basically for three reasons, namely, (i) that the continuance of appointment after the fixed duration was null and void by operation of law; (ii) that the respondent continued in the post by intervention of the court; and (iii) that this Court had declined to regularize their services in 1998."

19. In ***Chief Executive Officer, Pondichery Khadi and Village Industries Board and Anr v. K. Aroquia Radja and Ors*** *reported in* ***2013 AIR SCW 1759,*** *it was held as under:*

"17. The learned Single Judge who heard the Writ Petition No.3181 of 2008 and also the Division Bench which heard the writ appeal could not have ignored that the respondents were clearly told that their services were co-terminus, and they will have no right to be employed thereafter. Condition No.4

and 6 of the earlier referred terms and condition are very clear in this behalf. The respondents had taken the co-terminus appointment with full understanding. It was not permissible for them to challenge their dis-engagement when the tenure of the Chairman was over……..

18. As stated by this Court in Umadevi (supra), absorption, regularization or permanent continuance of temporary, contractual, casual, daily-wage or adhoc employees appointed/recruited and continued for long in public employment dehors the constitutional scheme of public employment is impermissible and violative of Article 14 and 16 of the Constitution of India. As recorded in paragraph 53 of the report in SCC, (para 44 of AIR 2006 SC 1806) this Court has allowed as a one time measure, regularization of services of irregularly appointed persons, provided they have worked for ten years or more in duly sanctioned posts. That is also not the case in the present matter."

20. In ***Hari Nandan Prasad and Anr. v. Employer I/R to Management of FCI and Anr.*** *reported in* ***2014 AIR SCW 1383*** *the apex Court in para 34 held as under:*

> *"34. On harmonious reading of the two judgments discussed in detail above, we are of the opinion that when there are posts available, in the absence of any unfair labour practice the Labour Court would not give direction for regularization only because a worker has continued as daily wage worker/adhoc/temporary worker for number of years. Further, if there are no posts available, such a direction for regularization would be impermissible. In the aforesaid circumstances giving of direction to regularize such a person, only on the basis of number of years put in by such a worker as daily wager etc. may amount to backdoor entry into the service which is an anathema to Art.14 of the Constitution. Further, such a direction would not be given when the concerned worker does not meet the eligibility requirement of the post in question as per the Recruitment Rules. However, wherever it is found that similarly situated workmen are regularized by the employer itself under some scheme or otherwise and the workmen in question who have approached Industrial/Labour Court are at par with them, direction of regularization in such cases may be legally justified, otherwise, non-regularization of the left over workers itself would amount to invidious discrimination qua them in such cases and would be violative of Art.14 of the Constitution. Thus, the Industrial adjudicator would be achieving the equality by upholding Art. 14, rather than violating this constitutional provision."*

21. Applying the ratio of the aforesaid apex Court's judgments to the facts and circumstances of the present case, one comes to an inescapable conclusion that the candidates, who have got appointment/ engagement on hourly basis or seasonal basis, cannot claim regularization, not to speak of declaring him/them to have been appointed on contract basis.

22-23….. ……. …… …….

24. As discussed hereinabove, the petitioners have no right for seeking a writ of mandamus to declare them to be appointed on contract basis. It is also well established that a person, who is appointed without following due process of law, cannot claim that he should be declared to have been appointed in due course, in terms of the judgment titled ***Secretary, State of Karnataka and others*** *vs.* ***Uma Devi (3) and others (2006) 4 SCC1.*** *It is apt to reproduce para 45 of the said judgment herein:*

> *"45. While directing that appointments, temporary or casual, be regularized or made permanent, the courts are swayed by the fact that the person concerned 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 open eyes. 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."

20. This judgment was questioned before the apex Court by the medium of SLP but the same was dismissed vide order dated 30.3.2015 in ***SLP No 9089-9090 of 2015 titled Anil Verma & others*** versus ***Amit Attri*** and others etc.

21. Again, this question arose before the Division Bench of this Court in a batch of *LPAs* and writ petitions, lead case of which is *CWP No. 6916 of 2011* and the same principles of law were laid down, though the facts were slightly different.

22. Applying the test in these writ petitions, the petitioners have no case.

23. Having glance of the above discussion, the writ petitions merit dismissal and are accordingly dismissed, along with pending applications, if any.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Mandir Committee (Adhoc), Mata Bhuvneshwari Jagannathi Temple Bekhali, Tehsil & Distt. Kullu, H.P. ...Petitioner

Versus

Chain Sukh & others ... Respondents

CWP No. 4824 of 2009
Date of Decision : December 24, 2015

Constitution of India, 1950- Article 226- One of the followers made out a grievance of misconduct against the sitting Kardar of the temple - an inquiry was conducted by SDO (Civil) Kullu who found the allegation of misappropriation of property to be well founded- District Collector-cum-Deputy Commissioner Kullu removed him as the Kardar and directed initiation of process for the selection of new Kardar- an appeal was preferred- Divisional Commissioner Mandi revised the order – held, that order was not passed under the H.P. Land Revenue Act and no appeal was maintainable against the same- order passed by Divisional Commissioner set aside and State directed to initiate steps for appointing a new Kardar in accordance with law. (Para-4 to 15)

Cases referred:
Raja Rajinder Chand vs. Mst. Sukhi & others, AIR 1957 SC 286
Khekh Ram vs. Yub Raj, 1998(2) Shim. L.C. 472

For the petitioner : Mr. Ajay Mohan Goel, Advocate, for the petitioner.
For the respondent : Mr. O. P. Sharma, Senior Advocate with Mr. Naveen K. Dass, Advocate, for respondent No. 1.
Mr. R. S. Verma, Addl. Advocate General for respondents No. 2 to 4.

The following judgment of the Court was delivered:

Sanjay Karol, J. (Oral)

It is not in dispute that the Management and affairs of Mata Bhuvneshwari Jagannathi Temple Bekhali, are governed and regulated in terms of Wajib-ul-arz (Annexure P-3) which reads as under:-

> "Copy of Bajibularj of Kothi Sari, Tehsil Kullu, District Kangra, Masmula Missal Hakimat 1948-49:
>
> 1. Mujarian Devta: Malkan deity has been declared owner of the land and itself act as Mujanima. Mujarian of deity are of two types. Firstly Mujarian on self service i.e. Kardar, Pujari-Prohit, Musician. They are given some land at concessional rent in lieu of their service to the deity. Kardar is appointed after giving due preference to their heredity. Pujari have normally their ancestral right. If they do some misconduct in their work, they can be terminated and other person from their family who is able to work, is appointed as Pujari. If it is not possible then the person is appointed on the concusses of the people to whom the deity belongs. Gur-Chala is not a ancestral post and is appointed by the deity itself or who can work properly. His work is to play deity. In case of misconduct he can be terminated. Musicians are normally servants and time to play the music is fixed. If deity goes out of the temple, these people have to follow the deity. Persons who offer flower to the deity daily or on function are also there. In our Kothi Devi Bhekhali is the deity of the whole Kothi. The above mentioned persons i.e. Kardar, Pujari, Gur-Chela can be terminated on above stated misconduct and public has a right to do so. From their side an application is moved. New persons is to be appointed on consensus basis and it is to be on the heredity basis if he is eligible. The Kardar is appointed by the state. These servants are to be given land in lieu of their services, which is they can mortgage and they cannot sell. Second type of Mujarian are those who gives Lagan in cash or as Gala to the deity in the temple these Mujarian are for few or many years. Till they pay Lagan, they cannot be evicted from the land according to custom their Mujarian is on heredity basis. And the land can be mortgage for many years as per custom. As per general custom the Mujarian loose to work on voluntary basis. When the new house of repair of old house is to be made, it is their duty they are given food in Dhar. All the persons who works, the food is provided. When deity is to brought outside the temple these people use to follow in and food is provided for them."
>
> [Emphasis supplied]

2. That the private parties; followers of the deity and the local residents (Mujarian) are governed by Wajib-ul-arz is not in dispute. Though rebuttable, there is presumption with regard to the entries made in the Wajib-ul-arz. This question is no longer res interga in view of law laid down by the apex Court in *Raja Rajinder Chand vs. Mst. Sukhi & others,* AIR 1957 SC 286 as also this Court in *Khekh Ram vs. Yub Raj,* 1998(2) Shim. L.C. 472 and RSA No. 81 of 1979, titled as *Ludar Chand vs. Ramu & another,* decided on 11.01.1991.

3. It is so provided in the Wajib-ul-arz, that services of the Kardar can be terminated on the ground of misconduct. Public has right to do so. However, they are required to initiate the process by way of an application. New Kardar can be appointed only on the basis of consensus and subject to eligibility, on hereditary basis. However,

appointment of the Kardar is to be done by the State. Wajib-ul-arz prescribes the advantages and the benefits attached to the office of the Kardar.

4. Though it is contended by the petitioner that there are more, however, it is not in dispute that at least one of the Hariyans i.e. the followers, made out a grievance of misconduct against the sitting Kardar (respondent No. 1) of the temple. As per inquiry report (Annexure P-5), the Sub Divisional Officer (C), Kullu found the allegations of misappropriation of property to be well founded. Resultantly certain recommendations were made for the management of the affairs of the temple. It is not in dispute that the inquiry report stood supplied to the private respondent who also filed response thereto (Annexure P-6) and after hearing the parties/all concerned, the District Collector-cum-Deputy Commissioner Kullu, District Kullu vide order dated 24.8.2009 (Annexure P-7) removed him as the Kardar and directed initiation of process for the selection of new Kardar in accordance with the procedure laid down in the Wajib-ul-arz.

5. Order dated 24.8.2009 came to be appealed by the private respondent under Section 14 of the H.P. Land Revenue Act, 1954 (hereinafter referred to as the Act) and the Divisional Commissioner, Mandi Division, Mandi, H.P., vide impugned order dated 30.10.2009 (Annexure P-9), by reversing the order passed by the District Collector, Kullu, remanded the matter back for consideration afresh.

6. The question which needs to be considered is as to whether the Divisional Commissioner had the authority/jurisdiction to decide the appeal filed by the private respondent.

7. Section 14 of the Act reads as under:

> "14. Appeals. – Save as otherwise provided by this Act, an appeal shall lie from original or appellate order <u>of a Revenue Officer</u> as follows, namely: -
>
> (a) to the collector when the order is made by an Assistant Collector of either grade;
>
> (b) to the Commissioner when the order is made by a Collector;
>
> (c) to the Financial Commissioner when the order is made by a Commissioner;
>
> (i) when an original order is confirmed on first appeal, a further appeal shall not lie;
>
> (ii) when any such order is modified or reversed on appeal by the Collector, the order made by the Commissioner on further appeal, if any, to him shall be final." [Emphasis supplied]

8. What needs to be considered is as to whether the order passed by the District Collector was in the capacity of a Revenue Officer or not.

9. The Act was enacted to amend and declare the Land Revenue Law of the State of Himachal Pradesh.

10. Sub-section (17) of Section 4 of the Act defines the "Revenue Officer" to mean a person having authority to act under the Act and discharge functions that of a Revenue Officer. Since the Deputy Commissioner had no jurisdiction or authority, nor was he exercising his powers under the Act, no appeal against his order could have lied under the provisions of Section 14 of the Act.

11. The nomenclature, be it Deputy Commissioner or District Collector would not make any difference for the order was certainly not passed under the provisions of the Act.

12. Noticeably the management of the affairs of the temple are not governed under the provisions of the Act. Hence impugned order, being without any authority or jurisdiction cannot be said to be legal.

13. In this view of the matter, impugned order dated 30.10.2009 (Annexure P-9) is quashed and set aside.

14. At this stage it is contended that the right of the private respondent to assail the order dated 24.8.2009 (Annexure P-7) cannot be foreclosed; grievance made out in CMP No. 12263 of 2015 requires adjudication before the appropriate forum; and in any event, Committee set up on adhoc basis cannot be allowed to continue to discharge functions of the Kardar in perpetuity. To this extent grievance made is genuine.

15. As such, present petition is disposed of in the following terms:-

(i) Impugned order dated 30.10.2009 (Annexure P-9) passed by Divisional Commissioner, Mandi Division, Mandi, H.P. in Case No. 171/09, titled as *Chain Sukh vs. The President Adhoc Mandir Committee, Mata Bhuvneshwari, Jagarnathi Mandir Bhekhli*, is quashed and set aside;

(ii) The State is directed to forthwith initiate steps for appointing a new Kardar in accordance with law. It stands clarified that the appointment shall be made strictly in terms of the Wajib-ul-arz of the area, which undisputedly binds the parties and the followers of the deity/Hariyans; and

(iii) Liberty is reserved to Sh. Chain Sukh (private respondent No. 1) to assail order dated 24.8.2009 (Annexure P-7) passed by the District Collector-cum-Deputy Commissioner Kullu District at Kullu in Case No. 1 of 2009, as also the issues raised in CMP No. 12263 of 2015, before the appropriate forum, in accordance with law, if so required and desired.

Petition stands disposed of accordingly, so also the pending applications, if any. Copy dasti.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND H*ON'BLE* MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.

Versus

Hardev Singh alias Bhola .....Respondent.

Cr. Appeal No.585 of 2015.
Reserved on: 23.12.2015.
Decided on: 24.12.2015.

N.D.P.S. Act, 1985- Section 18 and 20- Accused was found in possession of 1.500 kilograms of cannabis and 5 grams of opium- he was acquitted by the trial Court- accused was not given option to be searched before Magistrate or gazetted Officer- no independent

witness was associated despite the fact that witnesses were available- the person who carried rukka to police Station was also not examined- held, that in these circumstances, prosecution version was not established and the accused was rightly acquitted by the Court.

(Para- 6 to 9)

For the appellant: Mr. P.M.Negi, Dy. AG.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal has been instituted at the instance of the State against the judgment dated 1.7.2015, rendered by the learned Special Judge(II), Mandi, H.P. in Sessions Trial No. 32 of 2009, whereby the respondent-accused, who was charged with and tried for offences punishable under Sections 18/20-61-85 of the Narcotic Drugs and Psychotropic Act, 1985 (hereinafter referred to as the ND & PS Act), has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 13.1.2009, ASI Ram Lal and other police officials were present at place called Kangu. They had gone for investigation of the case under Sections 457 and 380 IPC. The accused came on foot at the spot, who was going towards Sundernagar. He tried to run away. He was nabbed. One Shyam Lal was associated in the investigation by the police and accused was searched. Inside the jacket of the accused, a polythene bag, white in colour, was recovered. On checking, stick type cannabis was found. It weighed 150 grams. One another polythene was also found in which 5 grams of opium was recovered. Sample was taken from the cannabis. The investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 9 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. He denied the prosecution case. The learned Trial Court acquitted the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. P.M.Negi, learned Dy. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused.

5. We have gone through the impugned judgment and records of the case carefully.

6. The case of the prosecution is that on 3.1.2009, the accused was seen going towards Sundernagar. He was apprehended. His personal search was carried out and contraband was recovered from his possession. Sh. Shyam Lal, an independent witness, was not produced before the Court. PW-9 ASI Ram Lal has categorically admitted that the personal search of the accused was carried out on the spot but Section 50 of the ND & PS Act was not complied with.

7. Section 50 of the ND & PS Act is mandatory. Since the personal search of the accused was carried out, he was required to be apprised of his legal right to be searched either before the Magistrate or the Gazetted Officer. The non-compliance of Section 50 of the ND & PS Act has vitiated the entire trial. Moreover, it has also come on record that the place where the accused was apprehended, there were ma7ny shops and houses and buses used to ply, but despite that no independent witness was associated to inspire confidence

the manner in which the accused was nabbed, search, seizure and sealing proceedings were completed on the spot.

8. The rukka was prepared on the spot and it was sent to the Police Station through Const. Rakesh Kumar for registration of the FIR. FIR was registered, however, the fact of the matter is that Constable Rakesh Kumar, who has allegedly taken rukka from the spot to the Police Station, has not been examined. Thus, the prosecution has failed to prove that the accused was found in conscious and exclusive possession of 150 grams of cannabis and 5 grams of opium. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 1.7.2015.

9. Accordingly, there is no merit in this appeal and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

State of H.P. .....Appellant.
Versus
Pappu son of Sh. Rasala Ram .....Respondent.

Cr. Appeal No.586 of 2015.
Reserved on: 23.12.2015.
Decided on: 24.12.2015.

N.D.P.S. Act, 1985- Section 20- Petitioner was found in possession of 800 grams of charas- he was acquitted by the trial Court- it was specifically stated in the consent memo that police had information regarding the narcotic drugs- provision of Section 42(2) was not complied with- an option to be searched before the Gazetted Officer, Magistrate or the police party was given, which was not in accordance with the Section 50 of N.D.P.S. Act as option to be searched before magistrate or gazette officer has to be given- independent witnesses were not associated- hence, in these circumstances, accused was rightly acquitted- appeal dismissed. (Para-13 to 17)

Case referred:
State of Rajasthan vrs. Parmanand and another, (2014) 5 SCC 345

For the appellant: Mr. P.M.Negi, Dy. AG.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal has been instituted at the instance of the State against the judgment dated 30.7.2015, rendered by the learned Special Judge, Shimla, H.P. in Sessions Trial No. 28-S/7 of 2012, whereby the respondent-accused, who was charged with and tried for offence punishable under Sections 20 of the Narcotic Drugs and Psychotropic Act, 1985 (hereinafter referred to as the "ND & PS Act"), has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 16.5.2012, SI Rupinder Kumar along with other police officials left the Police Station, State CID Bharari for collecting information and patrolling towards Taradevi-Shoghi side. When the police party reached near Taradevi on NH-22, at about 1:45 (noon), three km. short from Shoghi towards Taradevi, they noticed a person sitting on the parapet. SI Rupinder Kumar inquired his name from him. The person got perplexed and tried to run away. Since no independent witnesses were available, hence the I.O. made efforts to associate independent witnesses by stopping the vehicles passing thereby. But, no one stopped their vehicles, the I.O. associated Const. Govind Singh and HHG Prem Singh. Thereafter, the personal search of the accused was undertaken. During the search, it was found that the accused had tied something on his legs with the help of cello tape. The tap was removed and two packets were found containing the balls and sticks shaped black substance. It was found to be charas. It weighed 800 grams. The I.O. filled in the NCB forms in triplicate and specimen seal impressions of seal "W" were taken on three pieces of cloth. The case property was taken into possession. The rukka was sent to the Police Station. The investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 7 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. He denied the prosecution case. The learned Trial Court acquitted the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. P.M.Negi, learned Dy. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused.

5. We have gone through the impugned judgment and records of the case carefully.

6. PW-1 Const. Govind Singh was the member of the police party. He has stated that the I.O. has handed over seal "W" to him after use and he has lost the same. The I.O. prepared the rukka and the same was taken by him along with the case property, sample seals, recovery memo, NCB forms with direction to deposit the same at Police Station, State CID Bharari. In his cross-examination, he deposed that the spot where the recovery was made is situated towards Taradevi from Shoghi. He admitted that in between the spot and Taradevi, there was a check post of ITBP. The road bifurcate from Taradevi to village Phail. He also admitted that PWD workshop was at a distance of about 200-300 meters. The place where the recovery was made is situated on NH 22. There remains vehicular traffic and no vehicle was stopped for checking. He also admitted that no person was sent to PWD workshop to bring independent witnesses. The police had no prior information qua indulgence of the accused that he was carrying charas.

7. PW-2 MHC Parkash Chand deposed that on 16.5.2012 at about 4:00 PM, rukka was sent to the Police Station by SI Rupinder Kumar through PW-1 Const. Govind Singh. Thereafter FIR Ext. PW-2/B was registered. Const. Govind Singh when reached at Police Station, State CID Bharari, he handed over the case property to SHO Tenzin Shashni and on the same day SHO Tenzin Shashni deposited with him the case property. He entered the same in the malkhana register at Sr. No. 82. He forwarded the parcel alongwith the sample seals "W" and "R", NCB forms etc. on 17.5.2012 to FSL Junga through Const. Joginder Singh.

8. PW-3 Const. Joginder Singh deposed that he took the case property to Junga on 17.5.2012 vide RC No. 38/12.

9. PW-4 HC Pardeep Kumar was posted as Reader to Dy. S.P. (Crime), State CID Bharari. On 17.5.2012 SI Rupinder Kumar submitted the special report in the case.

10. PW-5 Prem Singh deposed that the I.O. has associated him and Const. Govind Singh as witnesses. Thereafter, the I.O. gave option to the accused for conducting his search. Memo Ext. PW-1/B was prepared in this regard.

11. PW-6 Insp. Tenzin Shashni deposed that on 16.5.2012 at about 4:00 PM, Const. Govind Singh produced rukka Ext. PW-2/A before him. He got recorded the FIR No. 10 Ext. PW-2/B. Thereafter, he made endorsement vide Ext. PW-2/C. Const. Govind Singh also produced a sealed parcel stated to be containing 800 grams charas sealed with seven seals of seal "W" before him alongwith the case property. He resealed the parcel with six seals of seal "R". He obtained specimen seal impression of seal "R" vide Ext. PW-6/A. He also filled in column Nos. 9 to 11 of the NCB forms in triplicate. Thereafter, the case property was handed over to the MHC. The resealing certificate is Ext. PW-2/D.

12. PW-7 SI Rupinder Kumar was the I.O. He deposed that on 16.5.2012, he alongwith Const. Govind Singh, HHG Prem Singh and HHG Rajeev Kumar left the Police Station for patrolling as well as collecting information relating to crime. They started for Shoghi-Taradevi road at 1:45 PM (noon). When they were present on the spot, 3 kms. short of Shoghi towards Taradevi, he noticed a person sitting on the paraphet. He developed suspicion that the accused might be having some contraband. He enquired about the antecedents of the accused. The accused tried to run away. He nabbed him. He has tried to stop the vehicles but the drivers of the vehicles did not stop. Thereafter, Const. Govind Singh and HHC Prem Singh were associated as witnesses. He gave option to the accused to give his personal search to some Magistrate or Gazetted Officer, upon which, the accused opted to give his search to the police present on the spot vide memo Ext. PW-1/A. Thereafter, he gave his personal search. The contraband was recovered from the lower portion of his legs. It weighed 800 grams. The search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he admitted that they had waited for independent witnesses for about 5-7 minutes. He has admitted that there is check post of ITBP and PWD workshop. He also admitted that he has not associated any person from the ITBP workshop or PWD workshop in the investigation of the case.

13. The consent memo of the accused was prepared vide memo Ext. PW-1/A. The State has produced the record. We have gone through memo Ext. PW-1/A. In Ext. PW-1/A, it is specifically mentioned in vernacular: ***"Madak Padarth hone ki vishwashnia suchna prapt hui hai".*** Section 42(2) of the ND & PS Act was not complied with. It was necessary for the I.O. to reduce the information in writing and send the same immediately to his superior officer. The learned trial Court has rightly come to the conclusion that it was not the case of chance recovery but the police had prior information that the accused was carrying some contraband with him.

14. The personal search of the accused was also carried out on the spot. PW-1 Govind Singh, in his examination-in-chief, has deposed that the I.O. had given option to the accused as to whether he wanted to be searched before the Gazetted Officer, Magistrate or the Police party. It would be apt at this stage to mention that though the I.O. has not stated that third option to the accused, but the statement of PW-1 Govind Singh is categorical to the effect that I.O. had given 3rd option to the accused to be searched before the Police Officer.

15. Section 50 of the ND & PS Act postulates only two options. i.e. either to be searched before the Executive Magistrate or the Gazetted Officer. Their lordships of the

Hon'ble Supreme Court in the case of ***State of Rajasthan vrs. Parmanand and another,*** reported in ***(2014) 5 SCC 345,*** have held that if merely a bag carried by a person is searched without there being any search of his person, S. 50 will have no application but if bag carried by him is searched and his person is also searched, S. 50 would be attracted. Their lordships have also held that it was improper for PW-10 SI "Q" to tell respondents that a third alternative was available. It has been held as follows:

> "15. Thus, if merely a bag carried by a person is searched without there being any search of his person, Section 50 of the NDPS Act will have no application. But if the bag carried by him is searched and his person is also searched, Section 50 of the NDPS Act will have application. In this case, respondent No.1 Parmanand's bag was searched. From the bag, opium was recovered. His personal search was also carried out. Personal search of respondent No.2 Surajmal was also conducted. Therefore, in light of judgments of this Court mentioned in the preceding paragraphs,Section 50 of the NDPS Act will have application.
>
> 19. We also notice that PW-10 SI Qureshi informed the respondents that they could be searched before the nearest Magistrate or before a nearest gazetted officer or before PW-5 J.S. Negi, the Superintendent, who was a part of the raiding party. It is the prosecution case that the respondents informed the officers that they would like to be searched before PW-5 J.S. Negi by PW-10 SI Qureshi. This, in our opinion, is again a breach of Section 50(1) of the NDPS Act. The idea behind taking an accused to a nearest Magistrate or a nearest gazetted officer, if he so requires, is to give him a chance of being searched in the presence of an independent officer. Therefore, it was improper for PW-10 SI Qureshi to tell the respondents that a third alternative was available and that they could be searched before PW-5 J.S. Negi, the Superintendent, who was part of the raiding party. PW-5 J.S. Negi cannot be called an independent officer. We are not expressing any opinion on the question whether if the respondents had voluntarily expressed that they wanted to be searched before PW-5 J.S. Negi, the search would have been vitiated or not. But PW-10 SI Qureshi could not have given a third option to the respondents when Section 50(1) of the NDPS Act does not provide for it and when such option would frustrate the provisions of Section 50(1) of the NDPS Act. On this ground also, in our opinion, the search conducted by PW-10 SI Qureshi is vitiated."

16. The accused was nabbed on NH-22. The traffic at this road flows 24 hours. It has come in the statement of PW-1 Const. Govind Singh that in between the spot and Taradevi, there was a check post of ITBP. He also admitted that PWD workshop was at a distance of about 200-300 meters from the spot. He also admitted that no person was sent to PWD workshop to bring independent witnesses. PW-7 SI Rupinder Kumar has also admitted that between Taradevi and the spot, there is check-post of ITBP and PWD workshop towards Taradevi. No one from the PWD workshop was associated by him in the investigation. He also admitted that there was a temple adjoining to PWD workshop. He also admitted that the vehicles also crossed and he had tried to stop them but no vehicle stopped. In case the drivers of the vehicle have not stopped the vehicles, he should have taken action against them under the provisions of the Cr.P.C. It was neither an isolated nor secluded place. The accused was apprehended on a National Highway and despite that no independent witnesses have been associated either from the PWD workshop or from the ITPB check-post or by associating the occupiers of the vehicles crossing at NH-22. PW-5 Prem Singh, initially deposed that the I.O made efforts to associate the independent

witnesses in the investigation of the case, however, later on stated that since no one was present, no efforts were made.

17. In the present case, the prosecution has neither complied with Section 42 or Section 50 of the ND & PS Act. The independent witnesses, though readily available, were not associated. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 30.7.2015.

18. Accordingly, there is no merit in this appeal and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Green View Apartments. ...Petitioner

Versus

State of H.P. and others. ...Respondents

CWP No. 3495 of 2009
Reserved on 27.11.2015
Date of decision: 28th December, 2015

Constitution of India, 1950- Article 226- Respondent No. 2 offered for sale property mortgaged with it- buyer was required to deposit 10% of the offer as earnest money- value of the property was assessed as Rs. 252.18 lacs - petitioner company gave bid for Rs. 150.00 lacs and deposited Rs.15.00 lacs towards earnest money- negotiations were carried out and the petitioner was declared successful being the highest offeree of Rs.307.00 lacs- amount deposited by the petitioner was forfeited- writ petition was filed challenging the order of respondent No. 2- respondent No. 2 stated that the offer of petitioner was conditional - petitioner had failed to deposit the difference of the balance amount- hence, amount deposited by him was forfeited- Clause-2 of the proceedings of the negotiation specifically provided that remaining amount was to be deposited by 3:00 P.M, failing which the earnest money would be forfeited- held, that respondent No. 2 had pleaded that offer of petitioner was conditional which was not acceptable to the respondent No. 2, therefore, there was no question of forfeiture of earnest money- earnest money could have been forfeited only, if offer had been unconditionally accepted by respondent No.2- writ petition allowed and respondent No. 2 directed to refund the earnest money along with interest @ 12% per annum from the date of deposit. (Para-6 to 11)

Case referred:

Kailash Nath Associates Vs. Delhi Development Authority and another (2015) 4 SCC 136

For the Petitioner: Mr. G.D. Verma, Senior Advocate with Mr.B.C. Verma, Advocate.

For the Respondents: Ms.Meenakshi Sharma, Additional Advocate General with Ms.Parul Negi, Deputy Advocate General, for respondent No. 1.

Mr.Ajay Kumar, Senior Advocate with Mr.Sumit Sood and Mr.Dheeraj K. Vashisht, Advocates, for respondent No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The petitioner has though claimed various reliefs, in this writ petition, however, during the course of hearing confined his prayer to relief No. (iii), only, which reads thus:-

> *"Issue a writ of mandamus directing the respondents to refund the earnest money deposited by the petitioner along with interest @12% p.a."*

2. Respondent No. 2, Himachal Pradesh State Industrial Development Corporation Limited offered for sale property of M/s Himachal Filament Pvt. Ltd., which had been mortgaged with it by inviting bids for the same. In terms of advertisement, intending buyer/third party was required to deposit 10% of their offer as earnest money on or before the date i.e. 5.8.2008 by way of draft payable to respondent No. 2 on any scheduled bank at Shimla, failing which the offer was stated to be not acceptable.

3. Respondent No. 2 gave maximum bid according to which the value assessed in respect of the unit was Rs.252.18 lacs and whereas the previous maximum bid received was Rs.137.00 lacs. The petitioner company gave its bid for Rs.150.00 lacs and deposited bank draft of Rs.15.00 lacs towards earnest money. Similarly, other participants also gave their respective bids and out of them, one Mr.R.K. Sharma offered highest bid of Rs.167.00 lacs. On the basis of these bids, respondent No. 2 conducted negotiations on the same date with the bidders and finally the petitioner was declared successful being the highest offer of Rs.307.00 lacs.

4. It is contended by the petitioner company that besides giving a draft of Rs.15.00 lacs, it also gave a cheque of `6.30 lacs, thereby a total amount of Rs.21.30 lacs was deposited by it. The petitioner further undertook/offered the respondent Corporation to pay a sum of Rs.95.00 lacs to the Sale Tax Department, which was the outstanding liability of the sick unit. It is then the case of the petitioner that the respondent had already intended to sell out the unit to respondent No. 3 M/s Rubicon Manufacturing Company and therefore, it illegally forfeited the amount deposited by the petitioner. This action of the respondent has been assailed on various grounds, as taken in the memo of the petition.

5. In reply filed by respondent No. 2, certain preliminary objections have been taken, but the sum and substance of the entire reply is that though the petitioner had deposited a sum of Rs.15.00 lacs along with its initial bid, but cheque of Rs.6.30 lacs was not deposited. It is further averred that the offer of the petitioner for Rs.307 lacs was conditional offer, in which the petitioner imposed a condition of depositing the sale tax due of M/s Himachal Filament Pvt. Limited, amounting to Rs.94.00 lacs and considered Rs.9.40 lacs as earnest money without depositing the same. It is further averred that as per the sale notice the sale tax dues were to be paid by the Corporation to the Excise Department and the bidder/petitioner had no justification to have included this issue in offer of Rs.307.00 lacs. It was on account of the failure of the petitioner to have deposited the difference of the balance amount of 10% of the earnest money of its bid by 3.00 P.M. that entailed the forfeiture of deposited amount of Rs.15.00 lacs being the difference of 10% of the earnest money of initial and revised bid.

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

6. Clause 2 of the proceedings of the Negotiation Committee dated 5.8.2008 (Annexure R-2/7) reads thus:

> *"2.On conclusion of the inter-se bidding the highest two bidders would be required to deposit difference of the balance amount of the 10% earnest money positively by 3:00 P.M. on 05.08.2008 itself with the Corporation i.e. prior to the meeting of the Sale Sub-Committee of the HPSIDC which was to meet to finalize the sale. In case the highest two bidders are not able to deposit the said amount by 3:00 P.M. with the H.P.SIDC, the earnest money deposited by them with their initial bid shall stand forfeited."*

7. It is evident from the aforesaid clause that on conclusion of the interse bidding, the difference of the balance amount of 10% earnest money by the highest two bidders was required to be deposited by 3.00 P.M. on 5.8.2008 itself, failing which the earnest money deposited by them with their initial bid would stand forfeited. The highest bid essentially will have to be referred to a lawful and concluded bid, which is unconditionally accepted by the Corporation and therefore, in case the same is not accepted, there would be no question of deposit.

8. Section 74 of the Indian Contract Act reads as under:-

> *"74. Compensation for breach of contract where penalty stipulated for.- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.*
>
> *Explanation.-A stipulation for increased interest from the date of default may be a stipulation by way of penalty.*
>
> *Exception.-When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of any condition of any such instrument, to pay the whole sum mentioned therein.*
>
> *Explanation.-A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested."*

9. Though a number of judgments have been cited by Mr.G.D. Verma, learned senior counsel for the petitioner, regarding the scope, ambit and applicability of the aforesaid provision, however, the same need not be referred to, in view of the recent decision of the Hon'ble Supreme Court in ***Kailash Nath Associates Vs. Delhi Development Authority and another (2015) 4 SCC 136***, wherein after taking into consideration the entire law on compensation for breach of contract under Section 74 of the Contract Act. The following principles were laid down:-

> "43.1 *Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the Court. In other cases, where a sum is named in a contract as a*

liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the Court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the Section.

43.4 The Section applies whether a person is a plaintiff or a defendant in a suit.

43.5 The sum spoken of may already be paid or be payable in future.

43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7 Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application."

10. Evidently, it is the case of respondent No. 2 that the offer of the petitioner for Rs.307 Lacs was conditional one, in which the petitioner had illegally imposed condition for depositing the sales tax and other conditions which were not acceptable to the Corporation. Therefore, once respondent No. 2 itself had not accepted the offer made by the petitioner by considering it to be not in accordance with law, the question of forfeiture of earnest money in such circumstances does not arise. It is only if respondent No. 2 had unconditionally accepted the offer, that the petitioner would have been mandatorily obliged to deposit the difference of the balance amount of 10% of the earnest money. In absence of any contract having been come into existence, respondent No. 2 had no jurisdiction or authority to have forfeited the earnest money deposited by the petitioner, more particularly when no material has been placed on record, which may even remotely suggest that respondent No. 2 has suffered any loss for want of deposit of difference of 10% of the earnest money.

11. In view of the aforesaid discussion, the action of respondent No. 2 in forfeiting the earnest money of Rs.15 lacs cannot be sustained and is, therefore, held to be illegal, arbitrary and is accordingly quashed and set aside. The respondents are directed to refund the earnest money deposited by the petitioner along with interest @ 12% per annum from the date of its deposit till its payment. The petition stands disposed of, so also the application(s), if any.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Jawahar Singh ...Appellant.
Versus
State of H.P. ...Respondent.

Criminal Appeal No.399 of 2014
Reserved on : December 19, 2015
Date of Decision : December 28, 2015

Code of Criminal Procedure, 1973- Section 379 and 410- **Drugs and Cosmetics Act, 1940-** Sections 18(a)(i) and 27(d)- Drug samples were taken which were not found to be of standard quality – trial Court summoned the accused- petitioner filed the revision against the order passed by the trial Court- it was specifically mentioned in the complaint that co-accused No.1 to 12 are responsible for the functioning of the firm which had manufactured the drugs- this plea is sufficient to summon the accused- mere fact that licence was suspended will not absolve the firm of the criminal liability as suspension is an administrative act- at the time of summoning of the accused, Court is to see whether there are sufficient ground to proceed-the complicated questions of law and fact are to be decided by the Court during the trial- petition dismissed. (Para-6 to 13)

Case referred:
Lal Mandi v. State of W.B., (1995) 3 SCC 603

For the Appellant : Mr. G.R. Palsara, Advocate.
For the Respondent : Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Jawahar Singh, hereinafter referred to as the accused, has assailed the judgment dated 19.11.2014, passed by Special Judge (III), Mandi, District Mandi, Himachal Pradesh, in Sessions Trial No.39/2013/2011, titled as *State of Himachal Pradesh v. Jawahar Singh,* whereby he stands convicted of the offence punishable under the provisions of Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) and sentenced to undergo rigorous imprisonment for a period of seven years and pay fine of Rs.1,00,000/-, and in default thereof to further undergo simple imprisonment for a period of one year.

2. It is the case of prosecution that on 26.2.2011, a police party, comprising of ASI Satpal (PW-14), HC Thakur Singh (PW-2), HHC Amar Singh (PW-3), HHC Raj Kumar (not examined) and HHC Jawala Ram (PW-1), was on patrol duty at a place known as Ghatta. At about 10 a.m., police party saw the accused come from Baijnath side. Observing the movement of the accused to be suspicious, police party nabbed him. They suspected him of carrying some contraband substance. After apprising him of his statutory rights and obtaining consent, vide Memo (Ex.PW-1/A), and associating police officials HHC Jawala Ram and HC Thakur Singh as witnesses, accused was searched. On search, it was found that he had concealed a bag under his armpit, which contained charas. HHC Amar Singh brought the weights and scale from Shri Vishal Mahant (PW-4). The recovered contraband substance was weighed and found to be of 850 grams. The same was sealed in a parcel with

six seals of seal impression 'T'. NCB form (Ex. PW-11/C) was filled up in triplicate. Ruka (Ex. PW-14/B), carried by HHC Amar Singh, led to registration of FIR No.36, dated 26.2.2011 (Ex.PW-11/A), for commission of offence punishable under the provisions of Section 20 of the Act, at Police Station, Jogindernagar, District Mandi, Himachal Pradesh. Special Report (Ex. PW-13/A) was sent to the Superior Officer. The contraband substance and the accused were produced before the SHO Shakuntla (PW-11), who resealed the contraband substance with three seals of seal impression 'H' and handed it over to MHC Chander Shekhar (PW-10). Thereafter, the contraband substance was produced before the Judicial Magistrate 1st Class, where samples were drawn and the contraband substance and the parcels were resealed. The sample was carried by Constable Rakesh Kumar (PW-5) to the Laboratory for analysis and report (Ex.PB) obtained. On completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 20 of the Act, to which he did not plead guilty and claimed trial.

4. In order to establish its case, prosecution examined as many as 14 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 defence of innocence and false implication. In defence, he examined two witnesses.

5. Appreciating the testimonies of the witnesses, trial Court found the accused not to have probablized his defence and finding the contradictions not to be material, convicted and sentenced him, as aforesaid. Hence, the present appeal by the accused.

6. I have heard Mr. G.R. Palsara, learned counsel for the accused, Mr. J.S. Guleria, learned Assistant Advocate General, for the respondent-State and also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the parties.

7. The apex Court in *Lal Mandi v. State of W.B.,* (1995) 3 SCC 603, has held that in an appeal against conviction, the appellate Court is duty bound to appreciate the evidence on record and if two views are possible on the appraisal of evidence, benefit of reasonable doubt has to be given to the accused.

8. As per the version of the defence witnesses, Shri Suresh Kumar (DW-1) and Shri Ravi Kant (DW-2), on the date of the occurrence of the incident, accused was travelling in a Government vehicle (Bus No.HP-37A-9681, which was stopped by the police party at Ghatta Chowk and searched. Accused was also searched.

9. From the testimony of Shri Suresh Kumar, it is evident that on 26.2.2011, Shri Ravi Kant (DW-2) was deputed to ply Bus No.HP-37A-9681 from Shimla to Palampur. Further, Shri Ravi Kant states that on the said date, at Ghatta Chowk, police stopped and searched the Bus in which accused was also travelling. Police informed the witness of recovery of the contraband substance from the accused. The witness further deposed that "thereafter we visited the chowki and police asked us to go from there". The witness has denied having falsely deposed in favour of the accused.

10. One is of the considered view that findings returned in Para-11 of the judgment, to the effect that the evidence led by the accused is weak, cannot be said to be correct. The witness is a Government employee. Testimony of the Driver remains unshattered on record. The genesis of the prosecution story of recovery of the contraband substance, in the manner police want the Court to believe, is rendered doubtful.

11. Be that as it may, independently and uninfluenced by the aforesaid observations, this Court proceeds to examine the testimony of the prosecution witnesses. After all, the burden of establishing its case, beyond reasonable doubt, initially rests upon the prosecution. Statutory presumption, under Section 35 of the Act, would arise only thereafter.

12. On the question of recovery of the contraband substance, prosecution seeks reliance upon the testimonies of HHC Jawala Ram (PW-1), HC Thakur Singh (PW-2), HHC Amar Singh (PW-3) and ASI Satpal (PW-14).

13. As per the version of ASI Satpal, on 26.2.2011, police party had left Police Post, Ghatta, on a patrol duty. At about 10 am, just ahead of Ghatta, they saw the accused, who, on seeing the police party, got scared and started running towards the jungle. On suspicion, he was apprehended. The place was secluded and isolated and as such no independent witness could be associated. On suspicion that the accused may be possessed of "narcotic drugs", he was informed of his statutory rights (in terms of Section 50 of the Act), vide Memo (Ex.PW-1/A). Accused consented to be searched by the police party present on the spot. On search, accused was found to have concealed a bag under his left arm, which was opened, from where one polythene packet (light green in colour) was recovered, which contained charas in the shape of sticks. On asking, HHC Amar Singh brought the scales. The contraband substance was weighed and found to be 850 grams. It was packed in a white cloth and sealed with six seals of seal impression 'T'. Impression of the seal was taken on a piece of cloth (Ex.PW-1/C). Original seal was handed over to HC Thakur Singh. NCB form (Ex.PW-11/C) was filled up in triplicate. Photographs (Ex.PW-14/A1 to A4) of the proceedings were also got snapped. Ruka (Ex.PW-14/B) was carried by HHC Amar Singh to the Police Station. He recorded statements of the witnesses and completed other formalities. Accused was arrested and alongwith the case property produced before SHO Shakuntla, who resealed the case property with three seals of seal impression 'H'. Special Report (Ex. PW-13/A) was also sent to the Superior Officer through HHC Jawala Ram. Accused alongwith the case property was also produced before the Judicial Magistrate 1st Class, Jogindernagar, in compliance of the provisions of sub-section (3) of Section 52A of the Act. Upon receipt of the report of Chemical Examiner (Ex.PB), contraband substance was again produced before Judicial Magistrate 1st Class and certificate taken on record. Two samples, each weighing 25 grams, were drawn by the said Magistrate. The said proceedings were also got photographed and photographs in this regard are Ex.PW-7/A1 to 7/A5. Contraband substance was then again deposited with the MHC and on completion of investigation, file was handed over to SHO Virender Jaswal.

14. Examination-in-chief part of the testimony of this witness materially stands corroborated by HHC Jawala Ram, HC Thakur Singh and HHC Amar Singh, but however close scrutiny of the cross-examination part of their testimonies not only reveals the defence of the accused to have been probablized but also witnesses to have contradicted themselves on material points, rendering the genesis of the prosecution story to be doubtful.

15. The genesis of the prosecution story of the police officials being on patrol duty at Ghatta itself appears to be in doubt. ASI Satpal does not remember as to whether he had laid any Naka at Ghatta or not. Significantly, he does not deny suggestion of the accused of having searched the HRTC Bus. He feigns ignorance and states "I do not remember that HRTC bus was searched by us at Ghatta", though he denies having recovered the Charas from the rack of the said Bus. Witness admits that no attempt was made by the accused to throw away the bag, who was apprehended after a distance of about 20 metres. His conduct was thus not suspicious.

16. Version of HHC Jawala Ram, ASI Satpal and HHC Amar Singh, regarding presence of HHC Amar Singh on the spot, when the accused was searched, stands materially contradicted by HC Thakur Singh, according to whom HHC Amar Singh had not reached the spot when personal search of the accused was conducted. It is not the case of prosecution that the accused was searched twice. There is only one search memo on record, which bears the signatures of only HC Thakur Singh and HHC Jawala Ram.

17. Version of ASI Satpal that he had associated HHC Jawala Ram and HC Thakur Singh, as witnesses, while carrying out search and seizure operations, no doubt is supported by HHC Jawala Ram and HC Thakur Singh, but stands contradicted through the uncontroverted testimony of HHC Amar Singh, who states that "I and HHC Jawla Ram cited as witnesses thereafter all the police officials gave their personal search to the accused vide memo Ext. PW.1/B on which I also put my signatures" Further, HHC Amar Singh states that after the contraband substance was sealed, original seal was handed over to him, which fact is contradicted by HC Thakur Singh, who admits it to have been handed over to him, which in any event has not been produced in Court, without any justifiable reason.

18. Contradictions and improbabilities do not end here. Undisputedly, HHC Amar Singh carried the rukka to the Police Station. In his examination-in-chief, he states that he left the spot alongwith the ruka at 12.15, but in the cross-examination part of his testimony, he states that it was so done at 10.15 p.m. It be only observed that typographical mistake can be only with regard to the word 'p' instead of 'A', but not the time.

19. Assuming it not to be there, even then there is further contradiction. HHC Amar Singh states that he reached the Police Station at 1.15 p.m. and arrived on the spot alongwith the file at 2.30 p.m, whereafter the police party left for the Police Station. He states that the distance between the spot and the Police Post is 500 metres. Now, SHO Shakuntla, who registered the FIR, states that after registration of the FIR, case file was sent to the spot at 1.45 p.m. ASI Satpal states that HHC Amar Singh left the spot with the ruka at 11.15 a.m. and returned sometime between 2.30-2.45 p.m and it took about four hours for completing the investigation on the spot and only thereafter police party reached the Police Station at about 4 p.m. But, according to HC Thakur Singh, police party left the spot at 2-2.30 p.m. and according to HHC Jawala Ram, police party left the spot at about 3-4 p.m. Contradiction with regard to time, when the ruka was taken; the file brought back to the spot; the time which the police party took to complete the proceedings on the spot and left the spot only renders the prosecution case to be doubtful, more so in the light of the statement of HC Thakur Singh to the effect that HHC Amar Singh was not present at the time when the accused was searched.

20. It may also be observed that the police party was not carrying the I.O. Kit. Wherefrom cloth, needle and the thread were brought, for packing the contraband substance, remains unexplained on record, for it is the case of Shri Vishal Mahant (PW-4) that only scales were brought from his shop.

21. Significantly, prosecution did not associate any independent person for carrying out the search and seizure operations. After all, ASI Satpal does state that on suspicion of carrying "narcotic drugs", accused was searched. Now, if he had some suspicion, he could have taken the accused to the nearest village, which was just at a distance of half a kilometre or to the Police Post, which was also at an equi- distance, as has come in the testimony of the witnesses. After all, HHC Amar Singh brought the scales from the shopkeeper (PW-4) at Mohan Ghati, which was just at a distance of half a kilometre from the spot of crime. It emerges from the uncontroverted testimony of Shri Vishal Mahant (PW-4) that there is Gram Panchayat, office of IPH Department at Mohanghati and at Ghatta,

there are 2-3 shops. Accused was nabbed at a place just ahead of Ghatta, as has emerged from the testimony of ASI Satpal. He could have been taken anywhere for carrying out the search and seizure operations.

22. But what is crucial is the contradiction in the testimony of police officials, with regard to association of independent witnesses. Whereas according to ASI Satpal, no police official was sent to search for independent witness, for shops were located at a distance of 1 km, which version, to a limited extent, stands materially contradicted by Shri Vishal Mahant, but according to HHC Amar Singh "I/O had sent police official to call the independent witnesses but they were not available". It has also emerged in the testimony of this witness that the police party had a motorcycle with themselves. Accused could have been conveniently taken to the nearby inhabited place.

23. All these contradictions, which are material, stand ignored by the Court below.

24. Thus, findings of conviction and sentence, returned by the Court below, cannot be said to be on the basis of any clear, cogent, convincing, legal and material piece of evidence, leading to an irresistible conclusion of guilt of the accused.

25. Hence, for all the aforesaid reasons, the appeal is allowed and the judgment of conviction and sentence, dated 19.11.2014, passed by Special Judge (III), Mandi, District Mandi, Himachal Pradesh, in Sessions Trial No.39/2013/2011, titled as *State of Himachal Pradesh v. Jawahar Singh,* is set aside and the accused is acquitted of the charged offence. He be released from jail, if not required in any other case. Amount of fine, if deposited by the accused, be refunded to him. Release warrants be immediately prepared.

Appeal stands disposed of, so also pending application(s), if any.

****

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

NTPC Limited .....Petitioner.

Versus

M/s Arien New Delhi Private Limited .....Respondent.

OMP(M) No. 35 of 2015 in
Arb. Case No.63 of 2014
Decided on: 28th December, 2015

Arbitration and Conciliation Act, 1996- Section 34(3)- An application under Section 34(3) of Arbitration and Conciliation Act was filed which was returned by Registry due to some objections- same was re-filed after removing the objection after lapse of more than one year – an application for condonation of delay was filed- held, that rules of procedure should be interpreted liberally- a note was made by the Counsel which was accepted by the Registry and the petition was registered- hence, main petition cannot be dismissed on the ground of delay as contended -application allowed. (Para-2 and 3)

For the petitioner: Mr. Neeraj Gupta, Advocate, for the petitioner.
For the respondent: Mr. Suneet Goel, Advocate, for the respondent.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge(Oral)

In this application a prayer has been made for condonation of delay as occurred in re-filing the objections under Section 34(3) of the Arbitration and Conciliation Act, 1996 filed against the impugned award.

2. True it is that the objections raised by the Registry in the main petition were removed and the same re-filed after a period over one year i.e. 16.10.2014, however with a note stating therein the reasons as to how the delay in re-filing main petition after removal of objections occurred. The Registry taking into consideration the note of learned counsel has received the main petition and after its registration listed in the Court for orders. The respondent/non-applicant after service has filed an application OMP No. 85 of 2015 with a prayer to dismiss the objections being re-filed after a period over one year and without any application seeking condonation of the delay as occurred. It is in reply to this application and also the present application filed separately, the applicant-petitioner has elaborated the reasons leading to re-filing of the main petition after removal of objections after a period over one year.

3. The application has been contested. In reply thereto filed on behalf of the respondent/non-applicant, it is averred that in view of part-I Chapter-II Rule 3 of the H.P. High Court(Original side) Rules, 1997, the application for condonation of delay as occurred in re-filing the petition/ suit or an appeal is required to be made to the Registrar. True it is that the petitioner-applicant has not moved an application to the Registrar, however, the note on the scrutiny sheet seems to have been treated as an application and the delay as occurred in re-filing the main petition condoned by the Registrar while ordering its registration. These are rules of procedure and should be interpreted liberally to impart justice and not to thwart it. Therefore, the note of learned counsel has rightly been appreciated by the Registry while registering the main petition on condonation of delay as occurred in refiling the same. The main petition could have not been sought to be dismissed on the ground of delay as occurred in re-filing the same. This application is, therefore, allowed. Consequently, the main petition is to be heard and disposed of on merits. The application is accordingly disposed of.

****

BEFORE HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Criminal Appeal Nos. 4246 and 4273 of 2013
Reserved on 3.12.2015
Date of decision: 28.12.2015

1. ***Cr. Appeal No. 4246 of 2013***

Sanjay Kumar. ...Appellant

Versus

State of Himachal Pradesh. ...Respondent

2. ***Cr. Appeal No. 4273 of 2013***

Chaman Shukla. ...Appellant

Versus

State of Himachal Pradesh. ...Respondent

Indian Penal Code, 1860- Section 363, 366, 506, 376, 201 read with Section 34- Prosecutrix was asked by PW-2 to check his brother who was sleeping in a room- she did not return – search was conducted but she could not be found- she was subsequently recovered on a road at Narkanda- it was found during investigation that accused had kidnapped the prosecutrix in a car and had raped her- accused was convicted by the trial Court- prosecutrix deposed that she was called by the accused and was asked to sit inside the car- she was taken to Rampur by the accused- she admitted in her cross examination that she had not disclosed the incident to 'J' in whose house she had stayed- she had also not stated this fact in the police Station- held that the conviction can be recorded on the sole testimony of prosecutrix but where the testimony is not satisfactory the same cannot be relied upon to record the conviction – in these circumstances, prosecution case is not proved beyond the reasonable doubt- accused acquitted. (Para-15 to 37)

Cases referred:
State of Punjab Vs. Gurmit Singh (1996) 2 SCC 384
State of Himachal Pradesh Vs. Asha Ram AIR 2006 SC 381
Rajinder Vs. State of Himachal Pradesh, (2009) 16 SCC 69
Rajoo Vs. State of Madhya Pradesh (2008) 15 SCC 133
Tameezuddin @ Tammu Vs. State (NCT of Delhi), (2009) 15 SCC 566
Dinesh Jaiswal Vs. State of MP, (2010) 3 SCC 323
Abbas Ahmad Choudhary Vs. State of Assam, 2010 (12) SCC 115
Rai Sandeep @ Deepu Vs. State of NCT of Delhi (2012(8 SCC 21
Radhu Vs. State of Madhya Pradesh, 2007 Cri. LJ 4704

For the Appellant(s): Mr.Anup Chitkara and Mr.B.M. Chauhan, Advocates.
For the Respondent: Mr.V.K. Verma, Additional Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

These appeals by the appellants/accused seek to challenge the judgment and order of conviction passed by learned Sessions Judge, Bilaspur, H.P., whereby and where under the Sessions Judge convicted the appellant, Sanjay Kumar who was charged under Sections 363, 366, 506, 376, 201 read with Section 34 IPC to undergo rigorous imprisonment for seven years and to pay a fine of Rs.20,000/- under Section 376 IPC, in default of payment of fine further undergo simple imprisonment for one year, under Section 363 IPC to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,000/-, in default of payment of fine to undergo simple imprisonment for six months, under Section 366 IPC to undergo rigorous imprisonment for five years and to pay a fine of Rs.5,000/-, in default of payment of fine, to further undergo simple imprisonment for six months and under Section 201 IPC to undergo rigorous imprisonment for one year and to pay a fine of Rs.2,000/-, in default of payment of fine, to further undergo simple imprisonment for three months. Appellant Chaman Shukla was convicted to undergo simple imprisonment for one year and to pay a fine of Rs.2,000/- under Section 201 IPC, in default of payment of fine, he shall further undergo simple imprisonment for three months. All these sentences shall run concurrently.

2. Briefly stated the prosecution story is that the prosecutrix, aged about 14 years, is the younger daughter of Parkash Chand (PW-5 who is a 'Katha Vachak' (Religious

story teller). In the month of March, 2012, PW-5 was giving discourse on 'Bhagvat Katha' in Sri Naina Devi temple at Sohra Buins and on 30.3.2012, his wife Shanta Sharma, daughter Tanu Sharma (PW-2) and the prosecutrix (PW-13) also went to listen the 'Katha' (Religious story). During Katha, PW-2 asked the prosecutrix to take her son, aged two years, to bed for sleeping in a room of the temple. When the prosecutrix did not return back after a long time, PW-2 went to the room where she found her son sleeping, but she did not find the prosecutrix. Then she informed her in-laws and others and they started searching her, but failed. The family had suspicion that the accused Sanjay Kumar had kidnapped the prosecutrix. PW-2 also telephoned her husband, Narender Shail (PW-1) and informed him about the missing of prosecutrix. Thereafter, PW-1 made complaint Ex. PW-1/A at the Police Station, Barmana and on that basis, FIR, Ext.PW-16/A was registered and endorsement of this was also made on the Rukka, which is Ex. PW-16/B.

3. On 1.4.2012, accused Chaman Shukla went to the Police Station, Rampur accompanied by the prosecutrix and intimated that he had found her walking on the road at Narkanda on 30.3.2012 and then taking pity, brought her to his home. After the prosecutrix was produced at Police Station, Rampur, intimation was sent to Police Station, Barmana. Then a party consisting of police officials and the relatives of the prosecutrix went to Rampur and the prosecutrix was handed over to the said team vide memo Ex. PW-21/A. Rapat in this regard was also made in Rojnamcha at Police Station, Rampur, which is Ex.PW-21/B.

4. The police moved an application Ex. PW-7/A on 2.4.2012 for medical examination of the prosecutrix and MLC is Ex. PW-7/B. The accused Sanjay Kumar was also arrested and an application Ex.PQ-10/A for his medical examination was moved to the Medical Officer, Regional Hospital, Bilaspur on 4.4.2012 and the MLC is Ex. PW-10/B.

5. During the police investigation, it was revealed that accused Sanjay Kumar kidnapped the prosecutrix in his Alto Car bearing No. HP-24-8684 on 30.3.2012 and they spent that night at the house of Jawala Devi (PW-6) at village Thaila Chakti, Tehsil Rampur, District Shimla where he also committed rape on her. On the next day, she was kept to the house of accused Chaman Shukla. The accused Chaman Shukla along with other co-accused tried to save accused Sanjay Kumar by forcing the prosecutrix to give statement that she came to Rampur of her own and further tried to mislead the police. The car bearing No. H.P.-24-8684 was found at the house of accused Sanjay Kumar and it was taken into possession vide memo Ex. PW-3/A along with its documents and one sim of Vodafone in the presence of witnesses, Babu Ram and HHC Dhani Ram. PW-6 also handed over one shirt of the prosecutrix which was forgotten by her at the former's house and this was recovered vide memo Ex.PW-1/B in the presence of witnesses Babu Ram and Parkash Chand. Map of the place where the prosecutrix was kept by the accused is Ex. PW-14/B.

6. With regard to the age of the prosexutrix, the police produced her birth certificate Ex.PW-8/A wherein her date of birth was recorded as 9.12.1997. In the birth register is Ex.PW-8/B, the entry of birth was recorded as 9.12.1997. The same date of birth is recorded in the family register Ex.PW-8/C.

7. PW-11, who accompanied the prosecutrix to the hospital, has deposited two parcels with the MHC, Police Station Barmana on 4.4.2012 and entry of this was made in the Rojnamcha, the copy of which is Ex. PW-17/A. PW-4 has deposited one more parcel, which was handed over to him by the Medical Officer, Regional Hospital, Bilaspur with the MHC, Police Station Barmana and reference of this has been made in the Rojnamcha, the copy of which is Ex.PW-17/B.

8. On 7.4.2012 SI Deep Chand took into possession one mobile phone along with Alto Car vide memo Ex.PW-3/A and deposited these in the Malkhana and the entry incorporated in the Malkhana register is Ex.PW-18/A.

9. On 9.4.2012 SI Deep Chand deposited one more sealed parcel in the Malkhana and entry ExPW-18/B of this was made in the Malkhana register.

10. On 11.4.2012, three parcels, two envelopes, copy of FIR, copy of MLC and sample seals sent through Constable Kamal Kishore to R.F.S.L., Gutkar and the copy of R.C. is Ex.PW-18/C. The police also moved an application before the Judicial Magistrate, Bilaspur for recording the statement of the prosecutrix under Section 164 Cr.P.C. and after passing order Ex. PW-19/A, statement Ex. PW-13/A was recorded.

11. After completion of investigation, the police came to conclusion that the accused kidnapped the prosecutrix to force her to have sexual intercourse with him, raped her and further threatened her with dire consequences if she disclosed anything regarding this incident. The accused were also alleged to have mislead the police to screen the principal offender. Consequently, the police filed the challan under Section 363, 366, 506, 376 and 201 of Indian Penal Code in the Court of learned Chief Judicial Magistrate, Bilaspur, who vide order dated 12.10.2012 committed the case to learned Sessions Judge, Bilaspur.

12. On consideration, charge under Sections 363, 366, 506, 367, 201 read with Section 34 IPC was framed against accused Sanjay Kumar and under Section 201 read with Section 34 IPC against remaining two accused Chaman Shukla and Lekh Ram to which they pleaded not guilty and claimed trial. The learned Sessions Judge convicted the accused Sanjay Kumar and Chaman Shukla as aforesaid, whereas accused Lekh Ram was acquitted from the charge framed against him.

13. The prosecution has examined as many as 21 witnesses in support of this case. Narender Shail (PW-1), brother of the prosecutrix lodged the FIR, Tanu Sharma (PW-2), wife of PW-1 and Parkash Chand (PW-5), father of the prosecutrix, who were present with the prosecutrix at Shri Naina Devi temple at Sohra Biuns, Babu Ram (PW-3), witness to Ex.PW-3/A and Ex.PW-3/B, HHC Dhani Ram (PW-4), who accompanied the accused to the Regional Hospital, Bilaspur where his medical examination was conducted, Smt.Jawala Devi (PW-6), in whose house the accused and the prosecutrix stayed at night on 30.3.2012 and where the rape was alleged to have been committed, Dr.Kavita Kumari (PW-7), conducted medical examination of the prosecutrix, Rakesh Kumar, Panchyat Secretary (PW-8), prepared birth certificate Ex.PW-8/A on the basis of birth register Ex. PW-8/B, Prem Singh (PW-9), accompanied the accused Lekh Ram and others to Rampur on 1.4.2012, Dr. Satyendra Sharad (PW-10), medically examined the accused, LC Shabana (PW-11), accompanied the prosecutrix to the hospital, Constable Kamal Kishore (PW-12), deposited the case property with F.S.L., Gutker, prosecutrix (PW-13), SI Deep Chand (PW-14), Investigating Officer, SI Mukesh Kumar (PW-15), recorded the statements of some of the witnesses, SI Govind Ram (PW-16), registered the FIR, HC Yashwant Singh (PW-17) and HC Roshan Lal (PW-18), were MHCs during the relevant period, Anil Kumar, Civil Judge (PW-19), recorded the statement of the prosecutrix under Section 164 Cr.P.C., Yogesh Rolta (PW-20), prepared the challan and Inspector Sangat Ram Negi (PW-21), was posted as SHO, Police Station, Rampur Bushehar when the prosecutrix was produced before him by accused Chaman Shukla.

14. At the outset, it may be observed that the prosecutrix has been proved to be below 16 years of age and therefore, her consent in this case even if assumed to be there is immaterial and inconsequential.

15. The prosecutrix while appearing as PW-13 has stated that the accused was known to her, as they both belong to the same village and were on visiting terms. On 30.3.2013, she along with her family members had gone to temple Sri Naina Devi Ji in Village Sohra Biuns, where Bhagvat Katha was going on. At about 3:00 P.M. her nephew aged about 1 and ½ years started crying and she came outside the temple along with him in order to make him sleep. At about 3:30 P.M. she received a phone call on her mobile from the accused, who asked her to come downwards at the gate of the temple. She refused, as earlier also the accused used to tease her. However, on his instance, she went to talk to him. He asked her to sit inside the Alto Car to have a talk, to which she refused. On his assurance, the prosecutrix sat inside the car, where the accused disclosed that he was in love with her and wanted to marry her. She refused and tried to get down from the vehicle, but he started the vehicle. On this despite requests, the accused did not stop the car and when prosecutrix tried to raise alarm, the accused threatened her to do away with her life. Thereafter at about 9/10 P.M. on the same day, the accused informed her that they had reached at Rampur, where the accused took her to the house of one lady named Jawala and committed rape with her during night. On the next evening, the accused took her to the house of co-accused Chaman Shukla and left her there. On the next day, some people from her village came to the house of Chaman Shukla and amongst them was co-accused Lekh Ram, who asked to accompany them to Police Station Rampur and make a statement to the effect that she ran away from her house of her own, because her parents used to beat her. He also asked her to make a statement that she met the accused Chaman Shukla at Narkanda. The accused Lekh Raj had threatened her that if she did not make such statement he would do away with the lives of all family members. Thereafter the prosecutrix accompanied by accused Chaman Shukla came to the Police Station Rampur and on the basis of her statement Daily Diary Report Mark-Z1 was entered. Thereafter the prosecutrix along with her brother and two police officials including one lady constable came to Rampur in the evening and thereafter she proceeded to her house along with them. On the next day, the police officials took the prosecutrix to Regional Hospital, Bilaspur for conducting medical examination. She was medically examined and the clothes worn by her, were also taken into possession by the doctor. On 8.4.2012, she along with her family members and IO visited Rampur and identified the house of Jawala Devi where the accused had kept her and committed rape on her. She had left her kurta in the house of Jawala Devi, which was taken into possession from her house.

16. During the course of investigation, the prosecutrix has also got recorded her statement under Section 164 Cr.P.C, which was exhibited as Ex. PW-13/A. The prosecutrix was cross-examined at length on the lines suggestive of the fact that she of her own volition and will had accompanied the accused. The prosecutrix in her cross-examination had stated that the car had not stopped anywhere up to Rampur. She also admitted that she did not disclose anything to Jawala Devi or her family members and even thereafter did not disclose anything to co-accused Chaman Shukla or his family members, though she spent one night there. She also admitted that she had not disclosed at the Police Station, Rampur that the accused had raped her. She categorically admitted that she had not disclosed this fact to anyone. She did not even disclose to anyone right from Bilaspur to Rampur that the accused had kidnapped her. She specifically stated that the accused had committed rape with her at place Thali Chakti and not at the house of the co-accused Chaman Shukla. She further stated that the accused had committed rape with her in the night of 30.3.2012 and

on 31.3.2012, she had stayed in the house of accused Chaman Shukla and no rape was committed with her on that day, as the accused Sanjay Kumar was not there.

17. PW-7 Dr. Kavita Kumar is the medical officer, who examined the prosecutrix on 2.4.2012 and as per her opinion, she had found injuries on the person of the prosecutrix of the dimension of less than 48 hours and because the hymen was torn plus local injury marks were present, possibility of rape according to her could not be ruled out, though final opinion was to be given after FSL report. After receipt of FSL report Ex. PW-7/C, this witness gave the final opinion that since human semen was found over the underwear of the prosecutrix, the possibility of attempt of rape could not be ruled out. She further opined that since the hymen was torn and there was inflation in hymen and human semen was found on the underwear of the prosecutrix, in her opinion, the possibility of rape could not be ruled out. The witness has been cross-examined at length, but her testimony remained unshaken. The witness was given suggestion as to whether the semen found on the exhibits has been matched with the semen of the accused, to which the witness answered in negative. She also feigned ignorance to the suggestion that the human semen and blood may have been planted on the clothes of the victim before she had been produced before her.

18. The statements of other witnesses are either formal or in line with the statement of prosecutrix and have been discussed in detail by the learned Sessions Judge. In so far as, the allegation

of rape is concerned, it is the sole testimony of the prosecutrix, coupled with the statement of doctor PW-7, on the basis of which the learned Sessions Judge has convicted accused Sanjay Kumar.

19. Mr.Anup Chitkara, learned counsel for the appellant Sanjay Kumar would argue that his client has been falsely implicated merely on suspicion on the pretext that he used to tease the prosecutrix, whereas the prosecutrix had run away of her own and, therefore, the accused was not responsible for abduction or alleged rape. He further argued that the prosecutrix in her statement had categorically stated that rape had been committed on her in night of March 30, 2012, whereas, the entries in DDR Ex. PW-21/A and PW-21/B establishes that the prosecutrix was with the other accused Chaman Shukla during the night of March 30, 2012. On the basis of such discrepancies, learned Sessions Judge had acquitted the co-accused Lek Ram, whereas accused Sanjay Kumar and Chaman Shukla were ordered to be convicted. It is further argued that the prosecutrix had alleged that the rape was committed on her in the house of PW-6 Jawala, who did not support the version of the prosecutrix. Learned counsel for the appellant would further contend that it was the specific case of the prosecution that the police had traced the prosecutrix by following her phone through telephone tower location, whereas, no such details were produced during the course of trial and therefore, an adverse inference under Section 114 of the Evidence Act deserves to be drawn. According to learned counsel, no DNA was conducted to link and connect the semen of the accused with the semen alleged to be recovered from the clothes of the prosecutrix and lastly it is argued that there is no presumption in law that the version of the prosecutrix is a gospel truth and it cannot be held that the prosecutrix must be believed irrespective of the improbabilities in her story and that the burden of proof is always on the prosecution and it never shifts.

20. It is now well settled principle of law that conviction can be founded on the sole testimony of the prosecutrix, unless there are compelling reasons for seeking corroboration. It is also equally settled that corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under the given circumstances. (Refer ***State of Punjab Vs. Gurmit Singh (1996) 2 SCC***

384, State of Himachal Pradesh Vs. Asha Ram AIR 2006 SC 381, Rajinder Vs. State of Himachal Pradesh, (2009) 16 SCC 69.) However, it has to be borne in mind that a case of sexual assault has to be proved beyond reasonable doubt as any other case and there is no presumption that the prosecutrix would always tell the entire story truthfully.

21. In ***Rajoo Vs. State of Madhya Pradesh (2008) 15 SCC 133***, the Hon'ble Supreme Court held that the testimony of a victim of rape has to be treated as if she is an injured witness but cannot be presumed to be a gospel truth. It was held that:-

> *"9. The aforesaid judgments lay down the basic principle that ordinarily the evidence of a prosecutrix should not be suspect and should be believed, the more so as her statement has to be evaluated at par with that of an injured witness and if the evidence is reliable, no corroboration is necessary. Undoubtedly, the aforesaid observations must carry the greatest weight and we respectfully agree with them, but at the same time they cannot be universally and mechanically applied to the facts of every case of sexual assault which comes before the Court. It cannot be lost sight of that rape causes the greatest distress and humiliation to the victim but at the same time a false allegation of rape can cause equal distress, humiliation and damage to the accused as well. The accused must also be protected against the possibility of false implication, particularly where a large number of accused are involved. It must, further, be borne in mind that the broad principle is that an injured witness was present at the time when the incident happened and that ordinarily such a witness would not tell a lie as to the actual assailants, but there is no presumption or any basis for assuming that the statement of such a witness is always correct or without any embellishment or exaggeration. Reference has been made in Gurmit Singh's case to the amendments in 1983 to Sections 375 and 376 of the India Penal Code making the penal provisions relating to rape more stringent, and also to Section 114A of the Evidence Act with respect to a presumption to be raised with regard to allegations of consensual sex in a case of alleged rape. It is however significant that Sections 113A and 113B too were inserted in the Evidence Act by the same amendment by which certain presumptions in cases of abetment of suicide and dowry death have been raised against the accused. These two Sections, thus, raise a clear presumption in favour of the prosecution but no similar presumption with respect to rape is visualized as the presumption under Section 114A is extremely restricted in its applicability. This clearly shows that in so far as allegations of rape are concerned, the evidence of a prosecutrix must be examined as that of an injured witness whose presence at the spot is probable but it can never be presumed that her statement should, without exception, be taken as the gospel truth. Additionally her statement can, at best, be adjudged on the principle that ordinarily no injured witness would tell a lie or implicate a person falsely. We believe that it is under these principles that this case, and others such as this one, need to be examined."*

22. In ***Tameezuddin @ Tammu Vs. State (NCT of Delhi), (2009) 15 SCC 566***, it was held as under:-

> *"7. It is true that in a case of rape the evidence of the prosecutrix must be given predominant consideration, but to hold that this evidence has to be accepted even if the story is improbable and belies logic, would be doing*

violence to the very principles which govern the appreciation of evidence in a criminal matter. We are of the opinion that story is indeed improbable. ….."

23. In ***Dinesh Jaiswal Vs. State of MP, (2010) 3 SCC 323***, the Hon'ble Supreme Court held as under:-

"10. Mr. C.D. Singh has however placed reliance on Moti Lal's case (supra) to contend that the evidence of the prosecutrix was liable to be believed save in exceptional circumstances. There can be no quarrel with this proposition (and it has been so emphasised by this Court time and again) but to hold that a prosecutrix must be believed irrespective of the improbabilities in her story, is an argument that can never be accepted. The test always is as to whether the given story prima facie inspires confidence. We are of the opinion that the present matter is indeed an exceptional one."

24. In ***Abbas Ahmad Choudhary Vs. State of Assam, 2010 (12) SCC 115***, the Hon'ble Supreme Court observed that:-

"5. We are however, of the opinion that the involvement of Abbas Ahmad Choudhary seems to be uncertain. It must first be borne in mind that in hery statement recorded on 17th September, 1997, the prosecutrix had not attributed any rape to Abbas Ahmad Choudhary. Likewise, she had stated that he was not one of those who kidnapped her and taken to Jalalpur Tea Estate and on the other hand she categorically stated that while she along with Mizazul Haq and Ranju Das were returning to the village that he had joined them somewhere along the way but had still not committed rape on her. It is true that in her statement in court she has attributed rape to Abbas Ahmad Choudhary as well, but in the light of the aforesaid contradictions some doubt is created with regard to his involvement. Some corroboration of rape could have been found if Abbas Ahmad Choudhary too had been apprehended and taken to the police station by P.W. 5 -Ranjit Dutta the Constable. The Constable, however, made a statement which was corroborated by the Investigating Officer that only two of the appellants Ranju Das and Md. Mizalul Haq along with the prosecutrix had been brought to the police station as Abbas Ahmad Choudhary had run away while en route to the police station. Resultantly, an inference can be rightly drawn that Abbas Ahmad Choudhary was perhaps not in the car when the complainant and two of the appellants had been apprehended by Constable Ranjit Dutta. We are, therefore, of the opinion that the involvement of Abbas Ahmad Choudhary is doubtful. We are conscious of the fact that in a matter of rape, the statement of the prosecutrix must be given primary consideration, but, at the same time, the broad principle that the prosecution has to prove its case beyond reasonable doubt applies equally to a case of rape and there can be no presumption that a prosecutrix would always tell the entire story truthfully."

25. In ***Rai Sandeep @ Deepu Vs. State of NCT of Delhi (2012(8 SCC 21***, the Hon'ble Supreme Court commented about the quality of the sole testimony of the prosecutrix which would be made basis to convict the accused and it was held:-

> *"15. In our considered opinion, the sterling witness should be of a very high quality and caliber whose version should, therefore, be unassailable. The Court considering the version of such witness should be in a position to accept it for its face value without any hesitation. To test the quality of such a witness, the status of the witness would be immaterial and what would be relevant is the truthfulness of the statement made by such a witness. What would be more relevant would be the consistency of the statement right from the starting point till the end, namely, at the time when the witness makes the initial statement and ultimately before the Court. It should be natural and consistent with the case of the prosecution qua the accused. There should not be any prevarication in the version of such a witness. The witness should be in a position to withstand the cross-examination of any length and howsoever strenuous it may be and under no circumstance should give room for any doubt as to the factum of the occurrence, the persons involved, as well as, the sequence of it. Such a version should have co-relation with each and everyone of other supporting material such as the recoveries made, the weapons used, the manner of offence committed, the scientific evidence and the expert opinion. The said version should consistently match with the version of every other witness. It can even be stated that it should be akin to the test applied in the case of circumstantial evidence where there should not be any missing link in the chain of circumstances to hold the accused guilty of the offence alleged against him. Only if the version of such a witness qualifies the above test as well as all other similar such tests to be applied, it can be held that such a witness can be called as a sterling witness whose version can be accepted by the Court without any corroboration and based on which the guilty can be punished. To be more precise, the version of the said witness on the core spectrum of the crime should remain intact while all other attendant materials, namely, oral, documentary and material objects should match the said version in material particulars in order to enable the Court trying the offence to rely on the core version to sieve the other supporting materials for holding the offender guilty of the charge alleged."*

26. Now in case the testimony of the prosecutrix is tested on the aforesaid exposition of law, it would be evident that there is no evidence whatsoever led by the prosecution to establish the presence of the accused either at Naina Devi Ji or Thali Chakti (Rampur), save and except sole testimony of the prosecutrix. In so far as the best person, who could have deposed about the presence of the accused at Rampur was Jawala, who though examined, had turned hostile and did not utter a single word regarding the presence of the accused at Rampur, where the offence of rape is alleged to have been taken place. The other witnesses would have thrown some light on the presence of the accused at Rampur, though on hear say basis, were those who accompanied Lekh Ram on the next day and visited the house of accused Chaman Shukla, but unfortunately none of them have been examined.

27. The Investigating Officer, PW-14 in his cross-exmaination has categorically stated that except the statement of Jawala Devi, he had not collected any other evidence regarding the presence of the accused at Thali Chakti (Rampur). He admitted that he had not collected any evidence as to where the car of the accused had been plied during the relevant period. He has not associated the husband of Jawala Devi in the investigation on the ground that he was not present in the house. He further admitted that Jawala Devi had a daughter, who was present in the house, but he had not recorded her statement. He

further admitted that the prosecutrix in her statement Ex. PW-14/A stated that the accused Sanjay Kumar had committed rape with her in the house of Jawala Devi and further clarified that the prosecutrix did not know Jawala Devi. However, he further admitted that he has not recorded such statement of the prosecutrix that she did not know Jawala Devi at that time. He further admitted that in the supplementary statement recorded on 8.4.2012, the prosecutrix had not disclosed anything about the fact that the rape was committed with her in the house of Jawala Devi. He categorically admitted that in statement Ex. PW-14/A and also in supplementary statement dated 8.4.2012, the prosecutrix had never disclosed that rape had been committed upon her at Rampur.

28. There is no evidence lead by the prosecution except the prosecutrix to even remotely suggest as to what was the relation of accused Sanjay Kumar with Jawala Devi and how he knew her. There is further nothing on record to suggest that even the main accused Sanjay Kumar was known to Chaman Shukla. At least bare minimum evidence to prove the relationship between the parties be it by acquaintance, friendship, relationship etc. ought to have been led, or else how a lady welcome any stranger at night accompanied by a minor girl and permitted them to stay in her house and the accused would conveniently rape the prosecutrix.

29. It was incumbent upon the prosecution to have at least establish the presence of the accused at the place where the alleged offences, more particularly, the offence of rape is alleged to have been committed.

30. In this background, if the testimony of the doctor is adverted to, it would only reveal that at the best, the prosecutrix may have been subjected to a sexual offence and the possibility of rape could not be ruled out. Obviously, the prosecutrix may have been subjected to rape, but by whom, still remains the un-answered question. Once human semen had been found on the underwear of the prosecutrix, then it was incumbent upon the prosecution to have match, link and connect the same with the accused.

31. There is no doubt that rape causes great distress and humiliation to the victim of rape but at the same time false allegation of committing a rape also causes humiliation and damage to the accused and accused has also rights which are required to be protected and the possibility of false implication has to be ruled out. The Hon'ble Supreme Court in ***Radhu Vs. State of Madhya Pradesh, 2007 Cri. LJ 4704*** had in this context noted as follows:-

> *"5. It is now well settled that a finding of guilt in a case of rape, can be based on the uncorroborated evidence of the prosecutrix. The very nature of offence makes it difficult to get direct corroborating evidence. The evidence of the prosecutrix should not be rejected on the basis of minor discrepancies and contradictions. If the victim of rape states on oath that she was forcibly subjected to sexual intercourse, her statement will normally be accepted, even if it is uncorroborated, unless the material on record requires drawing of an inference that there was consent or that the entire incident was improbable or imaginary. Even if there is consent, the act will still be a 'rape', if the girl is under 16 years of age. It is also well settled that absence of injuries on the private parts of the victim will not by itself falsify the case of rape, nor construed as evidence of consent. Similarly, the opinion of a doctor that there was no evidence of any sexual intercourse or rape, may not be sufficient to disbelieve the accusation of rape by the victim. Bruises, abrasions and scratches on the victim especially on the forearms, writs, face, breast, thighs and back are*

indicative of struggle and will support the allegation of sexual assault. The courts should, at the same time, bear in mind that false charges of rape are not uncommon. There have also been rare instances where a parent has persuaded a gullible or obedient daughter to make a false charge of a rape either to take revenge or extort money or to get rid of financial liability. Whether there was rape or not would depend ultimately on the facts and circumstances of each case."

32. In this backdrop now in case the DDR entries Ex. PW-21/A and Ex. PW-21/B are perused, these reveal that the prosecutrix during the night of March 30, 2012 was at the house of accused Chaman Shukla, as is reflected in these entries. But then it is the specific case of the prosecutrix herself that in so far as Chaman Shukla is concerned, he has not even touched the prosecutrix and moreover he has also not been charged with the offence of rape. It is also not the case of the prosecution that the entries in the DDR had been erroneously or incorrectly recorded, rather it is the prosecution, which has placed heavy reliance on these entries.

33. It is in this background that the prosecution was required to prove and establish that the accused Sanjay Kumar as the time of commission of the alleged offence was in fact in and around Rampur, more particularly at Thali Chakti, where the rape is alleged to have been committed. The same could have been conveniently established through the telephone tower location, especifically when the case of the prosecution itself was that they had traced the whereabouts of the prosecutrix by following her mobile phone through telephone tower location. Having failed to prove and place on record any such details, this Court is left with no other option, but to draw an adverse inference against the prosecution or else there was no reason why such important piece of evidence should have been withheld or not placed on record by the prosecution.

34. On the basis of the aforesaid discussion, it can conveniently be held that the charges of rape against accused Sanjay Kumar have not been established. In so far as the other charges are under Sections 363, 366, 506 and 201 are concerned, once the presence of the accused at Naina Devi Ji or at Thali Chakti (Rampur) has not been established, therefore, even these charges are not at all attributable, much less, proved against the principal accused.

35. Coming to the case of co-accused Chaman Shukla, it would be noticed that even the prosecutrix does not make any allegation of rape etc. against the said accused and therefore, he has only been charged with the offence under Section 201 and 34 IPC, but then the question arises as to whether these charges have been established against him.

36. Admittedly, even as per the prosecutrix version, no offence of rape was committed upon her by accused Sanjay Kumar, the main accused at the time when she was alleged to have been taken to the house of accused Chaman Shukla, rather her version is that accused Sanjay Kumar had already left the house. Now did accused Chaman Shukla have even the remotest knowledge regarding the fact that the prosecutrix have been subjected to rape, so as to attract the applicability of Sections 34 and 201 of IPC. The answer is obviously in the negative.

37. From the entire evidence led by the prosecution, it is absolutely clear that the appellant Chaman Shukla had no knowledge about the commission of any offence. Thus it can be safely concluded that the accused Chaman Shukla has simple been convicted on the basis of suspicion. The learned Court below has wrongly and erroneously concluded that appellant Chaman Shukla had tried to mislead the investigating agency by giving false

information and creating false evidence. Once the presence of main accused Sanjay Kumar at the place Thali Chakti (Rampur) itself is not established, then there is no question of the appellant Chaman Shukla shielding the main accused. In absence of any clear and cogent evidence placed on record by the prosecution that the accused had knowledge about the commission of alleged offence, his conviction for the charged offence cannot be sustained.

38. In view of aforesaid discussion, there is no scope of sustaining the conviction and sentence imposed upon the appellants. Resultantly, these appeals succeed and are hereby allowed. The judgment and order of sentence dated 4.12.2013 passed by learned Sessions Judge, Bilaspur, convicting and sentencing the appellants are set aside and the appellants are accordingly acquitted of the charges. Their bail bonds shall stand discharged.

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE P.S. RANA, J.

Sanjeev Kumar son of Shri Hardayal ....Appellant

Versus

State of H.P. ....Respondent

Cr. Appeal No. 104 of 2013
Judgment reserved on: 26th October 2015
Date of Judgment: 28th December 2015

Indian Penal Code, 1860- Section 363, 366 and 376- Minor prosecutrix was kidnapped by the accused and was raped first in orchard, then in a hotel near bus stand and thereafter in the house of the accused- birth certificate and school leaving certificate show that prosecutrix was minor on the date of incident- the consent of minor is immaterial in case of rape- prosecution version was duly supported by the minor prosecutrix and was corroborated by the recovery- testimony of prosecutrix is satisfactory - minor contradictions can arise due to lapse of time and cannot be used for discarding the prosecution version – held, that trial Court had rightly convicted the accused- appeal dismissed. (Para-12 to 23)

Cases referred:

Murugan alias Settu vs. State of Tamilnadu, AIR 2011 SC 1691
State of Punjab vs. Gurmit Singh and others, (1996)2 SCC 384
State of Rajasthan vs. N.K. the accused, (2000)5 SCC 30
State vs. Lekh Raj and another, (2000)1 SCC 247
Madan Gopal Kakkad versus Naval Dubey and another, (1992)3 SCC 204
Narayanamma vs. State of Karnataka, (1994) SCC 728
Bodhisattwa Gautam vs. Miss Subhra Chakraborty, AIR 1996 SC 922
Harpal Singh and another vs. State of H.P., AIR 1981 SC 361
C. Muniappan and others vs. State of Tamil Nadu, (2010)9 SCC 567
Sohrab and another vs. The State of Madhya Pradesh, AIR 1972 SC 2020
State of U.P. vs. M.K. Anthony, AIR 1985 SC 48
Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat, AIR 1983 SC 753
State of Rajasthan vs. Om Parkash, AIR 2007 SC 2257

Prithu alias Prithi Chand and another vs. State of Himachal Pradesh, (2009)11 SCC 588
State of Uttar Pradesh vs. Santosh Kumar and others, (2009)9 SCC 626
Appabhai and another vs. State of Gujarat, AIR 1988 SC 696
Rammi alias Rameshwar vs. State of Madhya Pradesh, AIR 1999 SC 3544
State of H.P. vs. Lekh Raj and another, (2000)1 SCC 247
Laxman Singh vs. Poonam Singh and others, (2004) 10 SCC 94
Kuriya and another vs. State of Rajasthan, (2012)10 SCC

For the Appellant: Mr. N.S. Chandel, Advocate.
For the Respondent: Mr. Kush Sharma, Deputy Advocate General with Mr.J.S.Guleria Assistant Advocate General.

The following judgment of the Court was delivered:

P.S.Rana, Judge

Present appeal is filed against the judgment and sentence passed by learned Additional Sessions Judge Shimla in Sessions Trial No. 19-S/7 of 2010 titled State of H.P. vs. Sanjeev Kumar decided on 27.02.2013.

Brief facts of the case

2. It is alleged by prosecution that on 5.4.2010 at about 10.11 PM at Palli Tehsil and P.S. Chirgaon District Shimla appellant kidnapped minor prosecutrix from lawful guardianship of her parents without their consent. It is alleged by prosecution that on the aforesaid date time and place appellant kidnapped minor prosecutrix with intention to commit illicit intercourse with her. It is alleged by prosecution that on intervening night of 5.4.2010 and 6.4.2010 appellant committed rape with minor prosecutrix in tin posh room in orchard and on the intervening night of 6.4.2010 and 7.4.2010 appellant again raped the prosecutrix in a room of hotel Anand near Bus Stand Shimla and further alleged that on the intervening night of 7.4.2010 and 8.4.2010 appellant again committed rape on minor prosecutrix in his house at Palli Khashdar. It is alleged by prosecution that prosecutrix was student of HPSEB Middle School Sandhasu Tehsil Chirgaon in the year 2010. It is further alleged by prosecution that minor prosecutrix was born on 15.9.1998. It is also alleged by prosecution that appellant asked the minor prosecutrix to marry him and when minor prosecutrix denied then appellant declared that he would commit suicide by consuming poison. It is alleged by prosecution that missing report Ext.PW7/A was recorded in P.S. Chirgaon and same was recorded by PW7 Tilak Singh. It is alleged by prosecution that FIR Ext.PW3/A was registered in police station Chirgaon District Shimla and on 8.4.2010 when ASI Om Parkash PW15 was in Chirgaon market with PW3 Ghan Shyam and Parkash the minor prosecutrix was found roaming near bus stand. It is alleged by prosecution that recovery memo Ext.PW3/B was prepared and prosecutrix was brought to CHC Sandhasu for medical examination. It is alleged by prosecution that Dr.Anjana Sharma examined minor prosecutrix, prepared slides, took pubic hairs of minor prosecutrix and also preserved salwar Ext.P8, shirt Ext.P9 and vest of minor prosecutrix for examination and sealed them in a parcel. It is alleged by prosecution that report of medical officer obtained relating to minor prosecutrix and medical officer opined that possibility of recent sexual intercourse could not be ruled out. It is alleged by prosecution that MLC of accused was also obtained and medical officer has opined that accused was capable of performing sexual intercourse. It is alleged by prosecution that medical officer prepared slides and sealed them and handed over to investigating officer. It is alleged by prosecution that site plan prepared and minor prosecutrix identified bed sheet on which rape was committed by accused. It is further

alleged by prosecution that extract of guest register of Anand hotel also obtained and bed sheet from room No. 5 of hotel where rape was committed was also obtained. It is alleged by prosecution that case property was deposited in malkhana and entries were recorded in register and thereafter case property was sent to FSL Junga. It is alleged by prosecution that I.O. also obtained school leaving certificate of minor prosecutrix and also obtained record from Panchayat Secretary relating to age of minor prosecutrix. It is alleged by prosecution that sample of seal also obtained.

3. Charge was framed by learned Additional Sessions Judge Shimla (H.P.) against appellant Sanjeev Kumar under Sections 363, 366 and 376 IPC on dated 25.10.2010. Accused did not plead guilty and claimed trial.

4. Prosecution examined fifteen oral witnesses in support of its case and also tendered documentary evidence.

5. Statement of accused recorded under Section 313 Cr.P.C. One witness was examined by appellant in defence evidence. Learned trial Court convicted appellant under Sections 363, 366 and 376 IPC and sentenced the appellant to simple imprisonment for a period of three years and fine to the tune of Rs.10,000/- (Rupees ten thousand only) for criminal offence under Section 363 IPC. Learned trial Court further directed that in default of payment of fine the appellant would undergo simple imprisonment for six months. Learned trial Court sentenced the appellant for a period of four years and fine to the tune of Rs.10,000/- (Rupees ten thousand only) for criminal offence punishable under Section 366 IPC and learned trial Court further directed that in case of non-payment of fine the appellant would further undergo simple imprisonment for one year. Learned trial Court further sentenced the appellant for a period of ten years and fine to the tune of Rs.10,000/- (Rupees ten thousand only) for criminal offence punishable under Section 376 IPC. Learned trial Court also directed that in default of payment of fine the appellant would further undergo simple imprisonment for one year. Learned trial Court further directed that all sentences shall run concurrently and period undergone by appellant w.e.f. 9.4.2010 till annoucement of sentence during investigation and trial shall be set off.

6. Feeling aggrieved against the judgment and sentence passed by learned Trial Court appellant filed present appeal.

7. Court heard learned Advocate appearing on behalf of the appellant and learned Deputy Advocate General appearing on behalf of the respondent and also perused the entire record carefully.

8. Following points arises for determination in the present appeal:-

Point No. 1

Whether learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and whether learned trial Court caused miscarriage of justice to the appellant as mentioned in memorandum of grounds of appeal?

Point No. 2

Final Order**.**

9. Reasons for findings on point No.1:

9.1. PW1 minor prosecutrix aged 13 years has stated that she along with her parents, sister and three brothers is residing in village Kashdhar of Tehsil Chirgaon District Shimla. She has stated that Rakesh, Rajesh and Devinder are her brothers and they are elder to her. She has stated that in the year 2010 she was student of HPSEB Middle school

Sandhasu and she left her house at 9 AM for school. She has stated that her parents used to sell milk in Sandhasu colony and she also used to take milk with her for selling purpose daily. She has stated that on 4.4.2010 at about 9/9.30 AM she sold the milk at Sandhasu colony and went to house of Hardayal who was resident of village Palli near Kashdhar and is related to her as her brother-in-law. She has stated that in the house of Hardayal his wife Dropti and her daughter were present. She has stated that on request of Dropti she stayed in their house during night. She has stated that son of Dropti namely appellant Sanjeev who is present in Court was also present. She has stated that on 4.4.2010 she stayed in the house of Hardayal during night and on 5.4.2010 at about 10 AM when she was going to house of Sawali her maternal aunt to village Masli then appellant came behind her and stopped her. She has stated that appellant told her that he intended to marry her. She has stated that when she declined then appellant declared that he would consume poison and would commit suicide. She has stated that thereafter she told that she would marry the appellant. She has stated that thereafter they both went to field where fruit bearing apple plants were present and in the night of 5.4.2010 she and accused stayed in the room of one person which was situated about a considerable distance of orchard. She has stated that in the room of third person (Gorkha) none else than she and appellant were present. She has stated that appellant committed rape upon her and on 6.4.2010 at about 7 AM she and appellant came upto Chirgaon and thereafter came to Shimla in bus. She has stated that thereafter on 6.4.2010 in night appellant took her to a hotel Anand at Shimla and appellant took room No. 5 in said hotel. She has stated that after making some entry in guest register on the night of 6.4.2010 appellant again committed rape upon her in hotel room. She has stated that thereafter on 7.4.2010 they came to Lakkar bazar after leaving the hotel and boarded into the bus and boarded down at Hatkoti. She has stated that from Hatkoti they came to Patsari and from Patsari they took bus for Chirgaon and thereafter they came to house of Sanjeev appellant at 8/9 PM. She has stated that again appellant committed rape upon her on 7.4.2010. She has stated that on 8.4.2010 she came to Chirgaon market from house of appellant and in market her parents and police were there and further stated that she and appellant were brought by them to police station Chirgaon. She has stated that she was brought to Sandhasu hospital for her medical examination and her medical examination was conducted. She has stated that she was also brought to the house of appellant Sanjeev and police took into possession one bed sheet from bed upon which appellant had committed rape upon her. She has stated that bed sheet was sealed with seal and she identitied the bed sheet. She has stated that thereafter she was brought to dera (Residential room) of Gorkha by police officials and one bed sheet was took into possession upon which rape was committed and she identified bed sheet. She has stated that thereafter she was brought to Anand hotel at Shimla and bed sheet was recovered from room No.5. She has stated that police also prepared site plan. She has also identified salwar Ext.P8 shirt Ext.P9 and vest P10 which were took into possession by medical officer. She has denied suggestion that she has attained the age of 18 years. She has denied suggestion that no bed sheets Ext.P2, Ext.P4 and Ext.P6 were took into possession by police officials. She has denied suggestion that articles have been planted in police station. She has denied suggestion that her parents were pressurising the parents of appellant to marry the minor prosecutrix with appellant. She has denied suggestion that she had relations with Rajput boy in village and when he refused to marry she filed false criminal complaint against appellant. She has denied suggestion that her parents have given her beatings and asked her to implicate the appellant. She has denied suggestion that even her parents were negotiating with parents of appellant for marriage. She has denied suggestion that appellant did not commit any wrong act/rape with her. She has denied suggestion that appellant did not take her to residential room of Gorkha. She has denied suggestion that appellant did not

take her to a hotel at Shimla. She has denied suggestion that clothes Ext.P8 to Ext.P10 did not belong to minor prosecutrix. She has denied suggestion that she has deposed falsley.

9.2 PW2 Devinder has stated that minor prosecutrix is his sister. He has stated that his mother informed him that minor prosecutrix had eloped with someone. He has stated that he came to Chirgaon and during the course of investigation he visited the house of appellant Sanjeev present in Court. He has stated that during the course of investigation bed sheet took from bed and same was took into possession by I.O. vide memo Ext.PW1/A. He has stated that bed sheet Ext.P4 is same bed sheet which was took from house of accused and bed sheet was wrapped in a cloth parcel. He has stated that thereafter he went to residential house of Gorkha and one bed sheet Ext.P2 took into possession which was sealed. He has stated that thereafter he went to hotel at Shimla and bed sheet was took into possession. He has denied suggestion that minor prosecutrix was admitted late in school. He has denied suggestion that age of minor prosecutrix was wrongly recorded in school record. He has denied suggestion that they were negotiating with parents of appellant for marriage.

9.3 PW3 Ghanshyam has stated that he has five children including the minor prosecutrix. He has stated that on 7.4.2010 when he was on tour he received a call from house that minor prosecutrix was taken away by someone. He has stated that thereafter he came to Chirgaon and went to police station and further stated that his daughter was there in police station. He has stated that thereafter minor prosecutrix was brought for her medical examination. He has stated that FIR Ext.PW3/A bears his signatures. He has denied suggestion that minor prosecutrix was admitted late in school. He has denied suggestion that minor prosecutrix was admitted in school at the age of nine years. He has denied suggestion that school record did not show correct age of minor prosecutrix. He has denied suggestion that he intended to marry minor prosecutrix with appellant and when parents of appellant refused thereafter he filed the present case. He has denied suggestion that minor prosecutrix told him that she had gone with another boy namely Parkash.

9.4 PW4 Dr. Anjana Sharma has stated that she was posted as medical officer at CHC Sandhasu w.e.f. April 2008 to July 2011. She has stated that on 8.4.2010 at about 4 PM minor prosecutrix was produced by police officials for her medical examination with alleged history of sexual assault. She has stated that after examination she observed as follows. She has stated that on general physical examination minor prosecutrix was conscious cooperative and well oriented to time place and person and pulse was 80 per minute and blood pressure was 110/70 mg. She has stated that on local examination secondary sexual characters were found well developed, pubic and axillary hairs were found well developed and breast was also found well developed. She has stated that labia majora was covering the labia minora but there was gapping at lower end exposing the introitus. She has stated that within introitus two fingers were admitted easily and hymen was torn and she prepared two slides one from vaginal smear and second from posterior fornix. She has stated that salwar, shirt and undergarments of minor prosecutrix took into possession and were sealed with seals in a parcel and thereafter given to I.O. along with pubic hairs. She has stated that possibility of sexual intercourse could not be ruled out. She has stated that semen and blood were detected in salwar. She has stated that she issued MLC Ext.PW4/B. She has stated that minor prosecutrix had disclosed her age 12 years. She has stated that she did not refer the minor prosecutrix for determination of dental and radiological age. She has denied suggestion that prosecutrix was not produced before her and also denied suggestion that she did not examine minor prosecutrix. She has denied suggestion that Ext.PW4/B is not correct.

9.5 PW5 Satya Pal has stated that he remained posted as teacher in HPSEB Middle School Sandhasu from July 1997 to June 2010 and further stated that police came in school and filed application Ext.PW5/A for obtaining school leaving certificate of minor prosecutrix. He has stated that he issued certificate Ext.PW5/B and certificate is correct as per original and bears his signatures. He has stated that prosecutrix was born on 15.9.1998 as per record. He has denied suggestion that date of birth of prosecutrix is not correct. He has denied suggestion that record was prepared by him at the instance of police officials.

9.6 PW6 Gulab Singh Secretary G.P. has stated that he is working as Secretary in G.P. Kashdhar for the last 5/6 years and he has brought the register of G.P. He has stated that application Ext.PW6/A was filed and thereafter he supplied birth certiifcate of minor prosecutrix. He has stated that birth certificate of minor prosecutrix is Ext.PW6/B and other certificate issued by him is Ext.PW6/C. He has stated that as per family register date of birth of minor prosecutrix was 15.9.1998. He has denied suggestion that he has recorded entry in register at the instance of police officials to support the prosecution case.

9.7 PW7 C. Trilok Singh has stated that he remained posted in police station Chirgaon w.e.f. September 2007 to July 2011. He has stated that on 5.4.2010 Rakesh Kumar came to police station Chirgaon and lodged missing report regarding his sister. He has stated that report was entered by him in roznamcha and further stated that copy is Ext.PW7/A which bears his signatures. He has stated that report was recorded as per version of Rakesh Kumar.

9.8 PW8 Surinder Singh has stated that he works as receptionist in hotel Anand at Shimla w.e.f January 2010 to December 2010 and has also brought guest register of hotel. He has stated that on 6.4.2010 one Sanjeev came to hotel alongwith girl and took room No. 5 for stay. He has stated that entry in register was made by him at the instance of Sanjeev. He has stated that Sanjeev had also signed the entry in his presence. He has stated that Sanjeev told that girl accompanying him was his wife. He has stated that during investigation police came to hotel and he handed over the extract of guest register Ext.PW8/A which is correct as per original entry. He has stated that police went into room No. 5 of hotel. He has denied suggestion that he has given false statement.

9.9 PW9 Kuldeep Singh has stated that he is posted as constable in police station Chirgaon since 2008 and on 10.4.2010 he went to the house of father of appellant with I.O. Devinder and prosecutrix and from the house of father of appellant one bed sheet was took into possession vide seizure memo Ext.PW1/A and thereafter it was wrapped in cloth parcel sealed with five seals. He identified bed sheet Ext.P4. He has stated that on the same day they went to dera (Residential room) of Gorkha which was in orchard and from there one bed sheet was also recovered and was took into possession vide seizure memo. He has stated that bed sheet was identified by prosecutrix and thereafter same was wrapped in cloth parcel and sealed with four seals of 'Y'. He identified bed sheet Ext.P2. He has denied suggestion that he did not come to the house of father of appellant alongwith police officials. He has denied suggestion that he did not come to dera (Room of Gorkha) along with police officials. He has denied suggestion that Ext.PW1/A and Ext.PW1/B were signed by him in police station Chirgaon.

9.10 PW10 Inspector Rajinder Singh has stated that after completion of investigation he prepared challan in case.

9.11 PW11 Rakesh Panjta has stated that they are five brothers and sisters and minor prosecutrix is youngst sister. He has stated that in the year 2010 minor prosecutrix was studying in school at Sandhasu and her age was 12/13 years. He has stated that on

4.4.2010 minor prosecutrix came to Sandhasu in order to deliver the milk to customers and thereafter she did not return to her house till evening. He has stated that minor prosecutrix was searched but she could not be traced. He has stated that next day her father came to police station and reported the matter. He has stated that on 7.4.2010 when he, his father and brothers were in police station Chirgaon then parents of Sanjeev appellant came and told that minor prosecutrix was with appellant. He has stated that on 8.4.2010 minor prosecutrix was recovered. He has stated that minor prosecutrix was recovered in Chirgaon market by police officials and her custody was given and memo Ext.PW3/B was prepared. He has stated that minor prosecutrix told that appellant took the minor prosecutrix to different places including Shimla. He has denied suggestion that prosecutrix had failed 2/3 times. He has denied suggestion that minor prosecutrix informed that accused did not take her to different places including Shimla. He has denied suggestion that he has no speaking terms with appellant and his family. Self stated that appellant and his parents are his relatives. He has denied suggestion that minor prosecutrix was taken away by some Rajput boy.

9.12 PW12 HC Jia Lal has stated that in the year 2010 he was working as constable in police station Chirgaon District Shimla H.P. He has stated that on 27.4.2010 MHC Balbir Singh handed over to him eight sealed parcels and two sealed envelopes with direction to deposit in office of FSL Junga vide RC No. 8 of 2010. He has stated that he deposited them in FSL Junga on 30.4.2010 vide RC Mark A. He has stated that no tampering was done with case property during the period it remained in his custody. He has stated that he handed over the receipt to MHC. He has denied suggestion that no case property was handed over to him for depositing in office of FSL Junga and also denied suggestion that he did not deposit the case property in office of FSL Junga.

9.13 PW13 HC Balbir has stated that he remained posted as I.O. in police station Chirgaon w.e.f. 2007 to 2012. He has stated that on 9.4.2010 HHC Bharat Singh deposited three sealed parcels with seal CHR with him along with sealed envelope. He has stated that on 12.4.2010 ASI Om Parkash deposited five parcels with him sealed with seal 'Y' and further stated that he recorded the entry in malkhana register at Sr. Nos. 246 and 247 respectively. He has stated that he has brought the malkhana register and extract of malkhana register is Ext.PW13/A. He has stated that on 27.4.2010 he sent all parcels and articles to office of FSL Junga through HHC Jia Lal vide RC No. 8 of 2010. He has stated that he has brought the road certificate and further stated that entries are in his hands. He has denied suggestion that articles were not deposited with him and also denied suggestion that he did not send HHC Jia Lal to deposit the articles in office of FSL Junga.

9.14 PW14 Dr. Ravinder Sharma has stated that he was posted as medical officer in civil hospital Rohru since 1998 and on 9.4.2012 on application Ext.PW14/A he examined Sanjeev Kumar accused son of Hardayal aged 19 years who was brought for medical examination. He has stated that after examination he observed that appellant Sanjeev Kumar was capable to perform sexual intercourse. He has stated that his opinion is Ext.PW14/B which is in his hands and bears his signatures in MLC. Appellant was identified by medical officer in Court.

9.15 PW15 ASI Om Parkash has stated that he remained posted as I.O. in police station Chirgaon w.e.f. 2009 to 2011. He has stated that on 8.4.2010 complainant Ghan Shyam came to police station Chirgaon and reported that his minor daughter was kidnapped by Sanjeev Kumar accused and FIR Ext.PW3/A was registered. He has stated that prior to this son of complainant namely Rakesh Kumar came to police station Chirgaon on 5.4.2010 and filed missing report Ext.PW7/A in police station. He has stated that missing report was prepared by MHC Tengin Chering which is Ext.PW15/A. He has stated

that after registration of FIR file was given to him for investigation. He has stated that on 8.4.2010 he went to Chirgaon market with complainant and his son Rakesh in search of minor prosecutrix and near bus stand Chirgaon minor prosecutrix was found and recovery memo Ext.PW3/B was prepared. He has stated that minor prosecutrix was medically examined in CHC Sandhasu and her MLC Ext.PW4/B was obtained. He has stated that on the basis of MLC Section 376 IPC was incorporated. He has stated that three sealed parcels which were prepared by medical officer CHC Sandhasu were given to him on 12.4.2010 and were deposited with MHC Chirgaon. He has stated that on 9.4.2010 appellant was arrested and he was medically examined and MLC Ext.PW14/B was obtained. He has stated that on 9.4.2010 he went to house of appellant and prepared site plan Ext.PW15/B where minor prosecutrix was raped by appellant. He has stated that bed sheet was took into possession upon which rape was committed and same was wrapped and sealed vide memo Ext.PW1/A in presence of witnesses. He has stated that bed and bed sheet were identified by minor prosecutrix. He has stated that on same day appellant, minor prosecutrix and Devinder were taken to residence of Gorkha. He has stated that site plan of residence of Gorkha Ext.PW15/C was prepared. He has stated that dera (Residential place) of Gorkha was found vacant as none was residing there. He has stated that bed sheet was also took into possession vide seizure memo Ext.PW1/A in presence of witnesses. He has stated that place of incident was identified by minor prosecutrix. He has stated that thereafter minor prosecutrix and her brother Devinder and appellant were took to Anand hotel near bus stand Shimla and from receptionist extract of hotel register was obtained where appellant disclosed his address and signed the entries and where appellant introduced the minor prosecutrix as his wife. He has stated that from room No. 5 of hotel bed sheet upon which rape was committed took into possession vide seizure memo. He has stated that sample of seal separately took. He has stated that he also obtained school leaving certificate Ext.PW5/B and also obtained birth certificate Ext.PW6/B from Gram Panchayat. He has stated that he also obtained FSL report Ext.PW15/G and recorded statements of prosecution witnesses as per their versions. He has stated that age of minor prosecutrix was found below 18 years at the time of commission of offence and after completion of investigation file was handed over to SHO. He has stated that charge sheet was prepared by SHO and further stated that for determination of medical age of minor prosecutrix ossification test and opinion of dental surgeon was not obtained. He has denied suggestion that medical examination of minor prosecutrix was not conducted and also denied suggestion that birth certificate of minor prosecutrix was not obtained. He has denied suggestion that age of minor prosecutrix was above 16 years at the time of alleged offence. He has denied suggestion that prosecutrix had told that she was not raped by anyone. He has denied suggestion that false case filed against appellant in collusion with minor prosecutrix and her parents. He has denied suggestion that prosecutrix had affairs with boy of locality belonging from upper caste. He has denied suggestion that parents of minor prosecutrix pressurised the appellant to solemnise the marriage with minor prosecutrix. He has denied suggestion that he did not visit house of father of appellant and also denied suggestion that he did not visit residential house of Gorkha and further denied suggestion that he did not visit hotel at Shimla. He has denied suggestion that no bed sheets took into possession. He has denied suggestion that bed sheets were manipulated.

10. Prosecution tendered the following documentary evidence. (1) Ext.PW1/A recovery memo of bed sheet. (2) Ext.PW1/B recovery memo of bed sheet. (3) Ext.PW1/C recovery memo of bed sheet from room No. 5 of hotel at Shimla. (4) Ext.PW3/A FIR No. 24 of 2010 dated 8.4.2010. (5) Ext.PW3/B identification report. (6) Ext.PW4/A application for medical examination of minor prosecutrix before medical officer CHC Sandhasu. (7) Ext.PW4/B MLC of minor prosecutrix aged 12 years. (8) Ext.PW5/A application to head master of Middle School Sandhasu for issuance of birth certificate of minor prosecutrix. (9)

Ext.PW5/B birth certificate issued by Headmaster HPSEB Middle School Sandhasu Chirgaon District Shimla H.P. where date of birth of minor prosecutrix has been shown as 15.9.1998. (10) Ext.PW6/A application moved to Panchayat Secretary to issue age certificate of minor prosecutrix and appellant Sanjeev Kumar. (11) Ext.PW6/B birth certificate of minor prosecutrix issued by Panchayat Secretary under Section 12/17 of Registration of Birth and Death Act 1969 and rule 8 of H.P. Registration of Birth and Death Rules 2003. (12) Ext.PW6/C certificate issued by Gram Panchayat under Birth and Death Registration Act 1969. (13) Ext.PW7/A missing report of minor prosecutrix dated 5.4.2010. (14) Ext.PW8/A extract of entries of guests from hotel Anand, Bus stand Shimla. (15) Ext.PW13/A extract of malkhana register. (16) Ext.PW13/B extract of RC register. (17) Ext.PW14/A application moved to medical officer CHC Sandhasu for conducting medical examination of appellant. (18) Ext.PW14/B MLC of appellant. (19) Ext.PW15/A missing report of minor prosecutrix dated 4.4.2010. (20) Ext.PW15/B site plan. (21) Ext.PW15/C site plan. (22) Ext.PW15/D site plan. (23) Ext.PW15/F sample seals obtained upon plain cloth. (24) Ext.PW15/G FSL report. (24) Ext.PW15/H and Ext.PW15/J statements of prosecution witnesses.(25) Ext.DA statement of prosecutrix.

11. Statement of accused recorded under Section 313 Cr.P.C. Accused has stated that he is innocent and he did not commit any criminal offence as alleged by prosecution. Accused examined one witness in defence.

12. DW1 Sanjeev Kumar Secretary has stated that he is working as Secretary G.P. Nakrari and he has brought the death and birth register of G.P. Nakrari w.e.f. 1994 to 1999. He has stated that there is no entry dated 15.9.1998 of prosecutrix in death and birth register of G.P. Nakrari.

13. Submission of learned Advocate appearing on behalf of the appellant that age of prosecutrix was above 16 years at the time of alleged incident and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that facts can be proved by way of oral and documentary evidence as per Indian Evidence Act 1872. As per Section 59 of Indian Evidence Act 1872 facts can be proved by way of oral evidence. Minor prosecutrix when appeared in witness box on 5.12.2011 has stated her age as 13 years. Even as per school leaving certificate issued by Headmaster Middle School Sandhasu Tehsil Chirgaon Ext.PW5/B placed on record date of birth of minor prosecutrix has been recorded as 15.9.1998. Even as per birth certificate issued under Sections 12 and 17 of Birth and Death Act 1969 age of minor prosecutrix has been recorded as 15.9.1998. School leaving certificate Ext.PW5/B has been issued by public servant in discharge of his public official duty and is relevant fact under Section 35 of Indian Evidence Act 1872. It was held in case reported in ***AIR 2011 SC 1691 titled Murugan alias Settu vs. State of Tamilnadu*** that documents made ante litem motam can be relied upon safely when such documents are admissible under Section 35 of Indian Evidence Act 1872. Birth certificate of prosecutrix Ext.PW6/B wherein date of birth of minor prosecutrix is shown as 15.9.1998 is issued under Section 12/17 of Registration of Birth and Death Act 1969. Any certificate issued under statutory act is relevant fact under Section 35 of Indian Evidence Act 1872 unless rebutted in accordance with law. School leaving certificate Ext.PW5/B and birth certificate Ext.PW6/B are proved on record by way of oral testimony of PW5 Satya Pal school teacher and PW6 Gopal Singh Secretary Gram Panchayat. Testimonies of PW5 Satya Pal school teacher and PW6 Gopal Singh Panchayat Secretary are trustworthy reliable and inspire confidence on Court. There is no reason to disbelieve the testimonies of PWs 5 and 6. There is no evidence on record in order to prove that PWs 5 and 6 have hostile animus against appellant at any point of time.

14. Submission of learned Advocate appearing on behalf of appellant that investigating officer was aware of the fact that PW3 father of minor prosecutrix is shifted to village Kashdhar from some other village and birth certificate of original village not produced on record intentionally and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that birth certificate Ext.PW6/B placed on record relating to minor prosecutrix remained unrebutted on record. Appellant did not adduce any rebuttal documentary evidence on record in order to rebut birth ceritifcate Ext.PW6/B placed on record. In absence of any rebuttal document relating to birth of minor prosecutrix we have no option except to rely upon birth certificate Ext.PW6/B placed on record because birth certificate Ext.PW6/B has been prepared by public official in discharge of his official duty under Section 12/17 of Registrationof Birth and Death Act 1969 and rules framed therein and is relevant fact under Section 35 of Indian Evidence Act 1872.

15. Submission of learned Advocate appearing on behalf of appellant that application for conducting ossification test of minor prosecutrix was filed by appellant and same was dismissed by trial Court on 7.8.2012 illegally and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. We have perused the entire record carefully. It is proved on record that on 8.6.2012 prosecution evidence was closed and thereafter case was listed for statement of accused under Section 313 Cr.P.C. on 22.6.2012. It is proved on record that statement of accused was recorded on 24.8.2012 under Section 313 Cr.P.C. and application for ossification test was filed on 22.6.2012 prior to recording statement of accused under Section 313 Cr.P.C. and it is also proved on record that application for ossification test was dismissed by learned trial Court on 7.8.2012 prior to recording statement of accused under Section 313 of Code of Criminal Procedure 1973 and it is also proved on record that thereafter case was listed for defence evidence. When the case was listed for defence evidence then appellant has examined Sanjeev Kumar Secretary Gram Panchayat Nakrari in defence evidence and thereafter appellant closed the defence evidence as per statement dated 22.11.2012 placed on record. We are of the opinion that appellant was at liberty to file application for ossification test of minor prosecutrix when the case was listed for defence evidence by learned trial Court. Appellant did not file any application for ossification test of minor prosecutrix when case was listed for defence evidence. It is well settled law that as per Section 233 of Code of Criminal Procedure 1973 where accused is not acquitted under Section 232 of Cr.P.C. he would be called upon to enter into a defence and to adduce any evidence in support of his defence. Accused person did not file any application during the period when the case was listed for defence evidence under Section 233 Code of Criminal Procedure 1973 for ossification test of minor prosecutrix. In view of the fact that appellant did not file any application under Section 233 Cr.P.C. when the case was listed for defence evidence we are of the opinion that no miscarriage of justice is caused to appellant in present case. It is held that right to adduce any defence evidence starts to accused person in session trial when case is listed for defence evidence under Section 233 of Code of Criminal Procedure 1973.

16. Another submission of learned Advocate appearing on behalf of appellant that semen sample of appellant obtained and such samples of appellant did not match with semen present on salwar of minor prosecutrix worn by her at the time of incident and bed sheet and in absence of such evidence appellant cannot be convicted for offence of rape is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the chemical analyst report Ext.PW15/G placed on record. As per chemical analyst report Ext.PW15/G placed on record human blood and human semen was detected on salwar of minor prosecutrix and human semen was also detected upon semen

sample of Sanjeev Kumar and human semen was also detected upon bed sheet which were took into possession vide seizure memo.

17. Submission of learned Advocate appearing on behalf of appellant that in alternative sexual intercourse was conducted with consent of minor prosecutrix and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that minor prosecutrix was minor at the time of alleged incident. It is well settled that consent of minor is immaterial as per Clause VI of Section 375 IPC wherein rape is defined. In present case it is proved on record by way of positive oral as well as documentary evidence that prosecutrix was minor at the time of commission of criminal offence of rape. Hence it is held that consent of minor is immaterial in rape cases.

18. Submission of learned Advocate appearing on behalf of appellant that recoveries proved by prosecution are also doubtful and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Prosecution has recovered three bed sheets as per recovery memos and as per testimony of minor prosecutrix appellant has committed rape with minor prosecutrix at three different places several times. Recovery memos are proved as per testimony of marginal witnesses. Testimonies of marginal witness are trustworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of marginal witnesses of recovery memos. There is no evidence on record that marginal wtiensses of recovery memos have hostile animus against the appellant at any point of time.

19. Submission of learned Advocate appearing on behalf of appellant that testimony of minor prosecutrix is not trustworthy and reliable and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the testimony of minor prosecutrix. Minor prosecutrix has specifically stated in positive manner that appellant has committed rape with her at three different places during night period many times. Minor prosecutrix has specifically stated in positive manner that in night of 5.4.2010 the appellant committed rape with minor prosecutrix in dera (Residential room) of one Gorkha which was situated at a considerable distance of orchard. Minor prosecutrix has specifically stated in positive manner that thereafter on night of 6.4.2010 appellant again committed rape upon her in hotel room at Shimla. Minor prosecutrix has specifically stated that thereafter again on intervening night of 7.4.2010 and 8.4.2010 appellant again committed rape upon her in residential house of accused at Chirgaon. Testimony of minor prosecutrix is corroborated by medical evidence. Medical officer i.e. PW4 Dr. Anjana Sharma has specifically stated in positive manner that hymen of minor prosecutrix was torn. PW4 has further stated that semen and blood was detected upon salwar of minor prosecutrix. PW4 Dr. Anajana Sharma has stated in positive manner when she appeared in witness box that recent sexual intercourse could not be ruled out because semen and blood were detected upon salwar of minor prosecutrix. Oral testimony of PW4 is also corroborated by MLC Ext.PW4/B placed on record. It is also proved on record by way of testimony of PW14 Dr. Ravinder Sharma that appellant was capable of performing sexual intercourse. Testimony of minor prosecutrix is also corroborated by chemical analyst report placed on record wherein it has been specifically mentioned that human blood and semen was detected upon salwar of minor prosecutrix. It is proved on record that prior to medical examination of minor prosecutrix minor prosecutrix remained in company of appellant at different places. There is no positive cogent and reliable evidence on record that third person remained in company of minor prosecutrix. In view of the fact that only appellant remained in company of minor prosecutrix it is held that criminal offence of rape was committed by appellant only with minor prosecutrix in absence of evidence of

intervention of any third person. It is well settled law that in rape cases direct evidence is not available beyond the evidence of victim only. It is well settled law that testimony of victim in sexual offence is vital and unless there are compelling reasons looking for corroboration of her statement Court should find no difficulty to act upon testimony of victim of sexual assault alone to convict the accused where testimony of prosecutrix inspires confidence and is found to be reliable. It is well settled law that corroborative evidence is not an imperative component of judicial credence in every rape case. It is well settled law that a woman or girl subjected to sexual assault is not an accomplice to the crime but is victim of another person lust and it is improper and undesirable to test her evidence with suspicion treating her as if she was an accomplice. It is well settled law that normally no woman would come forward to make a humiliating statement against her honour of having been raped unless it was true. It is well settled law that testimony of prosecutrix must be appreciated in the background of entire case and Court must be alive to its responsibility and should be sensitive while dealing with cases involving sexual molestation. ***See: (1996)2 SCC 384, titled State of Punjab vs. Gurmit Singh and others. See (2000)5 SCC 30 titled State of Rajasthan vs. N.K. the accused. See (2000)1 SCC 247 titled State vs. Lekh Raj and another. See (1992)3 SCC 204 titled Madan Gopal Kakkad versus Naval Dubey and another.*** It was held in case reported in ***(1994) SCC 728 titled Narayanamma vs. State of Karnataka*** that discovery of spermatozoa in private parts of prosecutrix is not must for offence under Section 376 IPC. It was held that there are sufficient factors which may negate spermatozoa.

20. Rape is not only a crime against a person of a victim but it is a crime against the entire society. It destroys the entire psychology of woman and pushed the woman into deep emotional crisis. Rape is a crime against the basic human rights and is violative of the victim's most cherished fundamental rights as mentioned in Article 21 of Constitution of India. ***See AIR 1996 SC 922 titled Bodhisattwa Gautam vs. Miss Subhra Chakraborty*** It is well settled law that sexual intercourse with a woman under the age of 16 years is a rape irrespective of consent. Consent age enhanced to 18 years w.e.f. 3.2.2013 as per Act No. 13 of 2013. ***See AIR 1981 SC 361 titled Harpal Singh and another vs. State of H.P.***

21. Submission of learned Advocate appearing on behalf of appellant that there is material improvement and contradiction in testimony of prosecution witnesses and on this ground appeal filed by appellant be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Learned Advocate appearing on behalf of appellant did not point out any material contradiction which goes to the root of case. Minor contradictions are bound to come in prosecution case when testimonies of prosecution witnesses are recorded after a gap of sufficient time. In present case incident took place on 5.4.2010 and testimonies of prosecution witnesses recorded on 5.12.2011, 6.12.2011, 5.1.2012, 6.1.2012, 5.5.2012, 8.6.2012. It was held in case reported in ***(2010)9 SCC 567 titled C. Muniappan and others vs. State of Tamil Nadu*** that if there are some omissions, contradictions and discrepancies the entire evidence cannot be disregarded. It was further held that an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the root of the matter and shake the basic version of prosecution's witness. It was held that minor discrepancies are bound to occur in statements of witnesses when testimony of witness is recorded after a gape of time. ***See: AIR 1972 SC 2020 titled Sohrab and another vs. The State of Madhya Pradesh. See AIR 1985 SC 48 titled State of U.P. vs. M.K. Anthony. See AIR 1983 SC 753 titled Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat See AIR 2007 SC 2257 titled State of Rajasthan vs. Om Parkash. See (2009)11 SCC 588 titled Prithu alias Prithi Chand and another vs. State of Himachal Pradesh. See(2009)9 SCC 626 titled State of Uttar Pradesh vs. Santosh Kumar and others. See AIR 1988 SC 696 titled Appabhai and another vs.***

State of Gujarat. See AIR 1999 SC 3544 titled Rammi alias Rameshwar vs. State of Madhya Pradesh. See (2000)1 SCC 247 titled State of H.P. vs. Lekh Raj and another. See (2004) 10 SCC 94 titled Laxman Singh vs. Poonam Singh and others. See (2012)10 SCC Kuriya and another vs. State of Rajasthan .

22. In view of above stated facts it is held that learned trial Court has properly appreciated the oral as well as documentary evidence placed on record and it is further held that no miscarriage of justice is caused to appellant. Point No.1 is answered in negative against the appellant.

Point No. 2 (Final Order)

23. In view of findings upon point No.1 appeal filed by appellant is dismissed. Judgment and sentence passed by learned trial Court affirmed. File of learned trial Court along with ceritified copy of this judgment be sent back forthwith. Appeal stands disposed of. Pending miscellaneous application(s) if any also stands disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE SURESHWAR THAKUR, J.

Union of India and another .....Petitioners.

Vs.

Shankar Lal Sharma .....Respondent.

CWP No. 4621 of 2011
Reserved on : 23.12.2015
Date of decision 28.12.2015

Constitution of India, 1950- Article 226- Petitioner retired from All India Radio, Shimla on 26.09.1992- he falls in the area not covered under the Central Government Health Scheme – he was given Rs. 100/- per month as fixed medical allowance- he remained under treatment from IGMC, Shimla and was advised to undergo surgical procedure for Coronary Artery Bypass Grafting (CABG)- he was referred to Prime Heart and Vascular Institute, Mohali- he remained admitted in the hospital for 15 days and incurred Rs. 1,79,559/- for his treatment and Rs. 20,000/- towards post operation treatment- he submitted claim for medical reimbursement, which was rejected- he approached Central Administrative Tribunal who allowed the application and directed the Union of India to consider the claim of the applicant for the reimbursement of medical expenditure incurred by him at the rate fixed by Central Government- Central Government preferred an appeal pleading that the matter is covered by the judgment of Hon'ble Supreme Court- Central Government had taken a conscious decision to grant fixed medical allowance to Central Government pensioners/family pensioners residing in areas not covered by Central Government Health Scheme- the decision was taken by the Government of India pursuant to the recommendation made by 5th Pay Commission of the Central Government- pensioners were required to give one time option at the time of their retirement for medical coverage under CGHS facilities or to get themselves registered in the nearest CGHS city for availing the hospitalization facilities- held, that decision taken by the Government was a final order- the appellant and similarly situated persons had changed their position by getting themselves treated from various institutes legitimately expecting that they are covered under CS(MA) Rules- no material was placed on record to show that memorandum was withdrawn, rescinded, superseded or any corrigendum was issued- the Central Government must act like a model employer – the O.M., dated 05.06.1998 supplements the CS (MA) Rules by extending the scope of health

coverage to retired Government Officials as well – all the Government officials who have retired from the Central Government constitute homogenous class- no reason has been assigned as to why applicant and similarly situated persons had been left out of the applicability of CGHS or CS(MA) Rules, 1944- this is a case of discrimination on account of residence of the person- Court must give such interpretation as will promote the march and progress towards a Socialistic Democratic State – right to health care and medical care is a fundamental right of worker under Article 221 read with Articles 39 (e), 41, 43, 48-A and all related articles – appellant cannot contend that O.M. dated 05.60.1998 was superseded- Union of India should take a common sense view to address the serious issue of welfare of retired employees- a retired employee needs more medical care vis-à-vis young employee- his medical issues are required to be dealt with more sensitivity, compassion and sympathy- Union of India directed to seek the option from the respondent and similarly situated retired employees residing in non-CGHS areas for medical coverage either under CGHS Scheme or under CS(MA) Rules, 1994- Union of India directed to release a sum of Rs. 1,79,559/- for his treatment and Rs. 20,000/- incurred towards post operation failing which petitioner will be entitled to interest @12% per annum. (Para-5 to 54)

Cases referred:

Sant Ram Sharma Vs. State of Rajasthan and others, AIR 1967 Supreme Court 1910

Excel Wear Vs. Union of India and others, AIR 1979 Supreme Court 25

Minerva Mills Ltd. and others Vs. Union of India and others, AIR 1980 Supreme Court 1789

S.P. Gupta Vs. President of India and others , AIR 1982 Supreme Court 149

D.S. Nakara and others Vs. Union of India, AIR 1983 Supreme Court 130

Sanjeev Coke Manufacturing Company Vs. M/s. Bharat Coking Coal Ltd. And another, AIR 1983 Supreme Court 239

Atam Prakash Vs. State of Haryana and others (1986) 2 Supreme Court Cases 249

Sodan Singh and others Vs. New Delhi Municipal Committee and others (1989) 4 Supreme Court Cases 155

D.V. Kapoor Vs. Union of India and others, AIR 1990 Supreme Court 1923

Kerala Hotel and Restaurant Association and others Vs. State of Kerala and others (1990) 2 Supreme Court Cases 502

Narendra Kumar Maheshwari Vs. Union of India and others, 1990 (Supp) Supreme Court Cases 440

Commissioner of Income Tax, Bangalore Vs. Vasudeo V. Dempo, 1993 Supp (1) Supreme Court Cases 612

Consumer Education & Research Centre and others Vs. Union of India and others (1995) 3 Supreme Court Cases 42

Surjit Singh Vs. State of Punjab and others AIR 1996 Supreme Court 1388

Director General of Posts and others Vs. B. Ravindran and another (1997) 1 Supreme Court Cases 641

Samatha Vs. State of A.P. and others (1997) 8 Supreme Court Cases 191

AIR India Statutory Corporation and others Vs. United Labour Union and others (1997) 9 Supreme Court Cases 377

Naga People's Movement of Human Rights Vs. Union of India (1998) 2 Supreme Court Cases 109

Secretary, H.S.E.B. Vs. Suresh and others (1999) 3 Supreme Court Cases 601

G.B. Pant University of Agriculture and Technology Vs. State of U.P., AIR 2000 Supreme Court 2695

Municipal Corporation of Delhi Vs. Female Workers (Muster Roll) and another (2000) 3 Supreme Court Cases 224
Steel Authority of India Ltd. and others Vs. National Union Waterfront Workers and others (2001) 7 SCC 1
State of Uttaranchal and others Vs. Sidharth Srivastava and others (2003) 9 Supreme Court Cases 336
M. Nagaraj and others Vs. Union of India and others (2006) 8 Supreme Court cases 212
Nandi Infrastructure Corridor Enterprises Limited and others Vs. Election Commission of India and another (2010) 13 Supreme Court Cases 334
General Manager (Operations) State Bank of India and another Vs. R. Periyasamy (2015) 3 Supreme Court Cases 101
Supreme Court Advocates-on-Record-Association and another Vs. Union of India, JT 2015 (10) SC1

For the petitioners: Mr. Angrez Kapoor, Advocate, vice Mr. Ashok Sharma, Assistant Solicitor General of India.
For the respondent: Mr. Ravinder N. Sharma and Mr. Pawan Gautam, Advocates.

The following judgment of the Court was delivered:

Rajiv Sharma, J.:

This petition is instituted against the judgment rendered by the learned Central Administrative Tribunal, Chandigarh Bench in Original Application No. 283-HP-2009, dated 02.06.2010.

2. Key facts necessary for the adjudication of this petition are that the respondent superannuated/retired from All India Radio, Shimla on 26.09.1992. He falls in the area not covered under the Central Government Health Scheme (hereinafter referred to as "CGHS" for the sake of brevity). He was given fixed medical allowance of Rs.100/- per month. He remained under treatment from Indira Gandhi Medical College and Associated Hospitals, Shimla. He was advised to undergo surgical procedure for Coronary Artery Bypass Grafting (CABG). The doctors referred him to Prime Heart and Vascular Institute, Mohali. He remained admitted as an indoor patient from 03.06.2008 to 17.06.2008, i.e., for 15 days. He incurred an expenditure of Rs.1,79,559/- on his treatment. He also incurred an additional sum of Rs.20,000/- towards post operation follow up, medicines and transportation charges. He submitted medical bills for reimbursement of medical expenses. However, the claim of the respondent was rejected on 23.12.2008 in view of letter, dated 20.08.2004. The letter, dated 23.12.2008, reads thus:

> *"...This has a reference to your notice dated 23.9.08 and this office regd. Letter of even No. SML-10(3)/2008-dated 20.11.08, regarding reimbursement of medical claims to Shri Shanker Lal Sharma, resident of Shanker Niwas, Middle Sangti, Summerhill, Shimla.*
>
> *In this connection, it is intimated that the case was forwarded to competent authority in the Government of India i.e. Ministry of Health & Family Welfare New Delhi. The Ministry of Health & Family Welfare has sent a copy of their letter No. S. 14025/4/96-MS dt. 20Th August, 2004, which is self explanatory and relevant to the case of Shri Shanker Lal Sharma. A copy of the said letter is enclosed.*

> *Keeping in view the instruction contained in the enclosed Ministry of Health & Family Welfare order, the medical claim of Shri Shan*ker Lal Sharma cannot be reimbursed..”

3. Feeling aggrieved, the respondent approached the learned Central Administrative Tribunal, Chandigarh Bench by way of an Original Application No. 283-HP-2009, seeking reimbursement of Rs.1,79,559/- with interest @25% per annum. The Original Application was contested by the petitioner-Union of India. The petitioner-Union of India filed a detailed reply to the Original Application. According to the reply filed by the petitioner-Union of India, the matter was taken up with the Nodal Ministry, i.e., Ministry of Health & Family Welfare through their Headquarters, i.e., DG, AIR, New Delhi, so that the case of the respondent could be considered as per rules. However, the Ministry of Health & Family Welfare, New Delhi clarified the position and also made available a copy of OM, dated 20.08.2004, which clarified the entire issue about extension of CCS Medical Attendance Rules, 1944 to Central Government pensioners residing in non-CGHS areas. There is also a reference of letter, dated 25.02.2000 in the reply. It was specifically stated that the case of the respondent was not covered by the judgment, dated 13.03.2008, rendered by the Hon'ble High Court of Punjab & Haryana in CWP No. 6559 of 2006, titled as ***Mohinder Singh Vs. UOI.*** The learned Central Administrative Tribunal, Chandigarh Bench, relying upon the judgment of Hon'ble High Court of Punjab & Haryana in CWP No. 6559 of 2006, titled as ***Mohinder Singh Vs. UOI***., allowed the Original Application on 02.06.2010 and ordered the Union of India to consider the claim of the respondent for reimbursement of medical expenditure incurred by him for his treatment in Prime Heart and Vascular institute, Mohali at the rates fixed by the Central Government under the rules or the actual expenditure, whichever was less and the claim of the respondent for follow-up treatment was ordered to be considered under the rules by the Union of India. Thereafter, a speaking order was passed by the Head of Office, All India Radio, Shimla on 07.12.2010 vide Annexure P-6. Respondent also filed a Contempt Petition for the implementation of judgment, dated 02.06.2010 and thereafter the present petition was filed assailing the judgment, dated 02.06.2010, rendered by the learned Central Administrative Tribunal, Chandigarh Bench in Original Application No. 283-HP-2009, dated 02.06.2010.

4. The sum and substance of the grounds taken in the present petition is that O.M. dated 05.06.1998 was only a departmental communication during the process of consultation and was not meant to be a final order. It was also stated in Para-11 of the petition that a Special Leave to Appeal (Civil) CC 9939/2004 titled as ***Union of India and another Vs. Prabhakar Sridhar Bapat*** raising an identical issue was pending before the Hon'ble Supreme Court, wherein also the issue relating to the scope and effect of OMs dated 5.6.1998 and 20.8.2004 as well as the non-applicability of the CS(MA) Rules to pensioners in non-CGHS areas was in question. The copies of the orders passed by the Hon'ble Supreme Court have been placed on record staying the Contempt proceedings in identical matters. The relevant portion of the grounds taken in the writ petition reads thus:

> *“...It was only an intra departmental communication during the process of consultation, not meant to be a final order. During the process of examination of the proposal, Department of Expenditure did not agree to the proposal in view of huge financial implications. The CS(MA) Rules were never amended so as to include pensioners residing in non-CGHS areas within the ambit of the said Rules. The controversy in any event was set at rest by a subsequent OM dated 20.8.2004 issued by the Ministry of Health, wherein, it was clarified that the earlier OM dated 5.6.1998 did not have the effect of extending the CS(MA) Rules to pensioners residing in non-CGHS areas. Thus the judgment of the Punjab and Haryana High Court is also of no assistance in the matter and*

reliance placed by the Tribunal in that regard is misconceived. The facts and circumstances leading to the filing of the present petitioner are set out hereunder.

11. That instead of accepting the well reasoned speaking order passed by the petitioners, the respondent with a view to pressurize the petitioners filed a contempt petition before the Central Administrative Tribunal being C.P. NO. 55 of 2011, a copy whereof is annexed as Annexure P-7. The said contempt petition came up for hearing before the Tribunal on 28th April, 2011. During the course of hearing the factum of the passing of the speaking order was orally brought to the notice of the Tribunal. It was also pointed out to the Tribunal that SLP © NO. ../2004 (CCNo9939)----UOI & Anr V/s Prabhakar Sridhar Bapat raising an identical issue was pending before the Supreme Court wherein also the issue relating to the scope and effect of Oms dated 5.6.1998 and 20.8.2004 as well as the non-applicability of the CS(MA) Rules to pennsioners in non CGHS areas was in question. It was also pointed out that in the SLP the Supreme Court had stayed the contempt proceedings. A copy of the said stay order passed by the Supreme Court in SLP © No. .../2004 (CCNo 9939)----UOI & Anr. V/s Prabhakar Sridhar Bapat is annexed as Annexure P-8....."

5. In order to mitigate the hardships faced by the retired Government officials, the Central Government framed a Scheme called the Central Government Health Scheme (CGHS). It was started under the Ministry of Health and Family Welfare in 1954 with the objective of providing comprehensive medical care facilities to Central Government employees, pensioners and their dependents residing in CGHS covered cities. CGHS currently covers 25 cities.

6. The Central Government took a conscious decision on the recommendations of the Fifth Central Pay Commission to grant fixed medical allowance @ `100/- per month to Central Government pensioners/family pensioners residing in areas not covered by Central Government Health Scheme administered by the Ministry of Health & Family Welfare and corresponding Health Schemes administered by other Ministries/Departments for their retired employees for meeting expenditure on day-to-day medical expenses that do not require hospitalization vide notification, dated 19.12.1997. The notification, dated 19.12.1997, reads as under:

"The undersigned is directed to state that in pursuance of Government's decision on the recommendations of the 5th Central Pay Commission announced in this Department's resolution No. 45/86/97-P & P.W. (A) dated 30.9.1977, sanction of the President is hereby accorded to the grant of fixed medical allowance @ Rs.100 p.m. to Central Government pensioners/family pensioners/residing in areas not covered by Central Government Health Scheme administered by the Ministry of Health & Family Welfare and corresponding Health Schemes administered by other Ministries/Departments for their retired employees for meeting expenditure on day-to-day medial expenses that do not require hospitalization."

7. A pragmatic and holistic decision was taken on 05.06.1998 vide Annexure P-3 that the pensioners should not be deprived of medical facilities from the Government in their old age when they require them most and the Ministry had no objection to the extension of the CS(MA) Rules to the Central Government pensioners residing in non-CGHS areas as recommended by the Pay Commission. The O.M. dated 05.06.1998 reads as under:

"The undersigned is directed to refer to the Department of Pension and Pensioners' Welfare, O.M. No. 45/74/97-PP & PW(C), dated 15.04.1997 on the above subject and to say that it has been decided by this Ministry that the pensioners should not be deprived of medical facilities from the Government in their old age when they require them most. This Ministry has, therefore, no objection to the extension of the CS(MA) Rules to the Central Government pensioners residing in non-CGHS areas as recommended by the Pay Commission. However, the responsibility of administrating the CS(MA) Rules for pensioners cannot be handled by CGHS. It should be administered by the respective Ministries/Departments as in the case of serving employees covered under CS(MA) Rules, 1944. The Department of Pension and Pensioners Welfare would need to have the modalities worked out for the implementation of the rules in consultation with the Ministries/Department prior to the measure being introduced to avoid any hardship to the pensioners. The pensioners could be given a one-time option at the time of their retirement for medical coverage under CGHS or under the CS(MA) Rules, 1944. In case of a pensioner opting for CGHS facilities, he/she would have to get himself/herself registered in the nearest CGHS city for availing of hospitalization facilities. In such cases, the reimbursement claims would be processed by the Additional Directors, CGHS of the concerned city. For those opting for medical facilities under the CS(MA) Rules, the scrutiny of the claims would have to be done by the parent office as in the case of serving employees and they payment would also have to be made by them. The list of AMAs to be appointed under CS(MA) Rules would be decided Ministry/Department-wise as provided under the rules. The beneficiaries of the CS(MA) Rules, 1944 would be entitled to avail of hospitalization facilities as provided under these rules.

The Departments of Pension and Pensioners' Welfare are requested to take further necessary action in the matter accordingly."

8. The Department of Pension and Pensioners' Welfare by making reference to O.M. dated 15.4.1997 in O.M. dated 05.06.1998 has decided that the pensioners should not be deprived of medical facilities from the Government in their old age when they require them most. Thus, the Ministry had no objection to the extension of the CS(MA) Rules to the Central Government pensioners residing in non-CGHS areas as recommended by the Pay Commission. However, the responsibility of administering the CS(MA) Rules for pensioners cannot be handled by CGHS. It was to be administered by the respective Ministries/Departments as in the case of serving employees covered under CS(MA) Rules, 1944. The Department of Pension and Pensioners Welfare was required to have the modalities worked out for the implementation of the rules in consultation with the Ministries/Department prior to the measure being introduced to avoid any hardship to the pensioners. The pensioners were required to be given one time option at the time of their retirement for medical coverage under CGHS or under the CS(MA) Rules, 1944. In case a pensioner opts for CGHS facilities, he/she would have to get himself/herself registered in the nearest CGHS city for availing of hospitalization facilities. In such cases, the reimbursement claims were to be processed by the Additional Directors, CGHS of the concerned city. Those opting for medical facilities under the CS(MA) Rules, the scrutiny of the claims was to be done by the parent office as in the case of serving employees and the

payment was also to be made by them. The Department of pension and Pensioners' Welfare was required to take further necessary action in the matter accordingly.

9. One Sh. Prabhakar Sridhar Bapat, who retired from the service of Postal Department on 01.03.1991, suffered from Infero Postered Lateral Stemy. He was admitted in the nearest private hospital, namely, Dinanath Mangeshkar Hospital and Research Center. Angiography and Angioplasty was done on 28th and 30th September, 2002. He was discharged from the hospital on 02.10.2002. He submitted an application for reimbursement of medical expenses of Rs.1,55,307.54/-to Post Master General, Vadodara vide letter, dated 11.02.2003. He was informed vide letter, dated 28.02.2003 that the Civil Servants (Medical Attendance) Rules (in short CS(MA) Rules) do not apply to retired Government Officials. On this ground, the reimbursement was not allowed. He filed an Original Application No. 205 of 2003 before the Central Administrative Tribunal, Ahmedabad Bench, Ahmedabad, which was allowed by the Central Administrative Tribunal, Ahmedabad Bench, Ahmedabad on 10.11.2003. There is reference of O.M. dated 05.06.1998 in para No. 7 of the judgment. The learned Central Administrative Tribunal, Ahmedabad Bench has made observations in para-9 of the judgment that the decisions discussed above have consistently held that in view of Order dated 5.6.1998, the terms of CS(MA) Rules would be applicable to the retiree of the Postal Department, who were not residing in the areas covered under the Scheme or have not opted for Medical Allowance. The Union of India was directed to sanction the admissible amount in terms of CS(MA) Rules and pay the same within a period of three months to the applicant. Feeling aggrieved by the judgment, dated 10.11.2003, rendered by the learned Central Administrative Tribunal, Ahmedabad Bench, Ahmedabad, the Union of India preferred SCA No. 3843/2004 before the High Court of Gujarat at Ahmedabad. The Division Bench of Gujarat High Court dismissed the same on 02.04.2004. The Union of India preferred Special Leave to Appeal (Civil) No. 10659/05 against the judgment, dated 02.04.2004. The Hon'ble Supreme Court intervened and stayed the Contempt proceedings on 02.05.2005. These copies are on the record of this case, though subsequently SLPs were dismissed and the stay orders were vacated, as discussed in para (supra).

10. It would be apt at this stage to reiterate that the Original Application filed by the respondent bearing Original Application No. 283-HP-2009 was allowed by the Central Administrative Tribunal, Chandigarh Bench by placing reliance on the judgment, dated 13.3.2008, rendered by the Punjab and Haryana High Court in CWP No. 6559 of 2006, titled as ***Mohinder Singh Vs. Union of India and others.***

11. Now, we would advert to Office Memorandum, dated 20.08.2004, Annexure P-4, which reads as under:

> *"Office Memorandum*
>
> *Sub:- Clarification on the views of this Department on recommendation of the 5th Central Pay Commission on extension of CS(MA) Rules, 1944 to Central Government pensioners residing in areas not covered by CGHS.*
>
> *The CS(MA) Rules, 1944 is not applicable to the Central Government pensioners. The 5th Central Pay Commission had recommended extension of CS(MA) Rules, 1944 to the Central Government pensioners residing in the areas not covered by CGHS. On a reference received from the Department of Pension and Pensioners Welfare on this subject, the response of the Department of Health had been conveyed through the O.M. No. S. 14025/4/96-MS dated 5.6.1998. The response of this Department was that it did not have any objections to the proposal of*

extension of CS(MA) Rules, 1944 to central government pensioners residing in non-CGHS areas as recommended by the 5th Pay Commission, subject to the condition that the responsibility of administering the CS(MA) Rules, 1944 for pensioners would be of the Departments/Ministries concerned.

The said O.M. dated 5.6.1998 was in reply to a reference in O.M. No. 457497 PP & PW (c) dated 15.4.97 from the Department of Pensions and Pensioners' Welfare. After that also communication between these two departments had continues on this subject. In fact, in a subsequent O.M. of the same number dated 12.1.1999, the views of all the Ministries/Departments of the Government of India had been sought before a final decision could be taken. But unfortunately, the O.M. dated 5.6.1998 has been misinterpreted by some pensioners as the final order of the Government of India to extend CS(MA) Rules, 1944 to pensioners. A lot of avoidable litigation has already taken place, because some pensioners have obtained favourable orders from various courts/tribunals on the basis of the said O.M. dated 5.6.1998.

It is therefore considered necessary to clarify unequivocally that the O.M. dated 5.6.1998 was not intended to be a final order extending the applicability of CS(MA) Rules, 1944 to pensioners. In fact, it is not possible for any individual department to take such policy decisions without obtaining views of various departments, and particularly, the Department of Expenditure. Such being the case, in the process of examining the recommendation of the 5th Pay Commission on this issue, the Department of Expenditure has categorically said that in view of huge financial implications, it is not feasible to extend CS(MA) Rules, 1944 to pensioners.

Therefore, any interpretation based on the O.M. dated 5.6.1998 of this Department that the pensioners come within the purview of the CS(MA) Rules, 1944 is wholly misplaced."

12. The gist of O.M. dated 20.08.2004 is that in sequel to O.M. dated 12.1.1999, the views of all the Ministries/Departments of the Government of India were sought before a final decision could be taken. However, O.M. dated 5.6.1998 was misinterpreted by some pensioners as the final order of the Government of India to extend CS(MA) Rules, 1944 to pensioners. It is was clarified that O.M. dated 5.6.1998 was not intended to be a final order extending the applicability of CS(MA) Rules, 1944 to pensioners. In fact, according to O.M. dated 20.08.2004, it was not possible for any individual department to take such policy decisions without obtaining views of various departments and particularly the Department of Expenditure.

13. In order to mitigate the hardships faced by the retired employees, who were not covered under the CS(MA) Rules, 1944, the Central Government, as noticed above, has framed Central Government Health Scheme. However, the area covered under the Scheme was limited to 25 cities. A conscious decision was taken to give benefit to those retirees, who do not fall within the areas covered under the Scheme by giving them fixed medical allowance @ Rs.100/- per month on 19.12.1997.

14. The decision, dated 5.6.1998 is in sequel to the recommendations made by the 5th Pay Commission of Central Government. The Pay Commission recommendations are made by taking into consideration all the pros and cons put before it by all the stake holders. The decision has been taken primarily to redress the grievance of all those retired Government Officials, who were not covered under CGHS and were also not covered under

CS(MA) Rules, 1944. These pensioners as per O.M., dated 5.6.1998 were to be given one time option at the time of their retirement for medical coverage under CGHS or under the CS(MA) Rules, 1944. In case a of a pensioner opting for CGHS facilities, he/she was to get himself/herself registered in the nearest CGHS city for availing of hospitalization facilities and in such cases, the reimbursement claim was to be processed by the Additional Directors, CGHS of the concerned city and for those opting for medical facilities under the CS(MA) Rules, the scrutiny of the claims was to be done by the parent office as in the case of serving employees and the payment was to be made by them.

15. A specific ground has been taken in the petition that the Hon'ble Supreme Court was seized of the matter relating to the scope and effect of O.Ms. dated 05.06.1998 and 20.08.2004 as well as the non-applicability of the CS(MA) Rules to pensioners in non CGHS areas was in question.

16. We do not accept the plea taken in the petition that O.M. dated 5.6.1998 was intra departmental communication. The decision dated 5.6.1998 was a conscious decision. It was a final order. The respondent and similarly situated persons have changed their position by getting themselves treated from various institutes legitimately expecting that they are covered under CS(MA) Rules. According to Office Memorandum, dated 20.08.2004, the view of all the Ministries/Departments of the Government of India were sought before a final decision could be taken. This Office Memorandum is dated 20.08.2004, but till date no material has been placed on record that O.M., dated 05.06.1998 was withdrawn, rescinded, superseded or any corrigendum was issued. The operation of O.M., dated 05.06.1998 has not been suspended. The only requirement as per O.M., dated 05.06.1998 was to work out the modalities in consultation with the Ministries/Department, that too, to avoid any hardship to the pensioners. It was to be followed by the Ministerial Act. The pensioners were to be given one time option at the time of their retirement either to opt for CGHS or under the CS(MA) Rules, 1944 for medical coverage. There was sufficient time for consultation with various Departments from 05.06.1998 to 20.08.2004. Though it is stated that the Department of Expenditure has categorically said that in view of huge financial implications, it is not feasible to extend CS(MA) Rules, 1944 to pensioners, but that decision has not been placed on record. The issue was with regard to the applicability of CGHS Scheme floated in 1954 and the applicability of CS(MA) Rules, 1944 to the retirees, who were not residing in the areas covered by CGHS Scheme. The O.M. dated 05.06.1998 cannot be stated to be a decision in isolation since it is based on the recommendations made by the 5th Pay Commission of the Central Government. The main objective underlined in the issuance of O.M. dated 05.06.1998 was to mitigate the hardships faced by the retired Government officials.

17. The Central Government must act like a model employer. Ours is a socialist welfare State. The difficulties faced by the retired Government officials have rightly been redressed by O.M. dated 05.06.1998. Thus, O.M., dated 05.06.1998 supplements the CS(MA) Rules by extending the scope of health coverage to retired Government Officials as well.

18. The matter is required to be considered from another angle. There is a Scheme floated by the Central Government in 1954, whereby, the persons who have been enrolled under the Scheme can get themselves treated in 25 cities across the country. All the Government Officials who retired from the Central Government constitute a homogeneous class whether they are living in station 'A' or 'B' after their retirement. There is no reason assigned why the respondent and similarly situated person have been left out from the applicability of CGHS or CS(MA) Rules, 1944. It is a case of invidious discrimination. The CGHS facilities could not be restricted to specified places. The

respondent and similarly situated persons are to be treated at par with those persons who are residing at Delhi and other areas covered under CGHS. There is no intelligible differentia so as to differentiate the retired Government officials vis-a-vis some other retired persons only on the ground of residing in a particular place. The objective of the Scheme is to provide better health facilities to the retired Government officials. It is with this objective that O.M. dated 5.6.1998 was issued.

19. In **Sant Ram Sharma** Vs. **State of Rajasthan and others,** AIR 1967 Supreme Court 1910, their Lordships of the Hon'ble Supreme Court have held that it cannot be said that till statutory rules governing promotion to selection grade posts are framed government cannot issue administrative instructions regarding principles to be followed. Their Lordships have held as under:

> *"7. We proceed to consider the next contention of Mr. N. C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found it the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provision in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed.*
>
> *8. In B. N. Nagarajan v. State of Mysore, AIR 1966 SC 1942, it was pointed out by this Court that it is not obligatory under the proviso to Art. 309 of the Constitution to make rules of recruitment etc., before a service can be constituted or a post created or filled, and secondly, the State Government has executive power, in relation to all matters with respect to which the Legislature of the State has power, to make laws. It follows from this that the State Government will have executive power in respect of Sch. 7, List II Entry 41. State Public Services, and there is nothing in the terms of Art. 309 of the Constitution which abridges the power of the executive to act under Art. 162 of the Constitution without a law. A similar view was taken by this Court in T. Cajec v. U. Jormonik Siem, l961-1 SCR 750 = (AIR 1961 SC 276) where Wanchoo. J., as he then was, who delivered judgment on behalf of the majority, observed as follows at pp. 762-764 of the Report (SCR) = (at p. 281 of AIR) :*
>
> *"The High Court has taken the view that the appointment and succession of a Siem was not an administrative function of the District Council and that the District Council could only act by making a law with the assent of the Governor so far as the appointment and removal of a Siem was concerned. In this connection, the High Court relied on para 3 (1)(g) of the Schedule, which lays down that the District Council shall have the power to make laws with respect to the appointment and succession of Chiefs and Headmen. The High Court seems to be of the*

view that until such a law is made there could be no power of appointment of a Chief or Siem like the respondent and in consequence there would be no power of removal either. With respect, it seems to us that the High Court has read far more into para 3(l)(g), than is justified by its language. Paragraph 3(1) is in fact something like a legislative list and enumerates the subjects on which the District Council is competent to make laws. Under Para 3(1)(g) it has power to make laws with respect to the appointment or succession of Chiefs or Headmen and this would naturally include the power to remove them. But it does not follow from this that the appointment or removal of a Chief is a legislative act or that no appointment or removal can be made without there being first a law to that effect.....Further once the power of appointment falls within the power of administration of the district the power of removal of officers and others so appointed would necessarily follow as a corollary. The Constitution could not have intended that all ad-ministration in the autonomous districts should come to a stop till the Governor made regulations under para l9(1)(b) or till the District Council passed laws under Para 3(l)(g). The Governor in the first instance and the District Councils thereafter were vested with the power to carry on the administration and that in our opinion included the power to appoint and remove the personnel for carrying on the administration. Doubtless when regulations are made under Para 19(1)(b) or laws are passed under Para 3(1) with respect to the appointment or removal of the personnel of the administration, the administration authorities would be bound to follow the regulations so made or the laws so passed. But from this it does not follow that till the regulations were made or the laws were passed, there could be no appointment or dismissal of the personnel of the administration. In our opinion, the authorities concerned would at all relevant times have the power to appoint or remove administrative personnel under the general power of administration vested in them by the Sixth Schedule. The view therefore taken by the High Court that there could be no appointment or removal by the District Council without a law having been first passed in that behalf under Para 3(1)(g) cannot be sustained."

9. We pass on to consider the next contention of Mr. N. C. Chatterjee that if the executive Government is held to have power to make appointments and lay down conditions of service without making rules in that behalf under the proviso to Art. 309, there will be a violation of Arts. 14 and 16 because the appointments would be arbitrary and capricious. In our view, there is no substance in this contention of the petitioner. If the State of Rajasthan had considered the case of the petitioner alongwith the other eligible candidates before appointments to the selection posts there would be no breach of the provisions of Arts. 14 and 16 of the Constitution because everyone who was eligible in view of the conditions of service and was entitled to consideration was actually considered before promotion to those selection posts were actually made. It was said by Mr. C. B. Agarwala on behalf of the respondents that an objective evaluation of the merit of the officers is made each year and promotion is made on scrutiny of the record sheets dealing with the competence, efficiency and experience of the officers concerned. In the present case, there is no specific allegation

by the petitioner in the writ petition that his case was not considered alongwith respondents 3 and 4 at the time of promotion to the posts of Deputy Inspector General of Police in 1955 or to the rank of Inspector General of Police or Additional Inspector General of Police in 1966. There was, however, a vague suggestion made by the petitioner in paragraph 68 of his rejoinder petition dated July 17, 1967 that "the State Government could not have possibly considered my case, as they considered and even in this counter-affidavit consider Shri Hanuman Sharma and Shri Sultan Singh senior to me by the new type of seniority they have invented for their benefit". Even though there is no specific allegation by the petitioner that there was no consideration of his case, respondent No. 1 has definitely asserted in paragraphs 23, 25, 40 and 44 of the counter-affidavit that at the time of promotion of respondents 3 and 4 to the selection posts of Deputy Inspector General of Police and of Inspector General of Police the case of the petitioner was considered. We are therefore of the opinion that the petitioner is unable to substantiate his argument that there was no consideration of his case at the time of promotion of respondents 3 and 4 to the selection posts. We must therefore proceed on the footing that respondent No. 1 had considered the case of the petitioner and taken into account the record, experience and merit of the petitioner at the time of the promotion of respondents 3 and 4 to the selection grade-posts. It is therefore not possible to accept the argument of Mr. N. C. Chatterjee that there was any violation of the constitutional guarantee under Arts. 14 and 16 of the Constitution in the present case. Mr. N. C. Chatterjee argued that the introduction of the idea of merit into the procedure of promotion brings in an element of personal evaluation, and that personal evaluation, opens the door to the abuses of nepotism and favouritism, and so, there was a violation of the constitutional guarantee under Arts. 14 and 16 of the Constitution. We are unable to accept this argument as well founded. The question of a proper promotion policy depends on various conflicting factors. It is obvious that the only method in which absolute objectivity can be ensured is for all promotions to be made entirely on grounds of seniority. That means that if a post falls vacant it is filled by the person who has served longest in the post immediately below. But the trouble with the seniority system is that it is so objective that it fails to take any account of personal merit. As a system it is fair to every official except the best ones, an official has nothing to win or lose provided he does not actually become so inefficient that disciplinary action has to be taken against him. But, though the system is fair to the officials concerned, it is a heavy burden on the public and a great strain on the efficient handling of public business. The problem, therefore is how to ensure reasonable prospect of advancement to all officials and at the same time to protect the public interest in having posts filled by the most able man? In other words, the question is how to find a correct balance between seniority and merit in a proper promotion-policy. In this connection Leonard D. White has stated as follows :

> *"The principal object of a promotion system is to secure the best possible incomebents for the higher positions, while maintaining the morale of the whole organization. The main interest to be served is the public interest, not the personal interest of members of*

the official group concerned the public interest is best secured when reasonable opportunities for promotion exist for all qualified employees, when really superior civil servants are enabled to move as rapidly up the promotion ladder as their merits deserve and as vacancies occur, and when selection for promotion is made on the sole basis of merit. For the merit system ought to apply as specifically in making promotions as in original recruitment.....Employees often prefer the rule of seniority, by which the eligible longest in service is automatically awarded the promotion within limits, seniority is entitled to consideration as one criterion of selection. It tends to eliminate favouritism or the suspicion thereof; and experience is certainly a factor in the making of a successful employee. Seniority is given most weight in promotions from the lowest to other subordinate positions. As employees move up the ladder of responsibility, it is entitled to less and less weight. When seniority is made the sole determining factor, at any level, it is a dangerous guide. It does not follow that the employee longest in service in a particular grade is best suited for promotion to a higher grade; the very opposite may be true."

(Introduction to the Study of Public Administration, 4th Edn., pp. 380, 383).

As a matter of long administrative practice promotion to selection grade posts in the Indian Police Service has been based on merit and seniority has been taken into consideration only when merit of the candidates is otherwise equal and we are unable to accept the argument of Mr. N. C. Chatterjee that this procedure violates, in any way, the guarantee under Arts. 14 and 16 of the Constitution.

20. Their Lordships of the Hon'ble Supreme Court in **Excel Wear** Vs. **Union of India and others**, AIR 1979 Supreme Court 25 have held that the difference pointed out by Supreme Court in AIR 1963 SC 1047 between the doctrinaire approach to the problem of socialism and the pragmatic one is very apt and may enable the Courts to lean more and more in favour of nationalization and State ownership of an industry after the addition of the word 'Socialist' in the Preamble of the Constitution. But so long as the private ownership of an industry is recognised and governs an overwhelmingly large proportion of our economic structure, it is possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interests of another section of the public namely the private owners of the undertakings? Their Lordships have held as under:

"*24. We now proceed to deal with the rival contentions. But before we do so, we may make some general observations. Concept of socialism or a socialist state has undergone changes from time to time, from country to country and from thinkers to thinkers. But some basic concept still holds the field. In the case of Akadasi Padhan v. State of Orissa, 1963 Supp (2) SCR 691 : (AIR 1963 SC 1047) the question for consideration was whether a law creating a State monopoly is valid under the latter part of Art. 19 (6) which was introduced by the (First Amendment) Act, 1951. While considering that question, it was pointed out by Gajendragadkar J., as he then was, at page 704 (of SCR) : (at p. 1053 of AIR) :-*

"With the rise of the philosophy of Socialism, the doctrine of State ownership has been often discussed by political and economic thinkers. Broadly speaking, this discussion discloses a difference in approach. To the socialist, nationalisation or State ownership is a matter of principle and its justification is the general notion of social welfare. To the rationalist, nationalisation or State ownership is a matter of expediency dominated by considerations of economic efficiency and increased output of production. This latter view supported nationalisation only when it appeared clear that State ownership would be more efficient, more economical and more productive. The former approach was not very much influenced by these considerations, and treated it a matter of principle that all important and nation-building industries should come under State control. The first approach is doctrinaire, while the second is pragmatic. The first proceeds on the general ground that all national wealth and means of producing it should come under national control, whilst the second supports nationalisation only on grounds of efficiency and increased output."

The difference pointed out between the doctrinaire approach to the problem of socialism and the pragmatic one is very apt and may enable the courts to lean more and more in favour of nationalisation and State ownership of an industry after the addition of the word 'Socialist' in the Preamble of the Constitution. But so long as the private ownership of an industry is recognised and governs an overwhelmingly large proportion of our economic structure, is it possible to say that principles of socialism and social justice can be pushed to such an extreme so as to ignore completely or to a very large extent the interests of another section of the public namely the private owners of the undertakings? Most of the industries are owned by limited companies in which a number of shareholders, both big and small, holds the shares. There are creditors and depositors and various other persons connected with or having dealings with the undertaking. Does socialism go to the extent of not looking to the interests of all such persons? In a State owned undertaking the Government or the Government company is the owner. If they are compelled to close down, they, probably, may protect the labour by several other methods at their command, even, sometimes at the cost of the public exchequer. It may not be always advisable to do so but that is a different question. But in a private sector obviously the two matters involved in running it are not on the same footing. One part is the management of he business done by the owners or their representatives and the other is running the business for return to the owner not only for the purpose of meeting his livelihood or expenses but also for the purpose of the growth of the national economy by formation of more and more capital. Does it stand to reason that by such rigorous provisions like those contained in the impugned sections all these interests should be completely or substantially ignored? The questions posed are suggestive of the answers.

21. Their Lordships of the Hon'ble Supreme Court in **Minerva Mills Ltd. and others** Vs. **Union of India and others**, AIR 1980 Supreme Court 1789 have held that merely because the Directive Principles are non-justiciable, it does not follow that they are in any way subservient or inferior to the Fundamental Rights. The Directive Principles impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. Their Lordships have held as under:

> *"112. Now it is interesting to note that although fundamental' rights and directive principles appear in the Constitution as distinct entities, there was no such demarcation made between them during the period prior to the framing of the Constitution. If we may quote the words of Granville Austin in his book.*
>
> *Both types of rights had developed as a common demand, products of the national and social revolutions, of their almost inseparable intertwining, and of the character of Indian politics itself. They were both placed on the same pedestal and treated as falling within the game category compendiouly described as "fundamental Rights". The Sapru Committee in its constitutional proposals made in 1945, recommended that the declaration of fundamental rights in its wider sense was absolutely necessary and envisaged these rights as falling in two classes ; one justiciable and the other non-justiciable the former being enforceable in courts of law and the latter, not. The committee however, felt difficulty in dividing the fundamental rights into these two classes and, left the whole issue to be settled by the Constitution-making body with the observation that though the talk was difficult, it was by no means impossible. This suggestion of the Sapru Committee perhaps drew its inspiration from the Irish Constitution of 1937, which made a distinction between justiciable and non-justiciable rights and designated the former as Fundamental Rights and the latter as Directive Principles of Social Policy. Dr. Lauterpacht also made a similar distinction between justiciable and non-justiciable rights in his "international Bill of the Rights of Man". The substantial provisions of this Bill were in two parts; Part I dealt with personal or individual rights enforceable in courts of law while Part II set out social and economic rights incapable of or unsuitable for such enforcement. Sir B. N. Rau, who was the Constitutional Adviser to the government of India, was considerably impressed by these ideas and he suggested that the best way of giving effect to the objectives set out in the Objectives Resolution was to split up the objectives into Fundamental Rights and Fundamental Principles of State Policy, the former relating to personal and political rights enforceable in courts of law and the latter relating to social and economic rights and other matters, not so enforceable and proposed that the Ch. on fundamental rights may he split up into two parts; Part 'a' dealing with the latter kind of rights under the heading "fundamental Principles of Social Policy" and Part 'b' dealing with the former under the heading '"fundamental Rights". The Fundamental Rights Sub-Committee also recommended that "the list of fundamental rights should be prepared in two parts, the first part consisting of rights enforceable by appropriate legal process and the second consisting of directive principles of social policy". A week later, while moving for consideration, the Interim Report on Fundamental Rights, Sardar Vallabhbhai Patel said:*

This is a preliminary report or an interim report because the committee when it sat down to consider the question of fixing the fundamental rights and its incorporation into the Constitution, came to the conclusion that the fundamental rights should be divided into two parts the first part justiciable and the other non-justiciable. This position was reiterated by Sardar Vallabhbhai Patel when he said while presenting the Supplementary Report. There were two parts of the Report; one contained fundamental rights which were justiciable and the other part of the Report referred to fundamental rights which were not justiciable but were directives. . It will, therefore, be seen that from the point of view of importance and significance, no distinction was drawn between justiciable and non-justiciable rights and both were treated as forming part of the rubric of Fundamental Rights, the only difference being that whereas the former were to be enforceable in courts of law, the latter were not to be so enforceable. This proposal of dividing the fundamental rights into two parts, one part justiciable and the other non-justiciable, was however not easy of adoption because it was a difficult task to decide in which category a particular fundamental right should be included. The difficulty may be illustrated by pointing out that at one time the right to primary education was included in the draft list of fundamental rights, while the equality clause figured in the draft list of fundamental principles of social policy. But ultimately a division of the fundamental rights into justiciable and non-justiciable rights was agreed upon by the Constituent Assembly and the former were designated as "fundamental Rights" and the latter as "directive Principles of State Policy". It has sometimes been said that the fundamental rights deal with negative obligations of the State not to encroach on individual freedom, while the directive principles impose positive obligations on the State to take certain kind of action. But, I find it difficult to subscribe to this proposition because, though the latter part may he true that the directive principles require positive action to be taken by the State, it is not wholly correct to say that the fundamental rights impose only negative obligations on the State. There are a few fundamental rights which have also a positive content and that has been, to some extent, unfolded by the recent decisions of this court in Hussainara Khatoon (I) v. State of Bihar, Madhav Hayawadanrao Hoskot v. State of Maharashtra and Sunil Batra (I) v. Delhi Administration. There are new dimensions of the fundamental rights which are being opened up by this court and the entire jurisprudence of fundamental rights is in a stage of resurgent evolution. Moreover, there are three Articles, namely, Article 15 (2) , Article 17 and Article 23 within the category of fundamental rights which are designed to protect the individual against the action of other private citizens and seen to impole positive obligations on the State to ensure this protection to the individual. I would not, therefore, limit the potential of the fundamental rights by subscribing to the theory that they are merely negative obligations requiring the State to abstain as distinct from taking positive action. The only distinguishing feature, to my mind, between fundamental rights and directive principles is that whereas the former are enforceable in a court of law, the latter, are not. And the reason for this is obvious. It has been expressed succinctly by the Planning Commission in the following words :

The non-justifiability clause only provides that the infant State shall not be immediately called upon to account for not fulfilling the new

obligations laid upon it. A State just awakened to freedom with its many pre-occupations might be crushed under the burden unless it was free to decide the order, the time, the place and the mode of fulfilling them. The social and economic rights and other matters dealt with in the directive principles are by their very nature incapable of judicial enforcement and moreover, the implementation of many of those rights would depend on the state of economic development in the country, the availability of necessary finances and the government's assessment of priority of objectives and values and that is why they are made non-justiciable. But merely because the directive principles are non-justiciable, it docs not follow that they are in any way subservient or inferior to the fundamental rights.

113. The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the socio-economic revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renascence, says Granville Austin,

> *The core of the commitment to the social revolution lies. . in the fundamental rights and the directive principles of State policy. Those are the conscience of the Constitution and, according to Granville Austin, they are designed to be the chief instruments in bringing about the great reforms of the socio-economic revolution and realising the constitutional goals of social, economic and political justice for all. The fundamental rights undoubtedly provide for political justice by conferring various freedoms on the individual, and also make a significant contribution to the fostering of the social revolution by aiming at a society which will be egalitarian in texture and where the rights of minority groups will be protected. But it is in the directive principles that we find the clearest statement of the socioeconomic revolution. The directive principles aim at making the Indian masses free in the positive sense, free from the passivity engendered by centuries of coercion by society and by nature, free from the abject physical conditions that had prevented them from fulfilling their best selves. The fundamental rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions in which there can be social and economic justice to everyone, is the theme of the directive principles. It is the directive principles which nourish the roots of our democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain merely a political democracy but also becomes social and economic democracy with fundamental rights available to all irrespective of their power, position or wealth. The dynamic provisions of the directive principles fertilise the static provisions of the fundamental rights. The object of the fundamental rights is to protect individual liberty, but can individual liberty be considered in isolation from the socio-economic structure in which it is to operate. There is a real connection between individual liberty and the shape and form of the social and economic structure of the society. Can there be any individual liberty at all for the large masses of people who are suffering from want and privation and who are cheated out of their individual rights by the exploitative economic system? Would their individual liberty not come in conflict with the liberty*

of the socially and economically more powerful class and in the process, get mutilated or destroyed? It is axiomatic that the real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few which is in conflict with the liberty of the many. The directive principles therefore) impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all, so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country. It will thus be seen that the directive principles enjoy a very high place in the constitutional scheme and it is only in the framework of the socio-economic structure envisaged in the directive principles that the fundamental rights are intended to operate, for it is only then they can become meaningful and significant for the millions of our poor and deprived people who do not have even the bare necessities of life and who are living below the poverty level.

117. Now on this question Article 37 is emphatic and makes the point in no uncertain terms. It says that the directive principles are "nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws". There could not have been more explicit language used by the Constitution-makers to make the directive principles binding on the State and there can be no doubt that the State is under a constitutional obligation to carry out this mandate contained in Article 37. In fact, non-compliance with the directive principles would be unconstitutional on the part of the Stale and it would not only constitute a breach of faith with the people who imposed this constitutional obligation on the State but it would also render a vital part of the Constitution meaningless and futile. Now it is significant to note that for the purpose of the directive principles, the "state" has the same meaning as given to it under Article 13 for the purpose of the fundamental rights. This would mean that the same State which is injected from taking any action in infringement of the fundamental rights is told in no uncertain terms that it must regard the directive principles as fundamental in the governance of the country and is positively mandated to apply them in making laws. This gives rise to a paradoxical situation and its implications are far-reaching. The State is on the one hand, prohibited by the constitutional injunction in Article 13 from making any law or taking any executive action which would infringe any fundamental right and at the same time it is directed by the constitutional mandate in Article 37 to apply the directive principles in the governance of the country and to make laws for giving effect to the directive principles. Both are constitutional obligations of the State and the question is, as to which must prevail when there is a conflict between the two. When the State makes a law for giving effect to a directive principle, it is carrying out a constitutional obligation under Article 37 and if it were to be said that the State cannot make such a law because it comes into conflict with a fundamental right, it can only be on the basis that fundamental rights stand on a higher pedestal and have precedence over directive principles. But, as we have pointed out above, it is not correct to say that under our constitutional scheme, fundamental rights

are superior to directive principles or that directive principles must yield to fundamental rights. Both are in fact equally fundamental and the courts have therefore in recent times tried to harmonise them by importing the directive principles in the construction of the fundamental rights. It has been laid down in recent decisions of this court that for the purpose of determining the reasonableness of the restrictions imposed on fundamental rights, the court may legitimately take into account the directive principles and where executive action is taken or legislation enacted for the purpose of giving effect to a directive principle, the restriction imposed by it on a fundamental right may be presumed to be reasonable. I do not propose to burden this opinion with reference to all the decided cases where this principle has been followed by the court, but I may refer only to one decision which, I believe, is the latest on the point, namely, Pathumma v. State of Kerala, where Fazal Ali,j. summarised the law in the following words :

One of the tests laid down by this court is that, in judging the reasonableness of the restrictions imposed by clause (5) of Article 19, the court has to bear in mind the directive principles of State policy. So also in the State of Bihar v. Kameshwar Singh, this court relied upon the directive principle contained in Article 39 in arriving at its decision that the purpose for which the Bihar Zimindari Abolition legislation had been passed was a public purpose. The principle accepted by this court was that if a purpose is one falling within the directive principles, it would definitely be a public purpose. It may also be pointed out that in a recent decision given by this court in Kasturi Lal Lakshmi Reddy v. State of J. and K. it has been held that every executive action of the government, whether in pursuance of law or otherwise, must be reasonable and informed with public interest and the yardstick for determining both reasonableness and public interest is to be found in the directive principles and therefore, if any executive action is taken by the government for giving effect to a directive principle, it would prima facie be reasonable and in public interest. It will, therefore, be seen that if a law is enacted for the purpose of giving effect to a directive principle and it imposes a restriction on a fundamental right, it would be difficult to condemn such restriction as unreasonable or not in public interest. So also where a law is enacted for giving effect to a directive principle in furtherance of the constitutional goal of social and economic justice it may conflict with a formalistic and doctrinaire view of equality before the law, but it would almost always conform to the principle of equality before the law in its total magnitude and dimension, because the equality clause in the Constitution docs not speak of mere formal equality before the law but embodies the concept of real and substantive equality which strikes at inequalities arising on account of vast social and economic differentials and is consequently an essential ingredient of social and economic justice. The dynamic principle of egalitarianism fertilises the concept of social and economic justice; it is one of its essential elements and there can be no real social and economic justice where there is a breach of the egalitarian principle. If, therefore, there is a law enacted by the legislature which is really and genuinely for giving effect to a directive principle with a view to promoting social and economic justice, it would be difficult to say that such law violates the

principle of egalitarianism and is not in accord with the principle of equality before the law as understood not in its strict and formalistic sense, but in its dynamic and activist magnitude. In the circumstances, the court would not be unjustified in making the presumption that a law enacted really and genuinely for giving effect to a directive principle in furtherance of the cause of social and economic justice, would not infringe any fundamental right under Article 14 or Article 19. Mr. G. H. Alexandrowick, an eminent jurist, in fact, says: "legislation implementing Part IV must be regarded as permitted restrictions on Part III". Dr. Ambedkar, one of the chief architects of the Constitution, also made it clear while intervening during the discussion on the Constitution (First Amendment) Bill in the Lok Sabha on 18/05/1951, that in his view,

> *So far as the doctrine of implied powers is concerned, there is ample authority in the Constitution itself, namely, in the directive principles "to permit Parliament to make legislation, although it will not be specifically covered by the provisions contained in the part on fundamental rights". If this be the correct interpretation of the constitutional provisions, as I think it is, the amended Article 31-G does no more than codify the existing position under the constitutional scheme by providing immunity to a law enacted really and genuinely for giving effect to a directive principle, so that needlessly futile and time-consuming controversy whether such law contravenes Article 14 or Article 19 is eliminated. The amended Article 31-C cannot in the circumstances be regarded as violative of the basic structure of the Constitution.*
>
> *118. But I may in the alternative, for the purpose of argument, assume that there may be a few cases where it may be found by the court, perhaps on a narrow and doctrinaire view of the scope and applicability of a fundamental right as in Karimbil Kunhikoman v. State of Kerala, where a law awarding compensation at a lower rate to holders of larger blocks of land and at higher rate to holders of smaller blocks of land was struck down by this court' as violative of the equality clause, that a law enacted really and genuinely for giving effect to a directive principle is violative of a fundamental right under Article 14 or Article 19. Would such a law enacted in discharge of the constitutional obligation laid upon the State under Article 37 be invalid, because it infringes a fundamental right? If the court takes the view that it is invalid, would it not be placing fundamental rights above directive principles, a position not supported at all by the history of their enactment as also by the constitutional scheme already discussed by me. The two constitutional obligations, one in regard to fundamental rights and the other in regard to directive principles, are of equal strength and merit and there is no reason why, in case of conflict, the former should be given precedence over the latter. I have already pointed out that whether or not a particular mandate of the Constitution is justiciable has no bearing at all on its importance and significance and justiciability by itself can never be a ground for placing one constitutional mandate on a higher pedestal than the other. The effect of giving greater weightage to the constitutional mandate in regard to fundamental rights would be to relegate the directive principles to a secondary position and*

emasculate the constitutional command that the directive principles shall be fundamental in the governance of the country and it shall be the duty of the State to apply them in making laws. It would amount to refusal to give effect to the words "fundamental in the governance of the country" and a constitutional command which has been declared by the Constitution to be fundamental would be rendered non-fundamental. The result would be that a positive mandate of the Constitution commanding the State to make a law would be defeated by a negative constitutional obligation not to encroach upon a fundamental right and the law made by the legislature pursuant to a positive constitutional command would be delegitimised and declared unconstitutional. This plainly would be contrary to the constitutional scheme because, as already pointed out by me, the Constitution does not accord a higher place to the constitutional obligation in regard to fundamental rights over the constitutional obligation in regard to directive principles and does not say that the implementation of the directive principles shall only be within the permissible limits laid down in the Ch. on fundamental rights. The main thrust of the argument of Mr. Palkhivala was that by reason of the amendment of Article 31-G, the harmony and balance between fundamental rights and directive principles are disturbed, because fundamental rights which had, prior to the amendment, precedence over directive principles are now, as a result of the amendment, made subservient to directive principles. Mr. Palkhivala picturesquely described the position emerging as a result of the amendment by saying that the Constitution is now made to stand on its head instead of its legs. But in my view the entire premise on which this argument of Mr. Palkhivala is based is fallacious because it is not correct to say, and I have in the preceding portions of this opinion, given cogent reasons for this view, that prior to the amendments fundamental rights had a superior or higher position in the constitutional scheme than directive principles and there is accordingly no question at all of any subversion of the constitutional structure by the amendment. There can be no doubt that the intention of the Constitution-makers was that the fundamental rights should operate within the socio-economic structure or a wider continuum envisaged by the directive principles, for then only would the fundamental rights become exercisable by all and a proper balance and harmony between fundamental rights and directive principles secured. The Constitution-makers therefore never contemplated that a conflict would arise between the constitutional obligation in regard to fundamental rights and the constitutional mandates in regard to directive principles. But if a conflict does arise between these two constitutional mandates of equal fundamental character, how is the conflict to be resolved? The Constitution did not provide any answer because such a situation was not anticipated by the Constitution-makers and this problem had therefore to be solved by Parliament and some modus operandi had to be evolved in order to creminate the possibility of conflict howsoever remote it might be. The way wan shown in no uncertain terms by Jawaharlal Nehru when he said in the Lok Sabha in the course of discussion on the Constitution (First Amendment) Bill:

The directive principles of State policy represent a dynamic move towards a certain objective. The fundamental rights represent something static, to preserve certain rights which exist. Both again are right. But somehow and sometime it might so happen that that dynamic movement and that static standstill do not quite fit into each other.

The dynamic movement towards a certain objective necessarily means certain changes taking place : that is the essence of movement. Now it may be that in the process of dynamic movement certain existing relationships are altered, varied or affected. In fact, they are meant to affect those settled relationships and yet if you come back to the fundamental rights they are meant to preserve, not indirectly, certain settled relationships. There is a certain conflict in the two approaches, not inherently, because that was not meant, I am quite sure. But there is that slight difficulty and naturally when the courts of the land have to consider these matters they have to lay stress more on the fundamental rights than on the directive principles. The result is that the whole purpose behind the Constitution, which was meant to be a dynamic Constitution leading to a certain goal step by step, is somewhat hampered and hindered by the static element being emphasised a little more than the dynamic element. . If in the protection of individual liberty you protect also individual or group inequality, then you come into conflict with that directive principle which wants, according to your own Constitution, a gradual advance, or let us put it in another way, not so gradual but more rapid advance) whenever possible to a State where there is less and less inequality and more and more equality. If any kind of an appeal to individual liberty and freedom is construed to mean as an appeal to the continuation of the existing inequality, then you get into difficulties. Then you become static, unprogressive and cannot change and you cannot realize the ideal of an egalitarian society which I hope most of us aim at. Parliament took the view that the constitutional obligation in regard to directive principles should have precedence over the constitutional obligation in regard to the fundamental rights in Articles 14 and 19, because fundamental rights though precious and valuable for maintaining the democratic way of life, have absolutely no meaning for the poor, downtrodden and economically backward classes of people who unfortunately constitute the bulls of the people of India and the only way in which fundamental rights can be made meaningful for them is by implementing the directive principles, for the directive principles are intended to bring about a socioeconomic revolution and to create a new socio-economic order where there will be social and economic justice for all and everyone, not only a fortunate few but the teeming millions of India, would be able to participate in the fruits of freedom and development and exercise the fundamental rights. Parliament therefore amended Article 31-C with a view to providing that in case of conflict directive principles shall have precedence over the fundamental rights in Articles 14 and 19 and the latter shall yield place to the former. The positive constitutional command to make laws for giving effect to the directive principles shall prevail over the negative constitutional obligation not to encroach

on the fundamental rights embodied in Articles 14 and 19. Parliament in making this amendment was moved by the noble philosophy eloquently expressed in highly inspiring and evocative words, full of passion and feeling, by Chandrachud, J. (as he then was) in his judgment in Kesvananda Bharati case at page 991 of the Report. I may quote here what Chandrachud, J. (as he then was) said on that occasion, for it sets out admirably the philosophy which inspired Parliament in enacting the amendment in Article 31-C. The learned Judge said:

I have stated in the earlier part of my judgment that tin' Constitution accords a place of pride to fundamental rights and a place of permanence to the directive principles. I stand by what I have said. The preamble of our Constitution recites that the aim of the Constitution is to constitute India into a sovereign democratic republic and to secure to "all its citizens", justice social, economic and political liberty and equality. Fundamental rights which are conferred and guaranteed by Part III of the Constitution undoubtedly constitute the ark of the Constitution and without them a man's reach will not exceed his grasp. But it cannot be overstressed that, the directive principles of State policy are fundamental in the governance of the country. What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal processes but that distinction does not bear on their relative importance. An equal right of men and women to an adequate means of livelihood ; the right to obtain humane conditions of work ensuring a decent standard of life and full enjoyment of leisure ; and raising the level of health and nutrition are not matters for compliance with the writ of a court, As I look at the provisions of Parts III and IV, I feel no doubt that the basic object of conferring freedoms on individuals, is the ultimate achievement of the ideals set out in Part IV. A circumspect use of the freedoms guaranteed by Part III is bound to subserve the common good but voluntary submission to restraints is a philosopher's dream. Therefore, Article 37 enjoins the State to apply the directive principles in making laws. The freedom of a few have then to be abridged in order to ensure the freedom of all. It is in this sense that Parts III and IV, as said by Granville Austin together constitute "the conscience of the Constitution". The nation stands today at the crossroads of history and exchanging the time honoured place of the phrase, may I say that the directive principles of State policy should not be permitted to become "a mere rope of sand". If the State fails to create conditions in which the fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish. In order, therefore, to preserve their freedom, the privileged few must part with a portion of it. This is precisely what Parliament achieved by amending Article 31-C. Parliament made the amendment in Article 31-C because it realised that "if the State fails to create conditions in which the fundamental freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and then all freedoms will vanish" and "in order,

therefore, to preserve their freedom, the privileged few must part with a portion of it". I find it difficult to understand how it can at all be said that the basic structure of the Constitution is affected when for evolving a modus vivendi for resolving a possible remote conflict between two constitutional mandates of equally fundamental character, Parliament decides by way of amendment of Article 31-G that in case of such conflict the constitutional mandate in regard to directive principles shall prevail over the constitutional mandate in regard to the fundamental rights under Articles 14 and 19. The amendment in Article 31-G far from damaging the basic structure of the Constitution strengthens and re-enforces it by giving fundamental importance to the rights of the members of the community as against the rights of a few individuals and furthering the objective of the Constitution to build an egalitarian social order where there will be social and economic justice for all, everyone including the low visibility areas of humanity in the country will be able io exercise fundamental rights and the dignity of the individual and the worth of the human person which are cherished values will not remain merely the exclusive privileges of a few but become a living realityfor the many. Additionally, this question may also be looked at from another point of view so far as the protection against violation of Article 14 is concern"d. The principle of egalitarianism. , as I said before, is an essential element of social and economic justice and, therefore, where a law is enacted for giving effect to a directive principle with a view to promoting social and economic justice, it would not run counter to the egalitarian principle arid would not therefore be violative of the basic structure, even if it infringes equality before the law in its narrow and formalistic sense. No law which is really and genuinely for giving effect to a directive principle can be inconsistent with the egalitarian principle and therefore the protection granted to it under the amended Article 31-C against violation of Article 14 cannot have the effect of damaging the basic structure. I do not therefore see how any violation of the basic structure is involved in the amendment of Article 31-C. In fact, once we accept the proposition laid down by the majority decision in Kesavananda Bharati case that the unamended Article 31-G was constitutionally valid, it could only be on the basis that it did not damage or destroy the basic structure of the Constitution and moreover in the Order made in Wawan Rao case on 9/05/1980 this court expressly held that the unamended Article 31-C "does not damage any of the basic or essential features of the Constitution or its basic structure", and if that be so, it is difficult to appreciate how the amended Article 31-C can be said to be violative of the basic structure. If the exclusion of the fundamental rights embodied in Articles 14 and 19 could be legitimately made for giving effect to the directive principles set out in clauses (b) and (c) of Article 39 without affecting the basic structure, I fail to see why these fundamental rights cannot be excluded for giving effect to the other directive principles. If the constitutional obligation in regard to the directive principles set out in clauses (b) and (c) of Article 39 could be given precedence over the constitutional obligation in regard to the fundamental rights under Articles 14 and 19, there is no reason in principle why such

precedence cannot be given to the constitutional obligation in regard" to the other directive principles which stand on the same footing. It would, to my mind, be incongruous to hold the amended Article 31-C invalid when the unamended Article 31-G has been held to be valid by the majority decision in Kesavananda Bharati case and by the Order made on 9/05/1980 in Woman Rao case.

123. I would therefore declare S. 55 of the Constitution (Forty second Amendment) Act, 1976 which inserted Ss. (4) and (5) in Article 368 as unconstitutional and void on the ground that it damages the basic structure of the Constitution and goes beyond the amending power of Parliament. But so far as S. 4 of the Constitution (Forty-second Amendment) Act, 1976 is concerned, I hold that, on the interpretation placed on the amended Article 31-G by me, it does not damage or destroy the basic structure of the Constitution and is within the amending power of Parliament and I would therefore declare the amended Article 31-G to be constitutional and valid.

22. Their Lordships of the Hon'ble Supreme Court in **S.P. Gupta** Vs. **President of India and others** , AIR 1982 Supreme Court 149 have held that the judiciary has therefore a socio economic destination and a creative function. It has to use the words of Glanville Austin, to become an arm of the socio-economic revolution and perform an active role calculated to bring social justice within the reach of the common man. Their Lordships have held as under:

"26. Having disposed of the preliminary objection in regard to locus standi of the petitioners, we may now proceed to consider the questions which arise for determination in these Writ Petition.The questions are of great constitutional significance affecting the principle of independence of the judiciary which is a basic feature of the Constitution and we would therefore prefer to begin the discussion by making a few prefatory remarks highlighting what the true function of the judiciary should be in a country like India which is marching along the road to social justice with the banner of democracy and the rule of law, for the principle of independence of the judiciary is not an abstract conception but it is a living faith which must derive its inspiration from the constitutional charter and its nourishment and sustenance from the constitutional values.It is necessary for every Judge to remember constantly and continually that our Constitution is not a non - aligned national charter.It is a document of social revolution which casts an obligation on every instrumentality including the judiciary, which is a separate but equal branch of the State, to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all.The judiciary has therefore a socio economic destination and a creative function.It has to use the words of Glanville Austin, to become an arm of the socio - economic revolution and perform an active role calculated to bring social justice within the reach of the common man.It cannot remain content to act merely as an umpire but it must be functionally involved in the goal of socio - economic justice.The British concept of justicing, which to quote Justice Krishna iyer, is still "bugged by the heirs of our colonial legal culture and shared by many on the bench" is that "the business of a Judge is to hold his tongue until the last possible moment and to try to be as wise as he is paid to look" and in the same strain are the words quoted

by Professor Gordon Reid from 'a memorandum to the Victorian government by Irvin, C.J.in 1923 where the judicial function was idealized in the following words :

The duty of His Majesty's Judges is to hear and determine issues of fact and of law arising between the king and the subject or between a subject and a subject presented in a form enabling judgment to be passed upon them, and when passed, to be enforced by a process of law.There begins and ends the function of the judiciary.Now this approach to the judicial function may be alright for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice, between chronic unequals.Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach.The judiciary cannot remain a mere bystander or spectator but it must become an active participant in the judicial process ready to use law in the service of social justice through a proactive goal - oriented approach.But this cannot be achieved unless we have judicial cadres who share the fighting faith of the constitution and who are imbued with the constitutional values.The necessity of a judiciary which is in tune with the social philosophy of the constitution has nowhere been better emphasised than in the words of justice Krishna Iyer which we quote:

Appointment of Judges is a serious process where judicial expertise, legal learning, life's experience and high integrity are components, but above all are two indispensables - social philosophy in active unison with the socialistic articles of the Constitution, and second, but equally important, built - in resistance to pushes and pressures by class interests, private prejudices, government threats and blandishments, party loyalties and contrary economic and politicial ideologies projecting into pronouncements.Justice Krishna lyer goes on to say in his inimitable style :

Justice Cardozo approvingly quoted President Theodore Roosevelt's stress on the social philosophy of the Judges, which shakes and shapes the course of a nation and, therefore, the choice of Judges for the higher courts which makes and declares the law of the land, must be in tune with the social philosophy of the Constitution.Not mastery of the law alone, but social vision and creative craftsmanship are important inputs in successful justicing.What is necessary is to have Judges who are prepared to fashion new tools, forge new methods, innovate new strategies and evolve a new jurisprudence, who are judicial statesmen with a social vision and a creative faculty and who have, above all, a deep sense of commitment to the Constitution with an activist approach and obligation for accountability, not to any party in power nor to the opposition nor to the classes which are vociferous but to the half - hungry millions of India who are continually denied their basic human rights.We need Judges who are alive to the socio - economic realities of indian life, who are anxious to wipe every tear from every eye, who have faith in the constitutional values and who are ready to use law as an instrument for achieving the constitutional objectives.This has to be the broad blueprint

of the appointment project for the higher echelons of judicial service.It is only if appointments of Judges are made with these considerations weighing predominantly with the appointing authority that we can have a truly independent judiciary committed only to the Constitution and to the people of India.The concept of independence of the judiciary is a noble concept which' inspires the constitutional scheme and constitutes the - foundation on which rests the edifice of our democratic polity.If there is one principle which runs through the entire fabric of the Constitution, it is the principle of the rule of law and under the Constitution, it is the judiciary which is entrusted with the task of keeping every organ of the state within the limits of the law and thereby making the rule of law meaningful and effective.It is to aid the judiciary in this task that the power of judicial review has been conferred upon the judiciary and it is by exercising this power which constitutes one of the most potent weapons in armory of the law, that the judiciary seeks to protect the citizen against violation of his constitutional or legal rights or misuse or abuse of power by the State or its officers.The judiciary stands between the citizen and the State as a bulwark against executive excesses and misuse or abuse of power by the executive and therefore it is absolutely essential that the judiciary must be free from executive pressure or influence and this has been secured by the Constitution - makers by making elaborate provisions in the Constitution to which detailed reference has been made in the judgments in Sankalchand Sheth case.But it is necessary to remind ourselves that the concept of independence of the judiciary is not limited only to independence from executive pressure or influence but it is a much wider concept which takes within its sweep independence from many other pressures and prejudices.It has many dimensions, namely, fearlessness of other power centres, economic or political, and freedom from prejudices acquired and nourished by the class to which the Judges belong.If we may again quote the eloquent words of Justice Krishna Iyer :

> *Independence of the Judiciary is not genuflexion ; nor is it opposition to every proposition of government.It is neither Judiciary made to opposition measure nor government's pleasure.The tycoon, the communalist, the parochialist, the faddist, the extremist and radical reactionary lying coiled up and subconsciously shaping judicial mentations are menaces to judicial independence when they are at variance with Parts III and IV of the Paramount Parchment.Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says, "be you ever so high, the law is above you." This is the principle of independence of the judiciary which is vital for the establishment of real participatory.democracy, maintenance of the rule of law as a dynamic concept and delivery of social justice to the vulnerable S.of the community.It is this principle of independence of the judiciary which we must keep in mind while interpreting the relevant provisions of the constitution.*

23. Their Lordships of the Hon'ble Supreme Court in **D.S. Nakara and others** Vs. **Union of India**, AIR 1983 Supreme Court 130 have held that Article 41 obligates the State within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to provide assistance in cases of

unemployment, old age, sickness and disablement, and in other cases of undeserved want. Article 43(3) requires the State to endeavour to secure amongst other things full enjoyment of leisure and social and cultural opportunities. Their Lordships have held as under:

> *"32. Having succinctly focussed our attention on the conspectus of elements and incidents of pension the main question may now be tackled. But, the approach of Court while considering such measure, is of paramount importance. Since the advent of the Constitution, the State action must be directed towards attaining the goals set out in Part IV of the Constitution which, when achieved, would permit us to claim that we have set up a welfare State. Article 38 (1) enjoins the State to strive to promote welfare of the people by securing and protecting as effective as it may a social order in which justice social, economic and political shall inform all institutions of the national life. In particular the State shall strive to minimise the inequalities in income and endeavour to eliminate inequalities in status, facilities and opportunities. Article 39 (d) enjoins a duty to see that there is equal pay for equal work for both men and women and this directive should be understood and interpreted in the light of the judgment of this Court in Randhir Singh v. Union of India, (1982) 1 SCC 618 : (AIR 1982 SC 879). Revealing the scope and content of this facet of equality, Chinnappa Reddy, J. speaking for the Court observed as under (para 1) :*
>
> > *"Now, thanks to the rising social and political consciousness and the expectations roused as a consequence and the forward looking posture of this Court, the underprivileged also are clamouring for their rights and are seeking the intervention of the Court with touching faith and confidence in the Court. The Judges of the Court have a duty to redeem their constitutional oath and do justice no less to the pavement dweller than to the guest of the Five Star hotel."*
> >
> > *Proceeding further, this Court observed that where all relevant considerations are the same, persons holding identical posts may not be treated differently in the matter of their pay merely because they belong to different departments. If that can't be done when they are in service, can that be done during their retirement ? Expanding this principle, one can confidently say that if pensioners form a class, their computation cannot be by different formula affording unequal treatment solely on the ground that some retired earlier and some retired later. Article 39 (e) requires the State to secure that the health and strength of workers, men and women, and children of tender age are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength.Article 41 obligates the state within the limits of its economic capacity and development, to make effective provision for securing the right to work, to education and to provide assistance in cases of unemployment, old age, sickness and disablement,and in other cases of underserved want.Article 43 (3) requires the State to endeavour to secure amongst other things full enjoyment of leisure and social and cultural opportunities.*
> >
> > *33. Recall at this stage the Preamble, the floodlight illuminating the path to be pursued by the State to set up a Sovereign Socialist Secular Democratic Republic. Expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-Second Amendment) Act, 1976. In the Objects and Reasons for amendment amongst other things, ushering in*

of socio-economic revolution was promised. The clarion call may be extracted:

"The question of amending the Constitution for removing the difficulties which have arisen in achieving the objective of socio-economic revolution, which would end poverty and ignorance and disease and inequality of opportunity, has been engaging the active attention of Government and the public for some time... ... ..

It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism... .. .. ..to make the directive principles more comprehensive.. ... ..."

What does a Socialist Republic imply? Socialism is a much misunderstood word. Values determine contemporary socialism pure and simple. But it is not necessary at this stage to go into all its ramifications. The principal aim of a socialist State is to eliminate inequality in income and status and standards of life. The basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave. This amongst others on economic side envisaged economic equality and equitable distribution of income. This is a blend of Marxism and Gandhism leaning heavily towards Gandhian socialism. During the formative years, socialism aims at providing all opportunities for pursuing the educational activity. For want of wherewithal or financial equipment the opportunity to be fully educated shall not be denied. Ordinarily, therefore, a socialist State provides for free education from primary to Ph. D. but the pursuit must be by those who have the necessary intelligent quotient and not as in our society where a brainy young man coming from a poor family will not be able to prosecute the education for want of wherewithal while the ill equipped son or daughter of a well to do father will enter the portals of higher education and contribute to national wastage. After the education is completed, socialism aims at equality in pursuit of excellence in the chosen avocation without let or hindrance of caste, colour, sex or religion and with full opportunity to reach the top not thwarted by any considerations of status, social or otherwise. But even here the less equipped person shall be assured a decent minimum standard of life and exploitation in any form shall be eschewed. There will be equitable distribution of national cake and the worst off shall be treated in such a manner as to push them up the ladder. Then comes the old age in the life of everyone, be he a monarch or a mahatma, a worker or a pariah. The old age overtakes each one, death being the fulfilment of life providing freedom. from bondage. But here socialism aims at providing an economic security to those who have rendered unto society what they were capable of doing when they were fully equipped with their mental and physical prowess. In the fall of life the State shall ensure to the citizens a reasonably decent standard of life, medical aid, freedom from want, freedom from fear and the enjoyable leisure, relieving the boredom and the humility of dependence in old age. This is what Article 41 aims when it enjoins the State to secure public assistance in old age, sickness and disablement. It was such a socialist State which the Preamble directs the centres of power Legislative, Executive and Judiciary to strive to set up. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society is a long march but during this journey to the

fulfilment of goal every State action (illegible) taken must be directed, and must be so interpreted, as to take the society one step towards the goal.

24. Their Lordships of the Hon'ble Supreme Court in **Sanjeev Coke Manufacturing Company** Vs. **M/s. Bharat Coking Coal Ltd. And another,** AIR 1983 Supreme Court 239 have held that the broad egalitarian principle of social and economic justice for all was implicit in every Directive Principle and, therefore, a law designed to promote a Directive Principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and the desirable constitutional goal of social and economic justice for all. Their Lordships have held as under:

> *"16. While we broadly agree with much that has been said by Bhagwati J. in the extracts above quoted, we do not think that those observations really advance, Mr. Sen's contention. To accept the submission of Shri Sen that a law founded on discrimination is not entitled to the protection of Article 31-C, as such a law can never be said to be to further the directive principle affirmed in Article 39 (b), would indeed be, to use a hackneyed phrase, to put the cart before the horse. If the law made to further the directive principle is necessarily non-discriminatory or is based on a reasonable classification, then such law does not need any protection such as that afforded by Art. 31-C. Such law would be valid on its own strength, with no aid from Art. 31-C. To make it 2 condition precedent that a law seeking the haven of Art. 31-C must be non-discriminatory or based on reasonable classification, is to make Article 31-C meaningless. If Article 14 is not offended, no one need give any immunity from an attack based on Art. 14. Bhagwati J. did not say anything to the contrary. On the other hand, it appears to us, he was, at great pains to point out that the broad egalitarian principle of social and economic justice for all was implicit in every Directive Principle and, therefore, a law designed to promote a Directive Principle, even if it came into conflict with the formalistic and doctrinaire view of equality before the law, would most certainly advance the broader egalitarian principle and the desirable constitutional goal of social and economic justice for all. If the law was aimed. at the broader egalitarianism of the Directive Principles, Article 31-C protected the law from needless, unending and rancorous debate on the question whether the law contravened Article 14's concept of equality before the law. That is how we understand Bhagwati J.'s observations. Never for a moment did Bhagwati, J. let in by another door the very controversy which was shut out by Article 31-C. Of course, the law seeking the immunity afforded by Art. 31-C must be a law directing the policy of the State towards securing a Directive Principle. Here, we are content to use the very words of Article 31-C. While we agree with Bhagwati, J. that the object of the law must be to give effect to the Directive Principle and that the connection with the Directive Principle must not be 'some remote or tenuous connection', we deliberately refrain from the use of the words 'real and substantial', 'dominant', 'basically and essentially necessary' and 'closely and integrally connected', lest anyone chase after the meaning of these expressions, forgetting for the moment the words of the statute, as happened once when the words 'substantial and compelling reasons' were used in connection with appeals against orders of acquittal and a whole body of literature grew up on what were 'substantial and compelling reasons'. As We have already said, we agree with much that has been said by Bhagwati J. and what we have now*

said about the qualifying words is only to caution ourselves against adjectives getting the better of the noun. Adjectives are attractive forensic aids but in matters of interpretation they are diverting intruders. These observations have the full concurrence of Bhagwati, J."

25. Their Lordships of the Hon'ble Supreme Court in **Atam Prakash** Vs. **State of Haryana and others** (1986) 2 Supreme Court Cases 249 have held that the implication of introduction of the word 'socialist' into the Preamble of the Constitution is clearly to set up a vibrant throbbing socialist welfare society". Court must strive to give such an interpretation as will promote the march and progress towards a Socialistic Democratic State. Their Lordships have held as under:

"12. A scrutiny of the list of persons in whose favour the right of pre-emption is vested under S.. 15 reveals certain glaring facts which appear to detract from the theory of preservation of the integrity of the family and the theory of agnatic fight of succession. First we notice that neither the father nor the mother, figures in the list though the father's brother does. The son's daughter and the daughter's daughter do not appear though the son's son and the daughter's son do.. The sister and the sister's son are excluded though the brother and the brother's son are included. Thus relatives of the same degree are excluded either because they are women or because they are related through women. It is not as if women and those related through women are altogether excluded because the daughter and daughter's son are included. If the daughter is to be treated on a par with the son. and the daughter's son is treated on a par with the son's son it does not appear logical why the father's son (brother) should be included and not the father's daughter (sister). These are but a few of the intrinsic contradictions that appear in the list of relatives mentioned in S. 15 as entitled to the right of pre-emption. It is ununderstandable why a son's daughter, a daughter's daughter, a sister or a sister's son should have no right of pre-emption whereas a father's brother's son has that right. As S. 15 stands, if the sole owner of a property sells it to his own father, mother, sister, sister's son, daughter's daughter or son's daughter, the sale can be defeated by the vendor's father's brother's son claiming a right of pre-emption.

26. Their Lordshisps of the Hon'ble Supreme Court in ***Sodan Singh and others*** Vs. **New Delhi Municipal Committee and others** (1989) 4 Supreme Court Cases 155 have held that though in view of the inclusion of the word "socialist" in the Preamble of the Constitution by the 42nd Amendment greater concern must be shown to improve the condition of the poor population in the country, and every effort should be made to allow them as much benefit as may be possible, but that by itself cannot remedy all the problems arising from poverty. Even the Constitution as it stood originally was committed to economic justice and welfare of the needy, but for that reason either then or now the other provisions of the Constitution and the laws cannot be ignored. Their Lordships have held as under:

"22. On behalf of some of the petitioners it was contended that in view of the inclusion of the word "socialist" 'in the Preamble of the Constitution by the 42nd Amendment greater concern must be shown to improve " the condition of the poor population in the country, and every effort should be made to allow them as much benefit as may be possible. There cannot be any quarrel with this proposition, but that by itself cannot remedy all the problems arising from poverty. Even

the Constitution as it stood originally was committed to economic justice and welfare of the needy. But for that reason either then or now the other provisions of the Constitution and the laws cannot be ignored. It is therefore, not possible to interpret the decision in Olga Tellis (AIR 1986 SC 180) in the manner suggested on behalf of the petitioners to bolster their case with the aid of Art. 21.

27. Their Lordships of the Hon'ble Supreme Court in **D.V. Kapoor** Vs. **Union of India and others,** AIR 1990 Supreme Court 1923 have held that the measure of deprivation of pension therefore, must be correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Article 41 of the Constitution. Their Lordships have held as under:

"6. As seen the exercise of the power by the President is hedged with a condition precedent that a finding should be recorded either in departmental enquiry or judicial proceedings that the pensioner committed grave misconduct or negligence in the discharge of his duty while in office, subject of the charge. In the absence of such a finding the President is without authority of law to impose penalty of withholding pension as a measure of punishment either in whole or in part permanently or for a specified period, or to order recovery of the pecuniary loss in whole or in part from the pension of the employee, subject to minimum of Rs. 60/-.

7. Rule 9 of the rules empowers the President only to withhold or withdraw pension permanently or for a specified period in whole or in part or to order recovery of pecuniary loss caused to the State in whole or in part subject to minimum. The employee's right to pension is a statutory right. The measure of deprivation therefore, must he correlative to or commensurate with the gravity of the grave misconduct or irregularity as it offends the right to assistance at the evening of his life as assured under Art. 41 of the Constitution. The impugned order discloses that the President withheld on permanent basis the payment of gratuity in addition to pension. The right to gratuity is also a statutory right. The appellant was not charged with nor was given an opportunity that his gratuity would be withheld as a measure of punishment. No provision of law has been brought to our notice under which, the. President is empowered to withhold gratuity as well, after his retirement as a measure of punishment. Therefore, the order to withhold the gratuity as a measure of penalty is obviously illegal and is devoid of jurisdiction."

28. Their Lordships of the Hon'ble Supreme Court in **Kerala Hotel and Restaurant Association and others** Vs. **State of Kerala and others** (1990) 2 Supreme Court Cases 502 have held that the expression 'socialist' was intentionally introduced in the Preamble by the Constitution (Forty-second Amendment) Act, 1976 with the principal aim of eliminating inequality in income and status and standards of life. The emphasis on economic equality in our socialist welfare society has to pervade all interpretations made in the context of any challenge based on hostile discrimination. Their Lordships have held as under:

"5 The preamble to the Constitution contains the solemn resolve to secure to all its citizens, inter alia, economic and social

justice along with equality of status and opportunity. The expression 'socialist' was intentionally introduced in the preamble by the Constitution (Forty-Second Amendment) Act, 1976 with the principal aim of eliminating inequality in income and status and standards of life. The emphasis on economic equality in our socialist welfare society has to pervade all interpretations made in the context of any challenge based on hostile discrimination. It is on the altar of this vibrant concept in our dynamic constitution that the attack based on hostile discrimination in the present case must be tested when the legislature intended to rest content with placing the tax burden only on the haves excluding the have-nots from the tax net for satisfying the tax need from this source. The reasonableness of classification must be examined on this basis when the object of the taxing provision is not to tax sale of all cooked food and thereby tax everyone but to be satisfied with the revenue raised by taxing only the sale of costlier food consumed by those who can bear the tax burden."

29. Their Lordships of the Hon'ble Supreme Court in **Narendra Kumar Maheshwari** Vs. **Union of India and others,** 1990 (Supp) Supreme Court Cases 440 have held that self made rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. Where such guidelines are intended to clarify or implement the conditions and requirements precedent to the exercise of certain rights conferred in favour of citizens or persons and a deviation therefrom directly affects the rights so vested the persons whose rights are affected have a clear right to approach the Court for relief. Sometimes guidelines control the choice of persons competing with one another for the grant of benefits, largesses or favours and, if the guidelines are departed from without rhyme or reason, an arbitrary discrimination may result which may call for judicial review. Their Lordships have held as under:

"69. Shri Ganesh submitted that the CCI is duty bound to act in accordance with the guidelines which lay down the princi- ples regulating the sanction of capital issues. This is especially so because the guidelines had been published. It was submitted that the investing public is, therefore, entitled to proceed on the basis that the CCI would act in conformity with the guidelines and would enforce them while sanctioning a particular capital issue. It was submitted that it is not permissible to deviate from the guidelines. In this connection, reliance was placed by him as well as by Shri Haksar, appearing for the petitioner in T.C. No. 161/88, upon the observations of this Court in Ramanna Dayaram Shetty v. International Airport Authority, [1979] 3 SCR 10 14, where this Court observed that it must be taken to be the law that where the Government is dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licence or granting other forms of largess, the government could not act arbitrarily at its sweet will and, like a private individual, deal with any persons it please, but its action must be in conformity with standard or norm which is not arbitrary, irrational or irrelevant. We accept the position that the power of discre- tion of the government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc. must be confirmed and structured by rational, relevant and nondiscriminatory standard or norm and if the government departed from such standard or norm in any particular case or cases, the action of the

government would be liable to be struck down, unless it could not be shown by the government that the departure was not arbitrary but was based on some valid principle which in itself was not irrational, irrele- vant, unreasonable or discriminatory. Mr. Haksar drew our attention to the observations of this Court in the case of Motilal Padampat Sugar Mills v. Uttar Pradesh, [1979] 2 SCR 641, where this Court reiterated that claim of change of policy would not be sufficient to exonerate the government from the liability; the government would have to show what precisely was the changed policy and also its reason and justification so that the Court could judge for itself which way the public interest lay and what the equity of the case demanded. It was contended by Shri Haksar that there were departures from the guidelines and there was no indication as to why such departures had been made.

106. It may, however, be stated that being not statutory in character, these guidelines are not enforceable. See the observations of this Court in Fernandez v. State of Mysore, [1967] 3 SCR 636: Also see R. Abdullah Rowther v. State Transport, etc., AIR 1959 SC 896; Dy.Asst. Iron & Steel Controller v. Manekchand Proprietor, [1972] 3 SCR 1; Andhra Industrial Work v. CCI & E, [1975] 1 SCR 321; K.M. Shanmugham v. S.R.V.S. Pvt. Ltd., [1964] 1 SCR 809). A policy is not law. A statement of policy is not a prescription of binding criterion. In this connection, reference may be made to the observations of Sagnata invest- ments Ltd. v. Norwich Corpn., [1971] 2 QB 614 and p. 626. Also the observations in British Oxygen Co. v. Board of Trade, [1971] AC 6 10. See also Foulkes' Administrative Law, 6th Ed. at page 18 1-184. In Ex. P. Khan, [1981] 1 All E.R. page 40, the court held that a circular or self made rule can become enforceable on the application of persons if it was shown that it had created legitimate expectation in their minds that the authority would abide by such a policy/guideline. However, the doctrine of legitimate expec- tation applies only when a person had been given reason to believe that the State will abide by the certain policy or guideline on the basis of which such applicant might have been led to take certain actions. This doctrine is akin to the doctrine of promissory estoppel. See also the observa- tions of Lord Wilberforce in IRC v. National Federation, [1982] AC 617). However, it has to be borne in mind that the guidelines on which the petitioners have relied are not statutory in character. These guidelines are not judicially enforceable. The competent authority might depart from these guidelines where the proper exercise of his discretion so warrants. In the present case, the statute provided that rules can be made by the Central Government only. Further- more, according to Section 6(2) of the Act, the competent authority has the power and jurisdiction to condone any deviation from even the statutory requirements prescribed under Sections 3 and 4 of the Act. In Regina v. Preston Supplementary, [1975] 1 WLR p. 624 at p. 631, it had been held that the Act should be administered with as little technicality as possible. Judicial review of these matters, though can always be made where there was arbitrariness and mala fide and where the purpose of an authority in exercis- ing its statutory power and that of legislature in confer- ring the powers are demonstrably at variance, should be exercised cautiously and soberly.

107. We would also like to refer to one more aspect of the enforceability of the guidelines by persons in the position of the petitioners in these cases. Guidelines are issued by Governments and statutory authorities in various types of situations. Where such guidelines are intended to clarify or implement the conditions and requirements precedent to the exercise of certain

rights conferred in favour of citizens or persons and a deviation therefrom directly affects the rights so vested the persons whose rights are affected have a clear right to approach the court for relief. Sometimes guidelines control the choice of persons competing with one another for the grant of benefits largesses or favours and, if the guide- lines are departed from without rhyme or reason, an arbi- trary discrimination may result which may call for judicial review. In some other instances (as in the Ramanna Shetty, case), the guidelines may prescribe certain standards or norms for the grant of certain benefits and a relaxation of, or departure from, the norms may affect persons, not direct- ly but indirectly, in the sense that though they did not seek the benefit or privilege as they were not eligible for it on the basis of the announced norms, they might also have entered the fray had the relaxed guidelines been made known. In other words, they would have been potential competitors in case any relaxation or departure were to be made. In a case of the present type, however, the guidelines operate in a totally different field. The guidelines do not affect or regulate the right of any person other than the company applying for consent. The manner of application of these guidelines, whether strict or lax, does not either directly or indirectly, affect the rights or potential rights of any others or deprive them, directly or indirectly, of any advantages or benefits to which they were or would have been entitled. In this context, there is only a very limited scope for judicial review on the ground that the guidelines have not been followed or have been deviated from. Any member of the public can perhaps claim that such of the guidelines as impose controls intended to safeguard the interests of members of the public investing in such public issues should be strictly enforced and not departed from departure therefrom will take away the protection provided to them. The scope for such challenge will necessarily be very narrow and restricted and will depend to a considerable extent on the nature and extent of the deviation. For in- stance, if debentures were issued which provide no security at all or if the debt-equity ratio is 6000:1 (as alleged) as against the permissible 2:1 (or thereabouts) a Court may be persuaded to interfere. A Court, however, would be reluctant to interfere simply because one or more of the guidelines have not been adhered to even where there are substantial deviations, unless such deviations are, by nature and extent such as to prejudice the interests of the public which it is their avowed object to protect. Per contra, the Court would be inclined to perhaps overlook or ignore such deviations, if the object of the statute or public interest warrant, justify or necessitate such deviations in a particular case. This is because guidelines, by their very nature, do not fall into the category of legislation, direct, subordinate or ancillary. They have only an advisory role .to play and non-adherence to or deviation from them is necessarily and implicitly permissible if the circumstances of any particu- lar fact or law situation warrants the same. Judicial control takes over only where the deviation either involves arbitrariness or discrimination or is so fundamental as to undermine a basic public purpose which the guidelines and the statute under which they are issued are intended to achieve.

30. Their Lordships of the Hon'ble Supreme Court in **Commissioner of Income Tax, Bangalore** Vs. **Vasudeo V. Dempo,** 1993 Supp (1) Supreme Court Cases 612 have held that circulars issued by department (Wealth Tax) normally meant to be followed and accepted by the authorities. Their Lordships have held as under:

> *"5. We have heard learned Counsel for the parties at length. We do not propose to express any considered opinion as learned Counsel appearing for the Department fairly accepted that the Act had been amended on April 1, 1989, and what was provided in the circular has how been incorporated in the Schedule itself. That lends support to the view taken by the High Court. Further, the Department; as is clear from the circular, at all points of time, intended that the spouses in Goa should be treated as individuals and granted exemption accordingly. We, however, consider it necessary to observe that the circulars issued by the Department are normally meant to be followed and accepted by the authorities. We do not find any justification for the officers not following it nor was the Department justified in pursuing the matter further in this Court."*

31. Their Lordships of the Hon'ble Supreme Court in **Consumer Education & Research Centre and others** Vs. **Union of India and others** (1995) 3 Supreme Court Cases 42 have held that the jurisprudence of personhood or philosophy of the right to life envisaged under Article 21, envisages its sweep to encompass human personality in its full blossom with invigorated health which is a wealth to the workman to earn his livelihood, to sustain the dignity of person and to live a life with dignity and equality. Their Lordships have further held that right to health and medical care to protect his health and vigour while in service or post retirement is a fundamental right of a worker under Article 21, read with Articles 39(e), 41, 43, 48-A and all related articles and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person. Their Lordships have held as under:

> *21. Article 38(1) lays down the foundation for human rights and enjoins the State to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which justice, social, economic and political, shall inform all the institutions of the national life. Art 46 directs the State to protect the poor from social injustice and all forms of exploitation. Article 39(e) charges that the policy of the State shall be to secure "the health and strength of the workers". Article 42 mandates that the States shall make provision, statutory or executive "to secure just and humane conditions of work". Article 43 directs that the State shall "endeavour to secure to all workers, by suitable legislation or economic organisation or any other way to ensure decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers". Article 48-A enjoins the State to protect and improve the environment. As human resources are valuable national assets for peace, industrial or material production, national wealth, progress, social stability, decent standard of life of worker is an input. Art 25(2) of the universal declaration of human rights ensures right to standard of adequate living for health and well being of the individual including medical care, sickness and disability. Article 2(b) of the International Convention on Political, Social and Cultural Rights protects the right of worker to enjoy just and favourable conditions of work ensuring safe and healthy working conditions.*
>
> *22. The expression 'life' assured in Art.21 of the Constitution does not connote mere animal existence or continued drudgery through life. It has a much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in work*

place and leisure. In Olga Tellis v. Bombay Municipal Corporation, (1985) 3 SCC 545 : (AIR 1986 SC 180), this Court held that no person can live without the means of living i.e. means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content of meaningfulness but it would make life impossible to live, leave aside what makes life liveable. The right to life with human dignity encompasses within its fold, some of the finer facets of human civilisation which makes life worth living. The expanded connotation of life would mean the tradition and cultural heritage of the persons concerned. In State of H.P. v.Umed Ram Sharma, (1986) 2 SCC 68 : (AIR 1986 SC 847), this Court held that the right to life includes the quality of life as understood in its richness and fullness by the ambit of the Constitution. Access to road was held to be an access to life itself in that State."

32. Their Lordships of the Hon'ble Supreme Court in **Surjit Singh** Vs. **State of Punjab and others** AIR 1996 Supreme Court 1388 have held as under:

"It is otherwise important to bear in mind that self preservation of one's life is the necessary con-concomitant of the right to life enshrined in Article 21 of the Constitution of India, fundamental in nature, sacred, precious and inviolable. The importance and validity of the duty and right to self defence in criminal law. Centuries ago thinkers of this Great land conceived of such right had recognised it. Attention can usefully be drawn to verses 17, 18, 20 and 22 in Chapter 16 of the Garuda Purana (A Dialogue suggested between the Divine and Garuda, the bird) in the *words of the Divine."*

33. Their Lordships of the Hon'ble Supreme Court in **Director General of Posts and others** Vs. B. Ravindran and another (1997) 1 Supreme Court Cases 641 have held that the intention behind the orders issued in 1963, 1964, 1978 and 1983 was to give some more benefit to the re-employed pensioners/ex-servicemen. The effect of the benefit was to be given at a stage prior to the consideration of hardship. Their Lordships have further held that under these circumstances, the Government could not have, under the guise of a clarificatory order, taken away the right which had accrued to such re-employed pensioners with retrospective effect by declaring that while considering hardship the last pay drawn at the time of retirement was to be compared with the initial pay plus pension whether ignorable or not. The 1985 clarificatory instructions were not only inconsistent with the relevant provisions of the Civil Service Regulations and the 1978 and 1983 orders but its effect was to supersede the said provision and the orders. Their Lordships have held as under:

"15. However it was submitted by the learned counsel for the appellants that the orders which were issued in 1963, 1964,1978 and 1983 did not deal with the aspect of hardship and were not intended to replace or change the basic policy contained in the 1958 instructions. They were intended as relaxations and, therefore, they cannot be said to have the effect of altering or modifying the 1958 policy. When the entire pension was made ignorable in the case of personnel below Commissioned Officers rank the position substantially changed and therefore the Government was obliged to clarity that as contemplated by the 1958 instructions hardship is to be seen

from the point whether pay plus pension plus pension equivalent of gratuity (whether ignorable or not) was less than the e time of retirement. What the Government thereby did was to reiterate that it there was no hardship no advance increment should be granted. What is overlooked by the learned counsel is that he intention behind the orders issued in 1963, 1964, 1978 and 1983 was to give some more benefit to the re-employed pensioner/ex-servicemen. The effect of the benefit was to be given at a stage prior to the consideration of hardship. The ignorable part of the pension was to be ignored while totalling up the initial pay plus the pension in order to find out whether the retired pensioner thereby was likely to get more or less than what he was getting at the time of the retirement. To that the 1958 policy stood altered or modified. Though the said four order did not directly deal with the aspect of hardship they did by widening the gas between the initial pay plus the non-ignorale part of the pension and the pay he drew before his retirement and thereby further necessitated giving of advance increments to alleviate hardship. It is, therefore, not correct to say that those orders had no concern with the aspect of hardship. What the contention raised on behalf of the appellants further overlooks is that pursuant to the orders issued in 1963 and 1964 corresponding amendments were made in Articles 521 and 526 of Civil Service Regulations. The said Regulations were some time prior to 1914 and had acquired statutory authority under Section 96-B(4) of the government of India Act, 1919 and have been continued in force by virtue of Article 313 of the Constitution. They are, therefore. statutory in nature. After its amendment in 1964 it read as under:-

"526(a) ....

(b) ....

(c) In case of service personnel who retire from the Forces before attaining the age of 55 and are re- employed in civil posts on or after 16th January 1964 the pension shown below shall be ignored in fixing their pay on re-employment-

(i) in the case of pensions not exceeding Rs. 50 Per mensem, the actual pension;

(ii) In other case the first Rs. 50 of the pension.

16. The subsequent orders issued in 1978 and 1983 were supplementary in nature and did have a binding force. Under these circumstances, the Government could not have, under the guise of a clarificatory order, taken away the right which had accrued to such re-employed pensioners with retrospective effect by declaring that while considering hardship the last pay drawn at the time or retirement was to be compared with the initial pay plus pension whether ignorable or not. The 1985 clarificatory instructions were not only in consistent with the relevant provisions of the Civil Service Regulations and the 1978 and 1983 orders but its effect was to supersede the said provision and the orders. The Tribunal was, therefore, right in holding the said instructions in so far as it directed to take into consideration the ignorable part of the pension also while considering hardship invalid and without any authority of law. These appeals are, therefore, dismissed with no order as to costs.

34. Their Lordships of the Hon'ble Supreme Court in **Samatha** Vs. **State of A.P. and others** (1997) 8 Supreme Court Cases 191 have held that it is an established rule of

interpretation that to establish Socialist Secular Democratic Republic, the basic structure under the rule of law, pragmatic, broad and wide interpretation of the Constitution makes social and economic democracy with liberty, equality of opportunity, equality of status and fraternity a reality to “we, the people of India”, who would include the Scheduled Tribes. All State actions should be to reach the above goal with this march under rule of law. Their Lordships have further held that it is necessary to consider at this juncture the meaning of the word “socialism” envisaged in the Preamble of the Constitution. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word “socialist” used in the Preamble must be read from the goals Articles 14, 15, 16, 17,21, 23, 38, 39, 46 and all other cognate articles seek to establish, i.e., to reduce inequalities in income and status and to provide equality of opportunity and facilities. Their Lordships have held as under:

> *“52. The word 'person' in the interplay of juristic thought is either natural or artificial. Natural persons are human beings while artificial persons are Corporations. Corporations are either Corporation aggregate or Corporation sole. In "English Law" by Kenneth Smith and Denis Keenan (Seventh Edition) at page 127, it is stated that "(L)egal personality is not restricted to human beings. In fact various bodies and associations of persons can, by forming a corporation to carry out their functions, create an organisation with a range of rights and duties not dissimilar to many of those possessed by human beings. In English law such corporations are formed either by charter, statute or registration under the Companies Acts; there is also the common law concept of the Corporation Sole". At page 163, it is further stated that "(T) he Crown is the executive head in the United Kingdom and Commonwealth, and government departments and civil servants act on behalf of the Crown", In "Salmond on Jurisprudence" by P.J. Fitzgerald (Twelfth Edition), at page 66, it is stated that "(A) legal person is any subject- matter other than a human being to which the law attributes personality. This extension, for good and sufficient reasons, of the concep-tion of personality beyond the class of human beings is one of the most noteworthy feats of the legal imagination....". At page 72, it is further amplified that "(T)he King himself, however, is in law no mere mortal man. He has a double capacity, being not only a natural person, but a body politic, that is to say, a corporation sole. The visible wearer of the crown is merely the living representative and agent for the time being of this invisible and underlying persona ficta, in whom by law the powers and prerogatives of the government of this realm are vested". In "Jurisprudence" by R.W.M. Dias (Fifth Edition), at page 265, it is stated that".... the value of personifying group activities is further reduced by the fact that courts have evolved ways of dealing with such activities without resorting to the device of persona".*
>
> *79. It is necessary to consider at this juncture the meaning of the "socialism" envisaged in the Preamble of the Constitution. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word "socialist" used in the Preamble must be read from the goals Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate Articles seek to establish, i.e., to reduce inequalities in income and status and to provide equality of opportunity and facilities. Social justice snjoins the Court to uphold government's endeavour to remove economic inequalities, to provide decent standard of living to the poor and to protect the interest of the weaker*

sections of the society so as to assimilate all the sections of the society in the secular integrated socialist Bharat with dignity of person and equality of status to all.

107. It is an established rule of interpretation that to establish Socialist Secular Democratic Republic, the basic structure under the rule of law, pragmatic broad and wide interpretation of the Constitution makes social and economic democracy with liberty, equality of opportunity, equality of status and fraternity a reality to "we, the people of india", who would include the Scheduled Tribes. All State actions should be to reach the above goal with this march under rule of law. The interpretation of the words 'person' 'regulation' and 'distribution' require to be broached broadly to elongate socio-economic justice to the tribals. The word 'regulates' in para (2)(b) of the Fifth Schedule to the Constitution and the title of the Regulation would not only control allotment of land to the Tribes in Scheduled area but also prohibits transfer of private or Government's land in such areas to the non-tribals. While later clause (a) achieves the object of prohibiting transfer inter vivos fay tribals to the non-tribals or non-tribals inter se, the first clauses includes the State Government or being an juristic person integral scheme of para 5(2) of Schedule, The Regulation seeks to further achieve the object of declaring with a presumptive evidence that the land in the Scheduled Areas belongs to the Scheduled Tribes and any transfer made to a non-tribal shall always be deemed to have been made by a tribal unless the transferee establish the contra. It also prohibits transfer of the land in any form known to law and declared such transfer as void except by way of testamentary disposition by a tribal to his kith and kin/tribal or by partition among them. The regulation and its predecessor law in operation in the respective areas regulate transfer between a tribal and non-tribal with prior permission of the designated officer as a condition precedent to prevent exploitation of the tribals. If a tribal is unwilling to purchase land from a non-tribal, the State Government is enjoined to purchase the land from a non-tribal as per the principles set down in the regulations and to distribute the same to a tribal or a cooperative society composed solely of tribals."

35. Their Lordships of the Hon'ble Supreme Court in **AIR India Statutory Corporation and others** Vs. **United Labour Union and others** (1997) 9 Supreme Court Cases 377 have held that Preamble of the Constitution, as its integral part, is designed to realize socio-economic justice to all people including workmen, harmoniously blending the details enumerated in the Fundamental Rights and the Directive Principles. The Act is a social welfare measure to further the general interest of the community of workmen as opposed to the particular interest of the individual entrepreneur. Their Lordships have held as under:

"14. As noted, the appellant, to start with, was a statutory authority but pending appeal in this Court, due to change in law and in order to be in tune with open economy, it became a company registered under the Companies Act. To consider its sweep on the effect of Heavy Engineering case (AIR 1970 SC 82) on the interpretation of the phrase "appropriate Government", it would be necessary to recapitulate the Preamble, Fundamental Rights (Part III) and Directive Principles (Part IV) - trinity setting out the conscience of the Constitution deriving from the source "We, the people", a charter to establish an egalitarian social order in which social and economie justice with dignity of person and equality of status and opportunity, are assured to every citizen in a

socialist democratie Bharat Republic. The Constitution, the Supreme law heralds to achieve the above goals under the rule of law. Life of law is not logic but is one of experience. Constitution provides an enduring instrument, designed to meet the changing needs of each succeeding generation altering and adjusting the unequal conditions to pave way for social and economie democracy within the spirit drawn from the Constitution. So too, the legal redressal within the said parameters. The words in the Constitution or in an Act are but a frame work of the concept which may change more than the words themselves consistent with the march of law. Constitutional issues require interpretation broadly not by play of words or without the acceptance of the line of their growth. Preamble of the Constitution, as its integral part, is designed to realise socio-economic justice to all people including workmen, harmoniously Wending the details enumerated in the Fundamental Rights and the Directive Principles. The Act is social welfare measure to further the general interest of the community of workmen as opposed to the particular interest of the individual entrepreneurs. It seeks to achieve a public purpose, i.e., regulated conditions of contract labour and to abolish it when it is found to be of perennial nature etc. The individual interest can, therefore, no longer stem the forward flowing tide and must, of necessity give way to the broader public purpose of establishing social and economie democracy in which every workman realises socio-economic justice assured in the Preamble, Arts. 14, 15 and 21 and the Directive Principles of the Constitution.

36. Their Lordships of the Hon'ble Supreme Court in **Naga People's Movement of Human Rights** Vs. **Union of India** (1998) 2 Supreme Court Cases 109 have held that executive instructions issued to fill up the gaps in statutory provisions have binding force. Their Lordships have held as under:

"56. In State of Uttar Pradesh v. Chandra Mohan Nigam & Ors., 1978 (1) SCR 521, this Court, while considering the validity of Rule 16(3) of the All India Services (Death- Cum-Retirement Benefits) rules, 1958, which empowered the Central Government to compulsorily retire a member of the All India Service, took note of the instructions issued by the Government and observed :-

"Since rule 16(3) itself does not contain any guidelines, directions or criteria, the instructions issued by the Government furnish an essential and salutary procedure for the purpose of securing uniformity in application of the rule. These instructions really fill up the yawing gaps in the provisions and are embedded in the conditions of service. These are binding on the Government and cannot be violated to the prejudice of the Government servant." [p. 531]

57. In Supreme Court Advocates-On-Record Association & Ors. v. Union of India, 1993 (4) SCC 441, one of us, Verma j., as the learned Chief Justice then was, speaking for the majority, after pointing out that in actual practice, the real accountability in the matter of appointments of superior Judges is of the Chief Justice of India and the Chief Justice of the High Courts and not of the executive, has said :-

"If that is the position in actual practice of the constitutional provisions relating to the appointments of the superior judges, wherein the executive itself holds out that it gives primacy to the opinion of the Chief Justice of India, and in the matter of accountability also it indicates the

primary responsibility of the Chief Justice of India, it stands to reason that the actual practice being in conformity with the constitutional scheme, should also be accorded legal sanction by permissible constitutional interpretation."

In the present case, the so called clarification vide O.M. dated 20.08.2004 cannot be termed as amendment or supersession of the earlier O.M. dated 05.06.1998. The real nature of O.M. dated 05.06.1998 is that the statutory benefits have been made applicable to the retired Government officials not residing in CGHS areas. Rights have accrued to the retired Government officials on the basis of O.M. dated 5.6.1998 and the same could not be taken away on the basis of notification dated 20.08.2004.

37. Their Lordships of the Hon'ble Supreme Court in **Secretary, H.S.E.B.** Vs. **Suresh and others** (1999) 3 Supreme Court Cases 601 have held that the democratic policy ought to survive with full vigour: socialist status as enshrined in the Constitution ought to be given its full play and it is in this perspective the question arises-is it permissible in the new millennium to decry the cry of the labour force desirous of absorption after working for more than 240 days in an establishment and having their workings supervised and administered by an agency within the meaning of Article 12 of the Constitution. The answer cannot possible be in the affirmative. The law courts exist for the society and in the event the law courts feel the requirement in accordance with principles of justice, equity and good conscience, the law courts ought to rise up to the occasion to meet and redress the expectation of the people. Their Lordships have further held that socialism ought not to be treated as a mere concept or an ideal, but the same ought to be practiced in every sphere of life. India is a Socialist State as the Preamble depicts and the aim of socialism, therefore, ought to be to distribute the common richness and the wealth of the country in such a way so as to subserve the need and the requirement of the common man. Their Lordships have held as under:

"3. Ours is a socialist State as the Preamble depicts and the aim of socialism, therefore, ought to be to distribute the common richness and the wealth of the country in such a way so as to sub-serve the need and the reqirement of the common man. Article 39 is a pointer in that direction. Each clause under the Article specifically fixes certain social and economic goal so as to expand the horizon of benefits to be accrued to the general public at large. In particular reference to Article 39(a) it is seen that the State ought to direct its policies in such a manner so that the citizens - men and women equally, have the right of an adequate means of livelihood and it is in this perspective again that the enactment in the statute book as noticed above (The Contract Labour (Regulation and Abolition) Act 1970) ought to be read and interpreted so that social and economic justice may be achieved and the constitutional directive be given a full play.

10. Turning attention, however, on to the legislative intent in the matter of enactment of the Act of 1970, at the first blush itself, it appears that in expression of its intent, the legislature very aptly coined the enactment, as such, for regulation and abolition of contract labour. Conceptually, engagement of contract labour by itself lends to various abuses and in accordance with devout objective as enshrined in the Constitution and as noticed herein before, this enactment has been introduced in the statute book in the year 1970, to regulate contract labour and to provide for its abolition in certain circumstances since prior to such, the factum of engagement of contract labour stood be set with exploiting tendencies and resulted in unwholesome labour practice.

> *18. As noticed above Draconion concept of law is no longer available for the purpose of interpreting a social and beneficial piece of legislation specially on the wake of the new millennium. The democratic polity ought to survive with full vigour: socialist status as enshrined in the Constitution ought to be given its full play and it is in this perspective the question arises - is it permissible in the new millennium to decry the cry of the labour force desirous of absorption after working for more than 240 days in an establishment and having their workings supervised and administered by an agency within the meaning of Article 12 of the Constitution - the answer cannot possibly be in the affirmative - the law Courts exist for the society and in the event law Courts feel the requirement in accordance with principles of justice, equity and good conscience, the law Courts ought rise up to the occasion to meet and redress the expectation of the people. The expression 'regulation' cannot possibly be read as contra public interest but in the interest of public.*

38. Their Lordships of the Hon'ble Supreme Court in **G.B. Pant University of Agriculture and Technology** Vs. **State of U.P.**, AIR 2000 Supreme Court 2695 have held that socialistic concept of the society as laid down in Part III and IV of the Constitution ought to be implemented in the true spirit of the Constitution. Their Lordships have held as under:

> *"3. There cannot possibly be any doubt that socialistic concept of the society as laid down in Part III and IV of the Constitution ought to be implemented in the true spirit of the Constitution. Decisions are there of this Court galore wherein this Court on more occasions than one stated that democratic socialism aims to end poverty, ignorance, disease and inequality of opportunity. In D. S. Nakara's case, (1983) 1 SCC 305 : AIR 1983 SC 130 : (1983 Lab IC 1), as also lately in Secretary, H.S.E.B. v. Suresh, (1999) 3 SCC 601 : 1999 AIR SCW 892 : AIR 1999 SC 1160 : (1999 Lab IC 1323), the same has been well pronounced and we need not dilate on that score any further.*

In this case, the plea of financial implication was rejected by the Hon'ble Supreme Court.

39. Their Lordships of the Hon'ble Supreme Court in **Municipal Corporation of Delhi** Vs. **Female Workers (Muster Roll) and another** (2000) 3 Supreme Court Cases 224 have held that a just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. These observations have been made by their Lordships of the Hon'ble Supreme Court while interpreting Maternity Benefit Act, 1961 vis-a-vis Article 42 of the Constitution of India. Their Lordships have held as under:

> *"33. A just social order can be achieved only when inequalities are obliterated and everyone is provided what is legally due. When who constitute almost half of the segment of our society have to be honoured and treated with dignity at places where they work to earn their livelihood. Whatever be the nature of their duties, their avocation and the place where they work; they must be provided all the facilities to which they are entitled. To become a mother is the most natural phenomena in the life of a woman. Whatever is needed to facilitate the birth of child to a woman who is in service, the employer has to be considerate and sympathetic towards her and must realise the physical difficulties which a working woman would face in performing her duties at the work place while carrying a baby in the womb or while rearing up the child after birth. The Maternity Benefit Act, 1961 aims to provide all these*

facilities to a working woman in a dignified manner so that she may overcome the state of motherhood honourably, peaceably, undeterred by the fear of being victimised for forced absence during the pre or post-natal period.

40. Their Lordships of the Hon'ble Supreme Court in **Steel Authority of India Ltd. and others** Vs. N**ational Union Waterfront Workers and others** (2001) 7 SCC 1 have held the Preamble to the Constitution is the lodestar and guides those who find themselves in a grey area while dealing with its provisions. It is now well settled that in interpreting a beneficial legislation enacted to give effect to the Directive Principles of State Policy which is otherwise constitutionally valid, the consideration of the Court cannot be divorced from those objectives. Their Lordships have held as under:

"9. After the advent of the Constitution of India, the State is under an obligation to improve the lot of the work-force. Article 23 prohibits, inter alia, begar and other similar forms of forced labour. The Directive Principle of State Policy incorporated in Art. 38 mandates the State to secure a social order for promotion of welfare of the people and to establish an egalitarian society. Art. 39 enumerates the principles of policy of the State which include welfare measures for the workers. The State policy embodied in Art. 43 mandates the State to endeavour to secure, by a suitable legislation or economic organisation or in any other way for all workers, agricultural, industrial or otherwise, work a living wage conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities. Art. 43A enjoins on the State to take steps by suitable legislation or in any other way to secure the participation of workers in the management of undertaking, establishment, or other organizations engaged in any industry. The fundamental rights enshrined in Arts. 14 and 16 guarantee equality before law and equality of opportunity in public employment. Of course, the preamble to the Constitution is the lodestar and guides those who find themselves in a grey area while dealing with its provisions. It is now well settled that in interpreting a beneficial legislation enacted to give effect to directive principles of the state policy which is otherwise constitutionally valid, the consideration of the Court cannot be divorced from those objectives. In a case of ambiguity in the language of a beneficial labour legislation, the Courts have to resolve the quandary in favour of conferment of, rather than denial of, a benefit on the labour by the legislature but without rewriting and/or doing violence to the provisions of the enactment.

41. Their Lordships of the Hon'ble Supreme Court in **State of Uttaranchal and others** Vs. **Sidharth Srivastava and others** (2003) 9 Supreme Court Cases 336 have held that administrative order exists unless it is quashed or it ceases to operate for any other reason. Their Lordships have held as under:

"21 In terms of Section 86 of the Act, it was argued that the reservation policy of the State of U.P. is embodied in the Uttar Pradesh Service (Reservation for Scheduled Castes, Scheduled Tribes and Other Backward Classes) Act, 1994, the executive decision dated 29.8.2001 cannot override the U.P. act of 1994 (supra) because the State Act continues to remain in force in Uttaranchal by virtue of the Section 86 of the Act. Assuming that be the position, as and when Uttaranchal State Public Service Commission proceeds to make selection, the policy contained in the U.P. Act of 1994 is to be followed unless it is amended by the Legislature of the State of Uttaranchal. It cannot also be contended that the State of Uttaranchal has no

right to have its own reservation policy to meet the requirements of the new State having due regard to various factors. Moreover, when the selection made by the UPPSC itself, as already stated above, is not for the State of Uttaranchal and it has no legal or binding effect to compel the State of Uttaranchal to appoint the selected candidates, the question of applying reservation policy as embodied in U.P. Act of 1994 does not arise. Consequently, this contention also fails.

42. Their Lordships of the Hon'ble Supreme Court in **M. Nagaraj and others** Vs. **Union of India and others** (2006) 8 Supreme Court cases 212 have held that principles of fedralism, secularism, reasonableness and socialism, etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. Their Lordships have further held that social justice is one of the sub-divisions of the concept of justice. It is concerned with distribution of benefits and burdens throughout a society as it results from social institutions. Their Lordships have held as under:

"19. Constitution is not an ephermal legal document embodying a set of legal rules for the passing hour. It sets out principles for an expanding future and is intended to endure for ages to come and consequently to be adapted to the various crisis of human affairs. Therefore, a purposive rather than a strict literal approach to the interpretation should be adopted. A Constitutional provision must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changing conditions and purposes so that constitutional provision does not get fossilized but remains flexible enough to meet the newly emerging problems and challenges.

20. This principle of interpretation is particularly apposite to the interpretation of fundamental rights. It is a fallacy to regard fundamental rights as a gift from the State to its citizens. Individuals possess basic human rights independently of any constitution by reason of basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. Every right has a content. Every foundational value is put in Part-III as fundamental right as it has intrinsic value. The converse does not apply. A right becomes a fundamental right because it has foundational value. Apart from the principles, one has also to see the structure of the Article in which the fundamental value is incorporated. Fundamental right is a limitation on the power of the State. A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the State are to be entitled is to be given a generous and purposive construction. In the case of Sakal Papers (P) Ltd. & Others v. Union of India and others this Court has held that while considering the nature and content of fundamental rights, the Court must not be too astute to interpret the language in a literal sense so as to whittle them down. The Court must interpret the Constitution in a manner which would enable the citizens to enjoy the rights guaranteed by it in the fullest measure. An

instance of literal and narrow interpretation of a vital fundamental right in the Indian Constitution is the early decision of the Supreme Court in the case of A.K. Gopalan v. State of Madras . Article 21 of the Constitution provides that no person shall be deprived of his life and personal liberty except according to procedure established by law. The Supreme Court by a majority held that 'procedure established by law' means any procedure established by law made by the Parliament or the legislatures of the State. The Supreme Court refused to infuse the procedure with principles of natural justice. It concentrated solely upon the existence of enacted law. After three decades, the Supreme Court overruled its previous decision in A.K. Gopalan10 and held in its landmark judgment in Maneka Gandhi v. Union of India and another that the procedure contemplated by Article 21 must answer the test of reasonableness. The Court further held that the procedure should also be in conformity with the principles of natural justice. This example is given to demonstrate an instance of expansive interpretation of a fundamental right. The expression 'life' in Article 21 does not connote merely physical or animal existence. The right to life includes right to live with human dignity. This Court has in numerous cases deduced fundamental features which are not specifically mentioned in Part-III on the principle that certain unarticulated rights are implicit in the enumerated guarantees. For example, freedom of information has been held to be implicit in the guarantee of freedom of speech and expression. In India, till recently, there is no legislation securing freedom of information. However, this Court by a liberal interpretation deduced the right to know and right to access information on the reasoning that the concept of an open government is the direct result from the right to know which is implicit in the right of free speech and expression guaranteed under Article 19(1)(a).

24. The point which is important to be noted is that principles of federalism, secularism, reasonableness and socialism etc. are beyond the words of a particular provision. They are systematic and structural principles underlying and connecting various provisions of the Constitution. They give coherence to the Constitution. They make the Constitution an organic whole. They are part of constitutional law even if they are not expressly stated in the form of rules.

27. Under the Indian Constitution, the word 'federalism' does not exist in the preamble. However, its principle (not in the strict sense as in U.S.A.) is delineated over various provisions of the Constitution. In particular, one finds this concept in separation of powers under Articles 245 and 246 read with the three lists in the seventh schedule to the Constitution.

33. From these observations, which are binding on us, the principle which emerges is that "equality" is the essence of democracy and, accordingly a basic feature of the Constitution. This test is very important. Free and fair elections per se may not constitute a basic feature of the Constitution. On their own, they do not constitute basic feature. However, free and fair election as a part of representative democracy is an essential feature as held in the Indira Nehru Gandhi v. Raj Narain (Election case). Similarly, federalism is an important principle of constitutional law. The word 'federalism' is not in the preamble. However, as stated above, its features are delineated over various provisions of the Constitution like

Articles 245, 246 and 301 and the three lists in the seventh schedule to the Constitution.

34. However, there is a difference between formal equality and egalitarian equality which will be discussed later on.

50. Social justice is one of the sub-divisions of the concept of justice. It is concerned with the distribution of benefits and burdens throughout a society as it results from social institutions property systems, public organizations etc.

51. The problem is what should be the basis of distribution? Writers like Raphael, Mill and Hume define 'social justice' in terms of rights. Other writers like Hayek and Spencer define 'social justice' in terms of deserts. Socialist writers define 'social justice' in terms of need. Therefore, there are three criteria to judge the basis of distribution, namely, rights, deserts or need. These three criteria can be put under two concepts of equality "formal equality" and "proportional equality". "Formal equality" means that law treats everyone equal and does not favour anyone either because he belongs to the advantaged section of the society or to the disadvantaged section of the society. Concept of "proportional equality" expects the States to take affirmative action in favour of disadvantaged sections of the society within the framework of liberal democracy.

102. In the matter of application of the principle of basic structure, twin tests have to be satisfied, namely, the 'width test' and the test of 'identity'. As stated hereinabove, the concept of the 'catch-up' rule and 'consequential seniority' are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional limitations. They are concepts derived from service jurisprudence. They are not constitutional principles. They are not axioms like, secularism, federalism etc. Obliteration of these concepts or insertion of these concepts do not change the equality code indicated by Articles 14, 15 and 16 of the Constitution. Clause (1) of Article 16 cannot prevent the State from taking cognizance of the compelling interests of backward classes in the society. Clauses (1) and (4) of Article 16 are restatements of the principle of equality under Article 14. Clause (4) of Article 16 refers to affirmative action by way of reservation. Clause (4) of Article 16, however, states that the appropriate Government is free to provide for reservation in cases where it is satisfied on the basis of quantifiable data that backward class is inadequately represented in the services. Therefore, in every case where the State decides to provide for reservation there must exist two circumstances, namely, 'backwardness' and 'inadequacy of representation'. As stated above equity, justice and efficiency are variable factors. These factors are context-specific. There is no fixed yardstick to identify and measure these three factors, it will depend on the facts and circumstances of each case. These are the limitations on the mode of the exercise of power by the State. None of these limitations have been removed by the impugned amendments. If the concerned State fails to identify and measure backwardness, inadequacy and overall administrative efficiency then in that event the provision for reservation would be invalid. These amendments do not alter the structure of Articles 14, 15 and 16 (equity code). The parameters mentioned in Article 16(4)

are retained. Clause (4A) is derived from clause (4) of Article 16. Clause (4A) is confined to SCs and STs alone. Therefore, the present case does not change the identity of the Constitution. The word "amendment" connotes change. The question is whether the impugned amendments discard the original constitution. It was vehemently urged on behalf of the petitioners that the Statement of Objects and Reasons indicate that the impugned amendments have been promulgated by the Parliament to overrule the decision of this court. We do not find any merit in this argument. Under Article 141 of the Constitution the pronouncement of this court is the law of the land. The judgments of this court in Virpal Singh1, Ajit Singh (I)2 , Ajit Singh (II)3 and Indra Sawhney5, were judgments delivered by this court which enunciated the law of the land. It is that law which is sought to be changed by the impugned constitutional amendments. The impugned constitutional amendments are enabling in nature. They leave it to the States to provide for reservation. It is well-settled that the Parliament while enacting a law does not provide content to the "right". The content is provided by the judgments of the Supreme Court. If the appropriate Government enacts a law providing for reservation without keeping in mind the parameters in Article 16(4) and Article 335 then this court will certainly set aside and strike down such legislation. Applying the "width test", we do not find obliteration of any of the constitutional limitations. Applying the test of "identity", we do not find any alteration in the existing structure of the equality code. As stated above, none of the axioms like secularism, federalism etc. which are overarching principles have been violated by the impugned constitutional amendments. Equality has two facets "formal equality" and "proportional equality". Proportional equality is equality "in fact" whereas formal equality is equality "in law". Formal equality exists in the Rule of Law. In the case of proportional equality the State is expected to take affirmative steps in favour of disadvantaged sections of the society within the framework of liberal democracy. Egalitarian equality is proportional equality.

103. The criterion for determining the validity of a law is the competence of the law-making authority. The competence of the law-making authority would depend on the ambit of the legislative power, and the limitations imposed thereon as also the limitations on mode of exercise of the power. Though the amending power in Constitution is in the nature of a constituent power and differs in content from the legislative power, the limitations imposed on the constituent power may be substantive as well as procedural. Substantive limitations are those which restrict the field of the exercise of the amending power. Procedural limitations on the other hand are those which impose restrictions with regard to the mode of exercise of the amending power. Both these limitations touch and affect the constituent power itself, disregard of which invalidates its exercise. [See: Kihoto Hollohan v. Zachillhu & Others.

43. Their Lordships of the Hon'ble Supreme Court in **Nandi Infrastructure Corridor Enterprises Limited and others Vs. Election Commission of India and another** (2010) 13 Supreme Court Cases 334 have explained the difference between terms “Cancel” and “Suspend”. Their Lordships have held as under:

> *"4. It is surprising that by jugglery of words the use of the expression`cancel' in paragraph 2 of the order dated 8/5/2008 has been tried to be justified. If that was the intention, the same should have been conveyed to the State Government after the order of cancellation was passed. The expressions "cancel" and "suspend" are conceptually different. At the same time there could not have been cancellation and suspension. "Cancel" means to destroy the force, effectiveness or validity of an order, a decision, to bring to nothingness. "Suspend" means to debar temporarily a privilege or make temporarily ineffective. To "suspend" is to take a temporary measure while to "cancel" has an element of permanency."*

44. Their Lordships of the Hon'ble Supreme Court in **General Manager (Operations) State Bank of India and another** Vs. **R. Periyasamy** (2015) 3 Supreme Court Cases 101 have held that Presumption is that the decision or executive order is properly and validly made and the initial onus of proof rests upon party alleging invalidity of order validly made. Their Lordships have held as under:

> *"14. In administrative law, it is a settled principle that the onus of proof rests upon the party alleging the invalidity of an order[9]. In other words, there is a presumption that the decision or executive order is properly and validly made, a presumption expressed in the maxim omnia praesumuntur rite esse acta which means 'all things are presumed to be done in due form.*
>
> *15. The Division Bench, in appeal, apparently found it fit to rely on an additional affidavit filed for the first time by the respondent in his Writ Petition, referring to the letter dated 30.12.1987 by which the respondent is purported to have sought the production of certain documents. It is not disputed that the respondent had not at any stage earlier made any grievance that he had written a letter dated 30.12.1987 calling upon the bank to produce certain documents for his perusal and which was denied. It is further not in dispute that there is no record of the bank having received the letter and there is no proof for it. The bank has denied receiving the letter and according to the bank they had received a letter dated 28.12.1987 and they had replied by their letter dated 14.01.1988. In their reply, there was no reference to the letter dated 30.12.1987 because they had not received it. We find that in the absence of proof that any such letter demanding certain documents was received by the bank, it was not permissible for the High Court to proceed to draw an inference that there was a failure of natural justice in the bank having denied certain documents. Thus it may be said, that an administrative authority such as the Appellant, cannot be put to proof of the facts or conditions on which the validity of its order must depend, unless the Respondent can produce evidence which will shift the burden of proof on the shoulders of the Appellant. How much evidence is required for this purpose will always depend on the nature of that particular case. In Potato Marketing Board v. Merricks[11], it was held that if an order has an apparent fault on the face of it, the burden is easily transferred. However, if the grounds of attack are bad-faith or unreasonableness, the Plaintiff's task is heavier."*

45. In view of the definitive law laid down by their Lordships of the Hon'ble Supreme Court as discussed hereinabove, it is held that a "socialist State", as the Preamble depicts, is the basic structure of the Constitution of India read with other cognate Articles of

Part-III and Part-IV of the Constitution of India. Similarly, the 'welfare State' is the basic feature of the Constitution of India. There is a difference between 'basic structure' and 'basic features' of the Constitution. Their lordships of the Hon'ble Supreme Court of India in **Supreme Court Advocates-on-Record-Association and another** Vs. **Union of India,** JT 2015 (10) SC1 have held that the expressions "'basic structure" and "basic features" of the Constitution convey different ideas though some of the learned Judges used those expressions interchangeably. The basic structure of the Constitution is the sum total of the basic features of the Constitution. Some of the basic features identified so far by this Court are democracy, secularism, equality of status, independence of judiciary, judicial review and some of the fundamental rights. Most of the basic features identified so far in the various cases referred to earlier are not emanations of any single Article of the Constitution. They are concepts emanating from a combination of a number of Articles each of them creating certain rights or obligations or both.

Their Lordships have held as under:

> *"497. An analysis of the judgments of the above mentioned cases commencing from Bharati case yields the following propositions: (I) Article 368 enables the Parliament to amend any provision of the Constitution; (ii) The power under Article 368 however does not enable the Parliament to destroy the basic structure of the Constitution; (iii) None of the cases referred to above specified or declared what is the basic structure of the Constitution; (iv) The expressions "basic structure" and "basic features" convey different ideas though some of the learned Judges used those expressions interchangeably. (v) The basic structure of the Constitution is the sum total of the basic features of the Constitution;(vi) Some of the basic features identified so far by this Court are democracy, secularism, equality of status, independence of judiciary, judicial review and some of the fundamental rights; (vii) The abrogation of any one of the basic features results normally in the destruction of the basic structure of the Constitution subject to some exceptions; (viii) As to when the abrogation of a particular basic feature can be said to destroy the basic structure of the Constitution depends upon the nature of the basic feature sought to be amended and the context of the amendment. There is no universally applicable test vis-à-vis all the basic features.*
>
> *498. Most of the basic features identified so far in the various cases referred to earlier are not emanations of any single Article of the Constitution. They are concepts emanating from a combination of a number of Articles each of them creating certain rights or obligations or both (for the sake of easy reference I call them " ELEMENTS "). For example, (a) when it is said that democracy is a basic feature of our Constitution, such a feature, in my opinion, emerges from the various articles of the Constitution which provide for the establishment of the legislative bodies (Parliament and the State Legislatures) and the Articles which prescribe a periodic election to these bodies based on adult franchise; the role assigned to these bodies, that is, to make laws for the governance of this Country in their respective spheres ; and the establishment of an independent machinery for conducting the periodic elections etc.;*
>
> *(b) the concept of secularism emanates from various Articles 15 and 16 which prohibits the State from practicing any kind of discrimination on the ground of religion and Articles 25 to 30 which guarantee certain fundamental rights regarding the freedom of religion to every person and the specific mention of such rights with reference to minorities.*

499. The abrogation of a basic feature may ensue as a consequence of the amendment of a single Article in the cluster of Articles constituting the basic feature as it happened in Minerva Mills case and Indira Nehru Gandhi case."

46. The legislation and the policies of the State must be pro-poor, pro-scheduled caste, scheduled tribes and other weaker sections of the society including the pensioners. The system must give due respect and maintain the dignity of the retired personnel by providing them sufficient means including good health care in their twilight years.

47. In the instant case, O.M. dated 05.06.1998 was neither suspended nor cancelled. According to O.M. dated 20.08.2004, the matter was required to be discussed, but the Court can take judicial notice of the fact that since till date, no decision has been taken, the Union of India has accepted the applicability of O.M. dated 05.06.1998, otherwise some decision was bound to have been taken either to suspend or cancel O.M. dated 05.06.1998 for 17 years. In view of the language employed in O.M. dated 20.08.2004, the principle of *contemporanea expositio* would not be attracted. It is wrong on the part of the petitioners to contend that O.M. dated 05.06.1998 was superseded. Word 'supersession' has not been mentioned at all in O.M. dated 20.08.2004. O.M. dated 05.06.1998 also supplemented the CS(MA) Rules, 1944.

48. O.M. dated 5.6.1998 was discussed by the learned Central Administrative Tribunal in its various judgments including O.A. No. 205 of 2003 titled as Mr. Prabhakar Sridhar Bapat Vs. Union of India and another, decided on 10.11.2003. It was also discussed by the Division Bench of Gujarat High Court in SCA No. 3843/2004, whereby the petition filed by the Union of India was dismissed on 02.04.2004 and also by the Punjab and Haryana High Court in CWP No. 6559 of 2006, decided on 13.03.2008. In this petition also, a specific ground has been taken that identical issues raised in O.A. No. 205/2003, titled as Mr. Prabhakar Sridhar Bapat Vs. Union of India and Another was pending before the Hon'ble Supreme Court including the applicability of O.Ms. dated 5.6.1998 and 20.08.2004. The Hon'ble Supreme Court has dismissed the SLPs. on 03.04.2012. The Review Petition was also dismissed by the Hon'ble Supreme Court on 30.10.2013. Thus, the judgment rendered by the learned Central Administrative Tribunal Ahmedabad Bench in O.A. No. 205 of 2003 on 10.11.2003, which has merged in the judgment rendered by the Division Bench of Gujarat High Court in Special Civil Application No. 3843/2004 decided on 02.04.2004, were upheld by the Hon'ble Supreme Court on 03.04.2012.

49. The Union of India should have taken a common sense view to address the serious issue of welfare of its retired employees. We can take judicial notice of the fact that a retired person needs more medical care vis-a-vis a young employee. A serving employee, who enjoys benefits under the CS(MA) Rules, 1944, cannot be left high and dry immediately after retirement for want of medical care. His medical issues are required to be looked into with more sensitivity, compassion and sympathy. His genuine requirements for medical treatment cannot be permitted to be buried in the labyrinth of red tapism. The recommendations of the Pay Commission, though recommendatory, have to be given highest regard, since the Central Government has planned to improve the conditions of service of Central Government employees by examining, reviewing, evolving and recommending changes including pension and other retiral benefits.

50. The Seventh Central Pay Commission constituted vide notification, dated 28.02.2014, has also strongly recommended the introduction of Health Insurance Scheme for Central Government employees and pensioners. In the interregnum, for the benefit of

pensioners residing outside the CGHS areas, the Commission recommended that CGHS should empanel those hospitals which are already empanelled under CS(MA)ECHS for catering to the medical requirements of these pensioners on a cashless basis. The Commission has also recommended that the remaining 33 postal dispensaries should be merged with CGHS and all postal pensioners, irrespective of their participation in CGHS while in service, should be covered under CGHS after making requisite subscription.

51. The legal maxim "*salus populi suprema lex esto"* can usefully be called in aid in the present case also. It means "Let the good (or safety) of the people be the Supreme (or highest) law". Salus is a latin word, which means health/prosperity, safety as per Black's Law Dictionary. Thus, health of the people should be the supreme law.

52. It is the prime responsibility of the State Government to protect health and vigour of retired Government officials, this being their fundamental right under Article 21, read with Articles 39(3), 41, 43, 48-A of the Constitution of India. The steps should be taken by the State to protect health, strength and vigour of the workmen. Non-providing of post-retirement medical care to retired Government official in a city not covered by CGHS at par with in service employee would result in violation of Article 21 of the Constitution of India. Moreover, employees need medical care most after their retirement. The State cannot call its own actions as wrong. We have clarified and explained O.M. dated 20.08.2004 and it is made clear that all the Central Government pensioners residing in non-CGHS areas would be covered either under the CS(MS) Rules, 1944 or CGHS as per their option to be sought for by the Central Government. In order to avoid litigation, this judgment shall apply to all the retired Government officials residing in non-CGHS areas. There should be equality of health benefits to retirees as well in their evenings of life. There cannot be any discrimination while extending the social benefits to in service and retirees. It is the prime responsibility of the State to protect the health of its workers. In view of the phraseology employed in O.M. dated 05.06.1998, Note 2 appended to Rule 1 is read down to extend the benefit of CS(MA) Rules, 1944 to retired Government officials residing in non-CGHS areas to save it from unconstitutionality and to make it workable. The higher Courts have to evolve new interpretive tools in changing times. The neo capitalism may concentrate wealth in the hands of few persons which would be contrary to the philosophy of the Constitution of India. Right to health is a human right. The action of the petitioner-Union of India not to reimburse the medical bills to the respondent and also not giving option to him and similarly situate persons residing in a city not covered under CGHS as per O.M. dated 5.6.1998 to either opt for CGHS Scheme or CS(MA) Rules, 1944, is illegal, arbitrary, capricious, discriminatory, thus, violative of Articles 14, 16 and 21 of the Constitution of India. The decision in matters pertaining to the health of the employee should be taken with utmost humane approach.

53. Ordinarily we would have ordered the retired Government officials to refund the amount already received by them, but taking into consideration that this would be oppressive and cause undue hardship

to them, we order the Union of India not to make recoveries from the respondent and similarly situate persons residing in non-CGHS areas in the event of their opting for CS(MA) Rules or CGHS.

54. Accordingly, the writ petition is dismissed. However, the Union of India is directed to seek the option from the respondent and similarly situated retired employees residing in non-CGHS areas for medical coverage either under CGHS Scheme or under CS(MA) Rules, 1994 as per Office Memorandum, dated 05.06.1998 within a period of six months. Henceforth, the pensioners should be given one time option at the time of their

retirement for medical coverage under the CGHS Scheme or CS(MA) Rules, 1994. The Union of India is also directed to release a sum of Rs.1,79,559/- incurred by the respondent on his treatment and a sum of Rs.20,000/- incurred by the respondent towards post operation follow up, medicines and transportation charges within a period of three months from today, failing which, the respondent shall be entitled to interest @12% per annum. The miscellaneous application(s), if any, also stand(s) disposed of. No costs.

"Salus populi suprema lex esto - The health of the people should be supreme law".

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

The State of Himachal Pradesh and another ...Petitioners.

Versus

Sh. Santosh Kumar and another ...Respondents.

CWP No. 11042 of 2011
Decided on: 29.12.2015

Constitution of India, 1950- Articles 226 and 227- In a reference, Industrial Tribunal-cum-Labour Court finding that juniors of the workmen/respondents were retained while dispensing with their services in violation of Section 25(G) of the Industrial Disputes Act, partly allowed the reference- feeling aggrieved the State approached the high Court- held that, under Articles 226 and 227 of the Constitution of India findings of the facts recorded by the Tribunal on appreciation of evidence cannot be substituted, unless the Labour Court has made a patent mistake in admitting evidence illegally or has made grave errors in law- in this case, Tribunal has properly appreciated the evidence, hence, no interference is required- writ petition dismissed. (Para-2 to 11)

Cases referred:

Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157

Iswarlal Mohanlal Thakkar versus Paschim Gujarat Vij Company Ltd. & Anr., 2014 AIR SCW 3298

For the petitioners: Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan & Mr. Romesh Verma, Additional Advocate Generals.

For the respondents: Mr. Ranjan Sharma, Advocate, for respondent No. 1.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

By the medium of this writ petition, the writ petitioners have questioned the judgment and award, dated 04.06.2011, made by the Presiding Judge, Industrial Tribunal-cum-Labour Court, Dharamshala, H.P. (for short "the Labour Court") in Reference No. 402/2008, titled as Santosh Kumar versus The Executive Engineer, I&PH Division Dalhousie, whereby the reference came to be partly allowed, (for short "the impugned award") on the grounds taken in the memo of writ petition.

2. The moot question is - whether the writ petition can be granted on the grounds taken in the writ petition, which are factual in nature and have been thrashed out by the Labour Court after framing the issues? The answer is in the negative for the following reasons:

3. After receiving the reference, the Labour Court has framed the issues and after examining the entire record, allowed the reference in favour of the workman-respondent herein.

4. It has been specifically mentioned in paras 15 and 16 of the impugned award that the State-writ petitioners have retained juniors to the workman-respondent herein and that is why the Labour Court granted the relief in favour of the workman-respondent herein.

5. The said act of the writ petitioners is in violation of Section 25-G of the Industrial Disputes Act, 1947 (for short "the Act") and the Labour Court has rightly made the observations in paras 15 and 16 of the impugned award, which read as under:

> *"15. However the supplementary affidavit of the respondent shows that one Rattan Chand s/o sh. Chamaru Figuring at Sr. No. 19 was reengaged in pursuance by the other of Administrative Tribunal and he has since been regularized w.e.f. 2-1-2007. Admittedly Rattan Chand was junior to the petitioner being immediately below him (Sr. No. 18). The respondent has also placed on record the order dated 22-9-1999 and 19-4-2001 which primarily shows that proper notices under Section 25-F has not been issued to the said Rattan Chand.*
>
> *16. The Ld. Dy. D.A. would thus contend that since the said Rattan Chand had been engaged in pursuance to the orders of the Court. It cannot be said that the respondent had retained persons juniors to the petitioner, while disengaging him. the petitioner had been issued a notice on 25-10-2000 to be effective from 30-11-2000. The service of the said Rattan Chand were also disengaged on 16th Nov., 2000. Their retrenchment had been ordered simultaneously, even as per the orders passed by the Hon'ble Administrative Tribunal. No proper notice had been issued to the said Rattan Chand. In another words disengagement of the said Rattan Chand was void and illegal. That being so it to be inferred the respondent had not followed the principle of "Last Come First Go" in the right perspective. Even if the said disengagement of Rattan Chand had been set aside by the Court on technical ground, the respondent should have again disengaged the service of the Rattan Chand by resorting to the proper procedure, is envisaged under Law. No such steps were taken by the respondent. Rather the said Rattan Chand has since been regularized in the year 2007. The reasons for retrenchment had remained the same for both Rattan Chand and the petitioner. Thus the respondent had to take further steps as were done in the case of the petitioner and other work Inspector reflected at Sr. No. 17 to 20 in the seniority list. Had the petitioner being junior to Rattan Chand his reengagement would not have mattered. Admittedly the petitioner is senior to Rattan Chand. The reengagement of said Rattan Chand is thus fatal to the respondent. Even if he (Rattan Chand) was engaged in pursuance to the order of the Court, facts remain that he was junior to the petitioner. A junior work Inspector having been retained is violative to the provisions of Section 25-G. As already discussed*

> *above no steps were taken by the respondent for having again removed Rattan Chand after completing all the codal formalities. The respondent did not resort to any retrenchment thereupon. Thus admittedly Rattan Chand being junior to the petitioner his reengagement, for whatsoever reasons is against the principle of "Last Come First Go". To this limited extent the disengagement of the petitioner cannot be sustained. Consequently the respondents are directed to reengage the petitioner. For the peculiar circumstances narrated hereinafter and more particular because the reengagement of the petitioner has been ordered keeping in view the reengagement of Rattan Chand his junior, no backwages are being ordered in favour of the petitioner. The petitioner shall continue to be reflected in the same position as he was placed earlier to the said Rattan Chand as far as seniority and continuity of service is concerned. The issue is accordingly decided partly in favour of the petitioner."*

6. The Apex Court in the case titled as **Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd.,** reported in **2014 AIR SCW 3157,** held that the findings of fact recorded by the Tribunal as a result of the appreciation of evidence cannot be questioned in writ proceedings and the Writ Court cannot act as an Appellate Court. It is profitable to reproduce para 18 of the judgment herein:

> *"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."*

7. This Court has also laid down the same principle in a batch of writ petitions, **CWP No. 4622 of 2013,** titled as **M/s Himachal Futuristic Communications Ltd. versus State of HP and another,** being the lead case, decided on 04.08.2014. It is worthwhile to reproduce para 13 of the judgment herein:

> *"13. Applying the test to the instant case, the question of fact determined by the Tribunal cannot be made subject matter of the writ petition and more so, when the writ petitioner(s) have failed to prove the defence raised, in answer to the references before the Tribunal. "*

8. This Court in a series of cases, being **CWP No. 4622 of 2013 (supra)**; **LPA No. 485 of 2012,** titled as **Arpana Kumari versus State of H.P. and others,** decided on 11th August, 2014; **LPA No. 23 of 2006,** titled as **Ajmer Singh versus State of H.P. and others,** decided on 21st August, 2014; and **LPA No. 125 of 2014,** titled as **M/s. Delux Enterprises versus H.P. State Electricity Board Ltd. & others,** decided on 21st October, 2014; while relying upon the latest decision of the Apex Court in **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. 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 rendered by the Apex Court in **Bhuvnesh Kumar Dwivedi's case (supra)** 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. 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 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 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 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:

"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]

9. The same principle has been laid down by this Court in **LPA No. 143 of 2015,** titled as **Gurcharan Singh (deceased) through his LRs versus State of Himachal Pradesh and others,** decided on 15th December, 2015.

10. 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."*

11. Having glance of the above discussions, no interference is required, the writ petition merits to be dismissed and the impugned award is to be upheld. Accordingly, the writ petition is dismissed and the impugned award is upheld.

12. Pending applications, if any, are also disposed of accordingly.

****

BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Chamel Singh S/o Late Garja Ram. ....Petitioner.

Vs.

State of H.P and others. ...Non-petitioners.

CWP No.4603 of 2015.
Order reserved on:18.12.2015.
Date of Order: December 30, 2015

Constitution of India, 1950- Article 226- Father of the petitioner was an ex serviceman - he expired on 11.5.1982- a truck registered in the name of mother of the petitioner was attached by non-petitioner Corporation as per HP Ex-servicemen Corporation Act 1979-

mother of petitioner expired and permission was granted to transfer truck in the name of petitioner- however, this permission was cancelled subsequently- respondent pleaded that they had acted in accordance with the direction issued by Division Bench of High Court of H.P.- High Court had issued 15 directions to ensure that bye-laws and rules of Corporation are amended as per order of Division Bench High Court of HP- it was specifically held that after the death of widow, the slot was to be given on the basis of seniority – right was not given to the major children of Ex-serviceman- no appeal was preferred- order had attained finality - in view of order of Hon'ble High Court of H.P. direction cannot be issued to the respondent to ply truck with H.P. Ex-serviceman Corporation. (Para-7 to 11)

For the petitioner:	Mr.Amit Singh Chandel, Advocate.
For Non-petitioner-1.	Mr.J.S.Rana, Asstt. Advocate General.
For non-petitioners No.2 to 4:	Mr.Mukul Sood, Advocate.
For non-petitioner-5	Mr.K.D.Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate.

The following order of the Court was delivered:

P.S.Rana Judge.

Present Civil Writ Petition is filed under Article 226 of the Constitution of India. It is pleaded that in the year 1979 HP Ex-servicemen Corporation Act was notified and on dated 11.5.1982 father of petitioner who was ex-serviceman expired. It is further pleaded that on dated 1.1.2003 truck No. HP 20C-3773 in the name of mother of petitioner was attached by non-petitioner Corporation as per HP Ex-servicemen Corporation Act 1979. It is further pleaded that on dated 6.1.2011 CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others was decided by Hon'ble Division Bench High Court of HP and thereafter on dated 24.1.2011 draft policy for allocation of transportation of work was framed and comments were sought from non-petitioner No.2 HP Ex-servicemen Corporation Hamirpur District Hamirpur through its Chairman-cum-Managing Director HP. It is further pleaded that thereafter on dated 5.2.2011 letter from the office of Secretary (SWD) was issued in compliance to directions issued by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others and thereafter on dated 17.2.2011 show cause notice was issued to truck operators having more than two trucks to delist their trucks w.e.f. 1.4.2011 as per directions issued by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. H.P. Ex-servicemen Corporation and others. It is further pleaded that on dated 18.6.2014 the mother of petitioner expired and thereafter on dated 16.1.2015 permission granted to transfer truck No. HP 20C-3773 in the name of legal heir i.e. petitioner. It is further pleaded that thereafter on dated 17.7.2015 permission granted in the name of petitioner was cancelled. Thereafter present civil writ petition filed by petitioner and sought relief that the regulations made for attachment of trucks with H.P Ex-servicemen Corporation Hamirpur District Hamirpur in 102 meeting of Board of Directors on dated 27.4.2011 Annexure P7 are in violation of HP Ex-servicemen Corporation Act 1979 as well as in violation of HP General Clauses Act 1968 and same be quashed and set aside. Additional relief also sought that order dated 17.7.2015 regarding delisting truck No. HP 20C-3773 of the petitioner w.e.f. 17.7.2015 be also quashed. Additional relief also sought with direction to HP Ex-servicemen Corporation Hamirpur to attach truck No. HP 20C-3773 belonging to petitioner with non-petitioner No. 2 i.e. HP Ex-servicemen Corporation Hamirpur.

2. Per contra response filed on behalf of non-petitioner No.1 State of HP pleaded therein that in view of order of Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others directions were issued to HP Ex-servicemen Corporation to take immediate necessary action. It is further pleaded that HP Ex-servicemen Corporation was also directed to ensure that bye-laws and rules of Corporation are amended as per direction given by Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others. It is further pleaded that HP Ex-servicemen Corporation framed bye-laws and rules for HP Ex-servicemen Truck Operators as per direction of Hon'ble Division Bench High Court of HP issued in CWP No. 2402 of 2008. It is further pleaded that civil writ petition against non-petitioner No.1 be dismissed.

3. Per contra separate response filed on behalf of non-petitioner Nos. 2 to 4 pleaded therein that fundamental right of petitioner is not infringed and present writ petition is not maintainable. It is further pleaded that non-petitioners No. 2 to 4 have acted strictly in accordance with direction issued by Hon'ble Division Bench High Court of HP passed in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation. It is further pleaded that as per direction of Hon'ble Division Bench High Court of HP issued in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others firstly ex-serviceman would be entitled to ply truck and in case ex-serviceman died then his widow would be entitled to ply truck and if widow died then attachment of truck would be ceased to exist and slot would be given on the basis of seniority. It is further pleaded that major children have no legal right to attach truck with ex-servicemen Corporation as per directions of HP High Court given in CWP No. 2402 of 2008. It is further pleaded that order passed by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others was assailed before Hon'ble Apex Court of India in SLP(Civil) CC 15914 of 2011 titled Y.K. Awasthi and others Vs. HP Ex-servicemen Corporation and others. Special Leave to Appeal (Civil) was dismissed by Hon'ble Apex Court of India on dated 10.10.2011 and order passed by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others has attained the stage of finality. It is further pleaded that truck was attached in the name of widow of ex-serviceman on 1.1.2003. It is further pleaded that widow expired on 18.6.2014 and after her death right to ply truck in Ex-servicemen Corporation came to an end in view of directions given by Hon'ble High Court of HP in CWP No. 2402 of 2008. It is further pleaded that order of delisting truck by Ex-servicemen Corporation is strictly inconsonance with directions issued by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. Ex-servicemen Corporation and others. It is further pleaded that there are number of ex-servicemen who have applied for attachment of trucks with Ex-servicemen Corporation and are waiting for attachment of their trucks with Corporation. It is further pleaded that if after the death of ex-serviceman and after death of widow of ex-serviceman if legal heirs of ex-serviceman are permitted to attach truck with Ex-servicemen Corporation in perpetuity then ex-servicemen who are in waiting for their turns for attachment of their trucks would not get their chance and the purpose of Corporation to give benefit to all ex-servicemen would be frustrated. It is further pleaded that order of Hon'ble Division Bench High Court of HP passed in CWP No. 2402 of 2008 has attained the stage of finality. Prayer for dismissal of civil writ petition sought.

4. Per contra separate response filed on behalf of non-petitioner No.5 pleaded therein that delisting of truck of ex-servicemen is internal matter of HP Ex-servicemen Corporation. It is further pleaded that non-petitioner No.5 only load the trucks recommended by Ex-servicemen Corporation. Prayer for dismissal of civil writ petition sought.

5. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioners and also perused entire record carefully

6. Following points arise for determination in present writ petition:

(1) Whether civil writ petition filed by petitioner is liable to be accepted as mentioned in memorandum of grounds of civil writ petition and in view of directions issued by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 decided on 6.1.2011 affirmed by Hon'ble Apex Court of India in SLP(Civil) CC No.15914 of 2011 titled Y.K.Awasthi Vs. HP Ex-servicemen Corporation and others decided on 10.10.2011?.

(2) Final order.

Findings upon Point No.1 with reasons.

7. Submission of learned Advocate appearing on behalf of petitioner that regulations made for attachment of trucks are in violation with HP Ex-servicemen Corporation Act 1979 is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others decided on 6.1.2011 issued fifteen directions to State of HP as well as HP Ex-servicemen Corporation to ensure that bye-laws, rules and regulations of the Corporation are amended as per directions issued by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others. Hon'ble Division Bench High Court of HP further directed that directions would be complied latest by 28th February 2011 and directions No.9 and 10 are quoted in toto:

> 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, the attachment shall cease to exist and the slot shall be given on the basis of seniority.

Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation held that after the death of widow the attachment of truck would be ceased to exist and the slot would be given on the basis of seniority. Hon'ble Division Bench High Court of HP has given right to ply truck to the widow of ex-serviceman and did not give right to major children of ex-serviceman to ply truck with Ex-servicemen Corporation.

8. Order passed by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others was assailed in SLP(Civil) CC No.15914 of 2011 titled Y.K.Awasthi Vs. HP Ex-servicemen Corporation and others. Hon'ble Apex Court of India on dated 10.10.2011 affirmed the order of Hon'ble Division Bench High Court of HP. Hence it is held that order of Division Bench High Court of HP wherein directions were issued has attained the stage of finality.

9. Submission of learned Advocate appearing on behalf of petitioner that impugned order Annexure: P2 dated 17.7.2015 regarding delisting truck No. HP-20C-3773 of petitioner be quashed and set aside is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the order of Chairman-cum-Managing Director HP Ex-servicemen Corporation dated 17.7.2015 Annexure:P2 placed on record. There is recital in the order that order was passed by Chairman-cum-Managing

Director HP Ex-servicemen Corporation in compliance to directions issued by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others dated 6.1.2011. It is well settled law that all authorities within State of HP are under legal obligation to comply directions of Hon'ble Division Bench High Court of HP unless the order of High Court of HP is not set aside by Hon'ble Apex Court of India in accordance with law. In the present case there is no evidence on record in order to prove that directions issued by Hon'ble Division Bench High Court of HP in CWP No.2402 of 2008 were set aside by any competent authority of law but on the contrary it is proved on record that directions issued by Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 were affirmed by Hon'ble apex Court of India in SLP(Civil) CC No.15914 of 2011 titled Y.K Awasthi Vs. HP Ex-servicemen Corporation and others. It is held that Division Bench High Court of HP has directed HP Ex-servicemen Corporation to comply directions latest by 28.2.2011 and Corporation has no option except to accept directions issued by Division Bench High Court of HP in CWP No.2402 of 2008.

10. Submission of learned Advocate appearing on behalf of petitioner that direction be issued to non-petitioners to attach truck No HP 20C-3773 of petitioner with HP Ex-servicemen Corporation is also rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others has directed in positive manner that after the death of widow the attachment shall cease to exist and the slot shall be given on the basis of seniority. Hon'ble Division Bench High Court of HP in CWP No.2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others did not held that major children of ex-serviceman would be entitled to ply truck with HP Ex-servicemen Corporation. On the contrary in internal page-9 of order dated 6.1.2011 in the bottom of order Hon'ble Division Bench High Court of HP in CWP No. 2402 of 2008 titled Baldev Singh Vs. HP Ex-servicemen Corporation and others held that right of ex-serviceman to get his truck attached would be inherited only by his widow and not by his children unless the children are minor. Hon'ble Division Bench High Court of HP has given right of inheritance to widow and to his minor children only and did not give right of inheritance to major children of ex-serviceman in CWP No. 2402 of 2008. In view of above stated facts point No.1 is answered against petitioner.

Point No.2 (Final order)

11. In view of findings on point No.1 civil writ petition No. 4603 of 2015 titled Chamel Singh Vs. State of HP and others is dismissed. No order as to costs. Civil writ petition disposed of. Pending application(s) if any also disposed of.

****

BEFORE HON'BLE MR.JUSTICE P.S.RANA, J.

Maya Devi wife of Sh Karam Chand. .....Petitioner.

Vs.

State of Himachal Pradesh. ....Non-petitioner.

Cr.MP(M) No. 1837 of 2015.
Order reserved on: 23.12.2015
Date of Order: December 30, 2015

.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the applicant for the commission of offences punishable under Sections 302 and 498A read with

Section 34 IPC- held, that while granting bail, Court has to see the nature and seriousness of offence, character and behavior of the accused, circumstances peculiar to the accused, reasonable possibility of securing the presence of the accused at the trial and investigation, reasonable apprehension of the witnesses being tampered with and the larger interest of the public and State- women and children are entitled to special treatment while considering the bail application- since applicant is a woman, hence bail application allowed and applicant ordered to be released on bail on furnishing personal bond in the sum of Rs. 1,00,000/- with two sureties in the like amount. (Para-6 to 9)

Cases referred:
Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253
Sanjay Chandra Vs. Central Bureau of Investigation, 2012 Cri.L.J 702 S.C

For the petitioner: Mr. Dinesh Thakur Advocate vice Mr.N.S.Chandel, Advocate.
For non-petitioner: Mr. M.L.Chauhan and Mr.Rupinder Singh Thakur Addl. Advocate Generals.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail relating to FIR No. 192 of 2015 dated 2.8.2015 registered under Sections 302 and 498A read with Section 34 IPC at Police Station Sadar District Kullu HP.

2. It is pleaded that petitioner is innocent and petitioner has been falsely implicated in present case. It is pleaded that there is no direct or indirect evidence connecting petitioner with criminal offence. It is further pleaded that petitioner belongs to respectable family and has sufficient immovable property at village Jiya in Tehsil Bhunter District Kullu HP and petitioner is deeply rooted in society. It is further pleaded that detention of petitioner would not advance the cause of justice in any manner. It is further pleaded that petitioner is only female member in the family and there is no one except her to take care of minor grand children. It is further pleaded that petitioner would join investigation as and when required by investigating officer. It is further pleaded that petitioner will be abide by the terms and conditions imposed by Court. It is further pleaded that petitioner will not tamper with prosecution witnesses in any manner. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. As per police report FIR No. 192 of 2015 dated 2.8.2015 is registered under Sections 302 and 498A read with Section 34 IPC at police station sadar District Kullu HP. There is recital in police report that on dated 2.8.2015 Smt.Girja Devi wife of Sh Sanjay Kumar filed complaint that her marriage was solemnized in the year 2003 and during night period her father-in-law namely Karam Chand and mother-in-law namely Maya Devi sprinkled kerosene oil upon Girja Devi and lit the fire. There is further recital in police report that when deceased Girja Devi were sleeping in her room father-in-law of deceased knocked the door and when deceased opened the door father-in-law of deceased brought deceased towards down side of her residential room and thereafter Maya Devi mother-in-law of deceased had given kerosene oil and thereafter father-in-law of deceased sprinkled kerosene oil upon body of deceased and thereafter lit the fire. There is further recital in police report that Sanjay husband of deceased was also harassing

deceased. There is further recital in police report that at the time of incident husband of the deceased was not present at the place of incident. There is further recital in police report that incident took place during mid night. After registration of FIR investigation was conducted and deceased was medically examined at regional hospital Kullu and MLC report was obtained. There is further recital in police report that last statement of deceased was recorded by Sub Divisional Magistrate Kullu and site plan was prepared and photographs also obtained. Statement of prosecution witnesses also recorded under Section 161 Cr.PC. There is further recital in police report that deceased died in hospital on dated 6.8.2015. There is further recital in police report that post mortem of deceased was conducted. There is further recital in police report that on dated 30.11.2015 challan is filed in competent Court of law. Prayer for rejection of bail application sought.

4. Court heard learned Advocate appearing on behalf of petitioner and Court also heard learned Additional Advocate General appearing on behalf of non-petitioner and also perused the record carefully.

5. Following points arise for determination in the present bail petition.

(1) Whether bail application filed under Section 439 of the Code of Criminal Procedure 1973 is liable to be accepted as alleged in memorandum of grounds of bail petition and as per special provision of bail to woman in heinous criminal offence punishable with death or imprisonment for life and as per proviso of section 437 of the Code of Criminal Procedure 1973 after completion of investigation and after filing of investigation report under section 173 Cr.PC?.

(2) Final Order.

Findings upon Point No.1 with reasons.

6. Su bmission of learned Advocate appearing on behalf of the petitioner that petitioner is innocent and she has been falsely implicated in the present case cannot be decided at this stage. Same fact will be decided when case shall be decided on merits by learned trial Court after giving due opportunity of hearing to both the parties to lead evidence in support of their case.

7. Another submission of learned Advocate appearing on behalf of the petitioner that investigation is completed and final investigation report under Section 173 Cr.PC stood filed in competent criminal Court of law and trial will be disposed of in due course of time and in view of special provision to females on bail present bail petition filed by petitioner be allowed is accepted for the reasons hereinafter mentioned. It is well settled law that at the time of granting bail following factors should be considered (i) Nature and seriousness of offence (ii) Character of the evidence (iii) Circumstances which are peculiar to the accused (iv) Possibility of the presence of the accused at the trial or investigation (v) Reasonable apprehension of witnesses being tampered with (vi) Larger interests of the public or the State. ***See AIR 1978 SC 179 titled Gurcharan Singh and others Vs. State (Delhi Administration.*** Also see ***AIR 1962 SC 253 titled The State Vs. Captain Jagjit Singh.*** It was held in case reported in ***2012 Cri.L.J 702 S.C titled Sanjay Chandra Vs. Central Bureau of Investigation*** that object of bail is to secure the appearance of the accused person at his trial and it was held that object of bail is not punitive in nature. It was held that bail is rule and committal to jail is exception. It was also held that refusal of bail is a restriction on the personal liberty of the individual guaranteed under Article 21 of the Constitution of India. It was held that it is not in the interest of justice that accused should be kept in jail for indefinite period.

8. Submission of learned Additional Advocate General that if the petitioner is released on bail then petitioner will induce and threat prosecution witness and on this ground bail petition be rejected is devoid of any force for the reason hereinafter mentioned. Court is of the opinion that conditions will be imposed in the bail order that petitioner will not induce or threat prosecution witnesses. If petitioner will flout terms and conditions of bail order then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail provided under Section 439(2) of the Code of Criminal Procedure 1973 in accordance with law. It was held in case reported in AIR 1957 Rajasthan 10 titled Mt.Choki Vs. State that special treatment of woman and children in bail matter is not inconsistent with Article 15 of Constitution of India. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order).

9. In view of findings on point No.1 bail petition filed by petitioner is allowed. It is ordered that petitioner will be released on bail on furnishing personal bond in the sum of Rs.1,00,000/- (One lac) with two sureties in the like amount to the satisfaction of learned trial Court on following terms and conditions. (i) That petitioner will join investigation as and when called for by the Investigating Officer in accordance with law. (ii) That petitioner shall 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 Court or to any police officer. (iii) That petitioner will not leave India without prior permission of Court. (iv) That petitioner will not commit similar offence qua which she is accused. (v) That petitioner will attend the proceedings of learned trial Court regularly till conclusion of the trial. Observation made hereinabove is strictly for the purpose of deciding the present bail petition and it shall not effect merits of case in any manner. Bail petition disposed of. All pending application(s) if any also disposed of.

****

BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE P.S.RANA, J.

State of H.P. .....Appellant.
Versus
Hem Raj alias Raju .....Respondent.

Cr. Appeal No.632 of 2015.
Decided on: 30.12.2015.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 175 grams of charas- he was acquitted by the trial Court- prosecution witnesses did not support the prosecution version regarding giving of option- therefore, claim of trial Court that provision of Section 50 of N.D.P.S. Act was not complied with cannot be faulted- accused acquitted. (Para-7 to 9)

For the appellant: Mr. V.S.Chauhan, Addl. AG.
For the respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal has been instituted at the instance of the State against the judgment dated 2.4.2015, rendered by the learned Special Judge, Solan, H.P. in Sessions

Trial No. 11-S/7 of 2012, whereby the respondent-accused, who was charged with and tried for offence punishable under Sections 20 of the Narcotic Drugs and Psychotropic Act, 1985 (hereinafter referred to as the "ND & PS Act"), has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 16.2.2012, HC Om Parkash (PW-9) along with the police party had gone on patrolling duty and checking of Narcotics in a government vehicle towards Dharampur side. At about 6:30 PM, they were present at Kathala when the accused came there on foot. He tried to run away. He was nabbed. PW-3 Bharat Chand and Bhagat Ram, who met the police party on the road, were associated in the search party as independent witnesses. The consent of the accused for his search was obtained vide memo Ext. PW-1/A. The accused consented to be searched by the police party present on the spot. The personal search of the accused was thereafter conducted and one carry bag was recovered from the left inner pocket of jacket of the accused. On opening, it was found to be containing charas in the form of wicks and balls. It weighed 175 grams. It was put back in the same carry bag and thereafter in a cloth parcel and the cloth parcel was sealed with three seals of impression "K". It was taken into possession vide memo Ext. PW-1/C. Rukka Ext. PW-6/A was prepared and was forwarded to the PS Dharampur through PW-11 HHC Hem Raj. On receipt of the rukka, FIR Ext. PW-6/B was registered at PS Dharampur by PW-12 Insp. Pritam Singh. The site plan Ext. PW-9/A was prepared by PW-9 HC Om Parkash. PW-12 Insp. Pritam Singh, resealed the case property with three seals of impression "P". Specimen seal Ext. PW-12/B was drawn separately and seal impression was also affixed over NCB form. He issued resealing certificate vide Ext. PW-12/C. The case property along with sample seals, seizure memo, NCB form, copy of FIR were deposited with PW-6 HHC Parveen Kumar, the then In-charge Malkhana, PS Dharampur, who made entry in the malkhana register. The abstract of the register is Ext. PW-6/E. The parcel containing contraband alongwith the sample seals, NCB form, seizure memo etc. were forwarded to FSL Junga through PW-7 HHC Ashok Kumar vide RC Ext. PW-6/F. He deposited the same at FSL, Junga in a safe condition. The report of the chemical examiner is Ext. PW-10/A. The investigation was completed and challan was put up before the Court after completing all the codal formalities.

3. The prosecution has examined as many as 12 witnesses to prove its case. The accused was also examined under Section 313 Cr.P.C. He denied the prosecution case. The learned Trial Court acquitted the accused, as noticed hereinabove. Hence, the present appeal.

4. Mr. V.S.Chauhan, learned Addl. Advocate General, appearing for the State has vehemently argued that the prosecution has proved its case against the accused.

5. We have gone through the impugned judgment and records of the case carefully.

6. PW-9 HC Om Parkash deposed that on 16.2.2012 at about 6:30 PM, he was present at Kathala along with other police officials on patrolling duty. The accused came on the spot on foot. He tried to run away. He was nabbed. Two independent witnesses, namely, Bharat Chand and Bhagat Ram were associated in search party and consent of the accused for search was obtained vide memo Ext. PW-1/A. The accused consented to be searched by the police party present at the spot. Thereafter, personal search of the accused was conducted and from the left inner pocket of his jacket, one light yellow coloured carry bag was recovered. On opening, it was found to be containing charas in the form of sticks/wicks. It weighed 175 grams.

7. The statement of PW-9 HC Om Parkash was corroborated and supported by PW-1 HC Hardev and PW-11 HHC Hem Raj, who were also members of the search party. The rukka Ext. PW-6/A was prepared and forwarded to Police Station through PW-11 HHC Hem Raj. PW-12 Insp. Pritam Singh re-sealed the case property with three seals of impression "P". The case property along with sample seals, seizure memo, NCB form and copy of FIR were deposited with PW-6 HHC Parveen Kumar. He made entry in the malkhana register vide Ext. PW-6/E. The parcel containing contraband alongwith the sample seals, NCB form, seizure memo etc. were forwarded to FSL Junga through PW-7 HHC Ashok Kumar vide RC Ext. PW-6/F. He took the same and deposited it at FSL, Junga.

8. In the instant case, the contraband was recovered from the jacket of the accused, which he was wearing. Thus, Section 50 of the ND & PS Act was required to be complied with. PW-3 Bharat Chand is the independent witness. In his cross-examination, PW-3 Bharat Chand admitted that the accused was alleged to have been given option to be searched before the Gazetted Officer or a Magistrate after the recovery of the contraband from his personal search. According to him, he reached the spot and the accused was already with the police officials. This statement of PW-3 Bharat Chand is in variance with the statements of PW-1 HHC Hardev Singh, PW-9 HC Om Parkash and PW-11 HHC Hem Raj. According to these witnesses, the option was given to accused prior to taking his personal search to get him searched either before the Gazetted Officer or Magistrate.

9. According to PW-3 Bharat Chand, the consent memo was prepared after the recovery of the contraband from the possession of the accused. PW-1 HHC Hardev Singh and PW-11 HHC Hem Raj have also not deposed that the accused was apprised that he has legal right to be searched before the Gazetted Officer or Magistrate. The learned trial Court has rightly come to the conclusion that there was breach of the mandatory provisions of Section 50 of the ND & PS Act. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 2.4.2015.

10. Accordingly, there is no merit in this appeal and the same is dismissed.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Deepak Gupta ...Petitioner

Versus

State of H.P. and others. . ...Respondents.

CWP No. 4012 of 2015
Judgment reserved on: 9.12.2015
Date of Decision : December 31, 2015.

Constitution of India, 1950- Article 226- Petitioner had constructed a house at Kachighati- a large number of roadside denting and painting workshops have mushroomed in and around the house of the petitioner making it difficult for him and his family members to live peacefully- workshops emit noxious, toxic and hazardous substance - they generate noise pollution and cause nuisance – however, no action was being taken against them- held, that citizens have a fundamental right to a wholesome, clean and decent environment - right to life includes the right to a clean environment - citizens have a right to enjoy the property unfettered by interference except in accordance with law- the authorities had not taken

action in accordance with regulatory provisions - workshops were registered under H.P. Shops and Commercial Establishments Act, 1969, when they could not have been registered- no action for causing pollution was taken- hence, direction issued to the respondents No.1 to 8 to ensure that no vehicle was parked near the premises of the petitioner – respondents further directed to regularly monitor the quality of air and noise levels- MC directed to take follow up action within a period of 6 months. (Para-9 to 33)

Cases referred:

Subhash Kumar vs. State of Bihar and others (1991) 1 SCC 598
Vellore Citizens' Welfare Forum vs. Union of India and others (1996) 5 SCC 647,
State of M. P. vs. Kedia Leather and Liquor Ltd. and others (2003) 7 SCC 389
M. C. Mehta vs. Union of India (2004) 12 SCC 118,
Noise Pollution (V), in Re: Forum, Prevention of Environmental and Sound Pollution vs. Union of India and another (2005) 5 SCC 733,
Farhd K. Wadia vs. Union of India and others (2009) 2 SCC 442
Ramlila Maidan Incident, in Re: (2012) 5 SCC 1
Anirudh Kumar vs. Municipal Corporation of Delhi and others (2015) 7 SCC 779
Kalidas Dhanjibhai vs. The State of Bombay AIR 1955 SC 62

For the Petitioner: Mr. G.C. Gupta, Senior Advocate, with Mr. Anil Negi, 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 3, 6 to 8.
Mr. Manish Sharma, Advocate, for respondent No.4.
Mr. Hamender Chandel, Advocate, for respondent No.5.
Mr. J. S. Bagga, Advocate, for respondent No.9.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

"A man's home is his Castle."

This maxim is one of the oldest and most deeply rooted principles in Anglo-American jurisprudence. It reflects an egalitarian spirit that embraces all levels of society down to the poorest man living in a Jhuggi or Jhompari. The maxim also forms part of the fabric of part III of the Constitution of India and is deeply rooted in Article 21 thereof.

2. The facts leading to filing of this petition is that the petitioner has constructed a house at Kachi-Ghati, which falls within the jurisdiction of the Municipal Corporation, Shimla. The area where the petitioner is residing is the gateway to the Shimla town, but unfortunately, of late large number of roadside denting and painting workshops have mushroomed in and around the house of the petitioner making it difficult for him and his family to live peacefully. The activity being carried out in these workshops emit noxious, toxic and hazardous substance and generate noise pollution and also causes nuisance which is violative of the various enactments on the subject, but no action despite this is being taken. On such allegations, the petitioner has prayed for the following directions:

> *"1. To ensure the health and safety of the petitioner, his family members and other residents of Kachi-ghati /Ghora Chowki area where*

numerous denting and painting shops have been established causing health and safety hazards to the life of the petitioner and his family.

2. *That directions may be issued to the respondents No. 1 to 8 to ensure that no such illegal work is done by the respondent No.9 and the other persons doing similar denting, painting work without following rules and regulations and without having proper set-up and spray booths etc., to ensure that toxic and hazardous substance has no adverse affect upon health and safety of the petitioner and his family members.*

3. *That to properly ensure that noise and air pollution is not being caused by the respondent No.9 as well as other similar persons so as to degrade the beauty and nature of the city.*

4. *Directing the respondents No. 1 to 8 to ensure that traffic hazards are not created by the respondent No.9 and other similar persons by parking the vehicles for repair alongwith the road and from throwing the junk vehicles on the road side.*

5. *Directing the respondents to take strict action against the said persons causing damage to the property and health of the petitioner and other members of the family by lodging FIR against the said persons and suitable actions in accordance with law.*

6. *Directing the respondents to ensure that no such hazardous and toxic substances are used by the respondent No.9 in the vicinity so as to cause threat to the health and safety of the petitioner and his minor child and old aged persons."*

3. Respondents No. 1, 2 and 7 i.e. Chief Secretary, Secretary (Home) and Superintendent of Police have filed common reply, wherein they have raised preliminary objection regarding maintainability of the petition on the ground of concealment of the fact that respondent No.9 has obtained licence from respondent No.8, the Labour Inspector, Shimla. In so far as the violations pointed out by the petitioner in the petition are concerned, it has been stated that no such incident or violation of any law was brought to their notice save and except obstruction being caused by respondent No.9 in public way for which the respondent No.9 stands charge-sheeted.

4. Respondent No.3 i.e. Director of Industries, in its reply has averred that the road side workshops are not registered by General Manager, DIC, Shimla and have not been granted any kind of permission by the respondent. It has further been averred that the activities of denting and painting fall within the category of Micro Service Enterprises in accordance with the provisions made under Section 7 (1) (b) of the Micro Small and Medium Enterprises Development Act, 2006 and in terms of Section 8 (1) (a) of the Act, it is incumbent upon the Micro Service Enterprises to file/obtain Entrepreneur Memorandum Part-I and Part-II from the office of the General Manager, DIC, Shimla.

5. Respondent No.4 i.e. Pollution Control Board in its reply has averred that the business /alleged activity carried out on the road side by respondent No.9 is to be regulated by the HPPWD authorities/National Highway authority of India under the road side regulation Act. The allegation regarding structural safety of nearby building, alleged traffic and fire hazards do not pertain to the Board. Insofar as the generation of noise pollution is concerned, it is averred that the site was inspected by the Environmental Engineer of the Pollution Control Board on 28.11.2015 and during inspection noise monitoring was also conducted. Results of noise monitoring were observed to be above the prescribed limits of 65dB(A) prescribed for Commercial Zone under Noise Pollution (Regulation and Control)

Rules, 2000. But then it is clarified that in addition to the activity being carried out by respondent No.9, the other business activity including vehicular traffic on the National Highway also contributes to the higher noise level.

6. Respondent No.5 i.e. Municipal Corporation, Shimla has its own tale to tell by claiming that the building of the petitioner has been constructed prior to the merger of the area in the Municipal Corporation limits, therefore, the status of each building whether they have been approved for commercial or domestic purposes are yet to be ascertained by conducting inspection of each building abutting the main highway. This would require considerable time as it is required to carry out the field survey and to verify the approvals. It is only after carrying out the field inspection that notices would be issued to the building owner/occupier to produce the building sanctions and after receiving the necessary data, appropriate action as per relevant regulations governing construction and change of building use shall be initiated against the violators.

7. Respondent No. 8, Labour Inspector has admitted that large number of roadside denting and painting workshops have been established by the persons coming from other towns, but has denied that such shops are being run without any licence or registration sanctioned from the competent authorities in violation of law. It is further stated that most of the shops and commercial establishments are registered and duly licensed including respondent No.9.

8. Now, insofar as respondent No.9, the person who is actually carrying out the denting and painting work is concerned, his only case as set out in the reply is that he is doing the denting and painting work for the last more than 12 years and it is not he alone, who is doing the said work, but there are many others doing the similar work. He further claims that denting work is being carried out at a place more than 30 to 40 meters away while the premises in question are being used only for carrying out the painting work.

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

9. Evidently, the replies filed by all the respondents only reflect their lack of sensitivity and oblivious ignorance to the mandate of Constitution, more particularly, Articles 21, 48A and 51A(g) thereof.

10. The citizens of this country have a fundamental right to a wholesome, clean and decent environment. The Constitution of India, in terms of Article 48A, mandates that the State is under Constitutional obligation to protect and improve the environment. By 42nd amendment to the Constitution, the Parliament, with an object of sensitizing the citizens of their duty, incorporated Article 51A therein requiring a citizen to protect and improve the natural environment. This led to framing of various laws in order to safeguard the environment.

11. Enjoyment of life and its attendant including right to live and human dignity encompasses within its ambit, protection and preservation of environment, ecological balance, free from pollution of air and water, sanitation without which life cannot be enjoyed. Environmental, ecological, air, water, pollution etc. should be regarded as amounting to violative of Article 21. Hygienic environment is an integral part or facet of humane and healthy environment.

12. The Constitution mandates the State Government and the local bodies, not only to ensure and safeguard proper environment but also casts an imperative duty on them

to take adequate measures to promote, protect and improve both the man-made and also the natural environment.

13. Article 21 of the Constitution of India reads thus:

> *"**21. Protection of life and personal liberty**. – No person shall be deprived of his life or personal liberty except according to procedure established by law."*

14. The right to life includes the right to a clean environment as it is only then that the people can enjoy the quality of life which is the essence of the right guaranteed under Article 21. Even the right to live in freedom from noise pollution has now come to be recognized an integral part of the fundamental right and, therefore, any unwanted, unpleasant or obnoxious levels of noise would tantamount to violating the right of others to a peaceful, comfortable and pollution-free life guaranteed under Article 21. Thus, the right of an individual to healthy and clean environment including air, water and noise-free environment is of paramount consideration and it is impermissible for anyone or anybody to cause environmental pollution and violate the prescribed standards.

15. In ***Subhash Kumar vs. State of Bihar and others (1991) 1 SCC 598,*** the Hon'ble Supreme Court held that the right to live is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life and if anyone endangers or impairs that quality of life in derogation of laws, a citizen has right to have recourse to Article 32 of the Constitution for removing the pollution of water or air which may be detrimental to the quality of life.

16. In ***Vellore Citizens' Welfare Forum vs. Union of India and others (1996) 5 SCC 647***, it was categorically held by the Hon'ble Supreme Court that the constitutional and statutory provisions protect a person's right to fresh air, clean water and pollution-free environment, but the source of the right is the inalienable common law or right of clean environment. It was further held that since our legal system has been founded on the British common law, therefore the right of a person to a pollution-free environment is a part of the basic jurisprudence of the land.

17. In ***State of M. P. vs. Kedia Leather and Liquor Ltd. and others (2003) 7 SCC 389*** it was held that the provision of Section 133 of the Code of Criminal Procedure can be invoked to prevent public nuisance in case there was imminent danger to the property and consequential nuisance to the public. It was also held that hygienic environment was an integral facet of healthy life and the right to live with human dignity becomes illusory in the absence of humane and healthy environment. It is apt to reproduce paras 8 and 10 of the judgment which reads thus:

> *"8. Section 133 of the Code appears in Chapter X of the Code which deals with maintenance of public order and tranquility. It is a part of the heading 'public nuisance'. The term 'nuisance' as used in law is not a term capable of exact definition and it has been pointed out in Halsbury's Laws of England that :*
>
> > *"even at the present day there is not entire agreement as to whether certain acts or omissions shall be classed as nuisances or whether they do not rather fall under other divisions of the law of tort".*
>
> *In Vasant Manga Nikumba and Ors. v. Baburao Bhikanna Naidu (deceased) by Lrs. and Anr. (1995 Supp.(4) SCC 54) it was observed that nuisance is an inconvenience which materially interferes with the ordinary physical comfort of human existence. It is not capable of precise definition. To bring in application*

> *of Section 133 of the Code, there must be imminent danger to the property and consequential nuisance to the public. The nuisance is the concomitant act resulting in danger to the life or property due to likely collapse etc. The object and purpose behind Section 133 of the Code is essentially to prevent public nuisance and involves a sense of urgency in the sense that if the Magistrate fails to take recourse immediately irreparable damage would be done to the public. It applies to a condition of the nuisance at the time when the order is passed and it is not intended to apply to future likelihood or what may happen at some later point of time. It does not deal with all potential nuisance, and on the other hand applies when the nuisance is in existence. It has to be noted that some times there is a confusion between Section 133 and Section 144 of the Code. While the latter is more general provision the former is more specific. While the order under the former is conditional, the order under the latter is absolute. The proceedings are more in the nature of civil proceedings than criminal proceedings.*
>
> *10. The two statutes relate to prevention and control of pollution and also provide for penal consequences in case of breach of statutory provisions. Environmental, ecological air and water pollution amount to violation of the right to life assured by Article 21 of the Constitution of India, 1950 (in short "the Constitution"). Hygienic environment is an integral facet of healthy life. Right to live with human dignity becomes illusory in the absence of humane and healthy environment."*

18. In ***M. C. Mehta vs. Union of India (2004) 12 SCC 118***, the Hon'ble Supreme Court reiterated that the right to life is a fundamental right under Article 21 of the Constitution and it includes the right of enjoyment of pollution-free air for enjoyment of life. It was further observed that most vital necessities such as air, water and soil, having regard to right of life under Article 21 cannot be permitted to be misused and polluted so as to reduce the quality of life of others.

19. Thus, on the basis of the aforesaid exposition of law, it can safely be concluded that in a civilized society governed by the rule of law, every citizen has a right to enjoy his/her property unfettered by interference, except in accordance with law. Any interference with this right of enjoyment without the sanction of the law cannot be countenanced by a court of law. Should such enjoyment of properties sanctioned by law be interfered with, it shall be the solemn duty of the State to ensure that a citizen is permitted to live freely and fearlessly and enjoy the property in accordance with law.

20. In ***Noise Pollution (V), in Re: Forum, Prevention of Environmental and Sound Pollution*** vs. ***Union of India and another (2005) 5 SCC 733***, the Hon'ble Supreme Court was dealing with a question as to whether freedom from noise pollution was a part of right to life under Article 21. It was observed that in modern days noise had become one of the major pollutants and had serious effects on human life. It was more than just a nuisance as it constitutes a real and present danger to people's health and could produce serious physical and psychological stress. It was further held that no one could compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels and thereby violating the right of others to a peaceful, comfortable and pollution free life guaranteed by Article 21. It was held:-

> *"10. Article 21 of the Constitution guarantees life and personal liberty to all persons. It is well settled by repeated pronouncements of this Court as also the High Courts that right to life enshrined in Article 21 is not of mere survival or existence. It guarantees a right of person to life with human dignity. Therein*

are included, all the aspects of life which go to make a person's life meaningful, complete and worth living. The human life has its charm and there is no reason why the life should not be enjoyed along with all permissible pleasures. Anyone who wishes to live in peace, comfort and quiet within his house has a right to prevent the noise as pollutant reaching him. No one can claim a right to create noise even in his own premises which would travel beyond his precincts and cause nuisance to neighbours or others. Any noise which has the effect of materially interfering with the ordinary comforts of life judged by the standard of a reasonable man is nuisance. How and when a nuisance created by noise becomes actionable has to be answered by reference to its degree and the surrounding circumstances including the place and the time.

11. Those who make noise often take shelter behind Article 19(1) (a) pleading freedom of speech and right to expression. Undoubtedly, the freedom of speech and right to expression are fundamental rights but the rights are not absolute. Nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers. While one has a right to speech, others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge into aural aggression. If anyone increases his volume of speech and that too with the assistance of artificial devices so as to compulsorily expose unwilling persons to hear a noise raised to unpleasant or obnoxious levels then the person speaking is violating the right of others to a peaceful, comfortable and pollution-free life guaranteed by Article 21. Article 19 (1) (a) cannot be pressed into service for defeating the fundamental right guaranteed by Article 21. We need not further dwell on this aspect. Two decisions in this regard delivered by High Courts have been brought to our notice wherein the right to live in an atmosphere free from noise pollution has been upheld as the one guaranteed by Article 21 of the Constitution. These decisions are Free Legal Aid Cell Shri Sugan Chand Aggarwal alias Bhagatji v. Govt. of NCT of Delhi and Ors., AIR 2001 Del. 455 and P.A. Jacob v. Superintendent of Police, Kottayam, AIR 1993 Ker 1. We have carefully gone through the reasoning adopted in the two decisions and the principle of law laid down therein, in particular, the exposition of Article 21 of the Constitution. We find ourselves in entire agreement therewith.

II Noise as nuisance and health hazard

15. Noise is more than just a nuisance. It constitutes a real and present danger to people's health. Day and night, at home, at work, and at play, noise can produce serious physical and psychological stress. No one is immune to this stress. Though we seem to adjust to noise by ignoring it, the ear, in fact, never closes and the body still responds-sometimes with extreme tension, as to a strange sound in the night.

16. Noise is a type of atmospheric pollution. It is a shadowy public enemy whose growing menace has increased in the modern age of industrialization and technological advancement. Although a soft rhythmic sound in the form of music and dance stimulates brain activities, removes boredom and fatigue, but its excessiveness may prove detrimental to living things. Researches have proved that a loud noise during peak marketing hours creates tiredness, irritation and impairs brain activities so as to reduce thinking and working

abilities. Noise pollution was previously confined to a few special areas like factory or mill, but today it engulfs every nook and corner of the globe, reaching its peak in urban areas. Industries, automobiles, rail engines, aeroplanes, radios, loudspeakers, tape recorders, lottery ticket sellers, hawkers, pop singers, etc., are the main ear contaminators of the city area and its market place. The regular rattling of engines and intermittent blowing of horns emanating from the caravan of automobiles do not allow us to have any respite from irritant noise even in suburban zones.

17. In the modern days noise has become one of the major pollutants and it has serious effects on human health. Effects of noise depend upon sound's pitch, its frequency and time pattern and length of exposure. Noise has both auditory and non-auditory effects depending upon the intensity and the duration of the noise level. It affects sleep, hearing, communication, mental and physical health. It may even lead to the madness of people.

18. However, noises, which are melodious, whether natural or man-made, cannot always be considered as factors leading to pollution.

19. Noise can disturb our work, rest, sleep, and communication. It can damage our hearing and evoke other psychological, and possibly pathological reactions. However, because of complexity, variability and the interaction of noise with other environmental factors, the adverse health effects of noise do not lend themselves to a straightforward analysis.

112. In P.A. Jacob v. the Superintendent of Police, it was said : (AIR p.1)

> *"The right to speech implies, the right to silence. It implies freedom, not to listen, and not to be forced to listen. The right comprehends freedom to be free from what one desires to be free from. Free speech is not to be treated as a promise to everyone with opinions and beliefs, to gather at any place and at any time and express their views in any manner. The right is subordinate to peace and order. A person can decline to read a publication, or switch off a radio or a television set. But, he cannot prevent the sound from a loudspeaker reaching him. He could be forced to hear what he wishes not to hear. That will be an invasion of his right to be let alone, to hear what he wants to hear, or not to hear, what he does not wish to hear. One may put his mind or hearing to his own uses, but not that of another. No one has a right to trespass on the mind or ear of another and commit auricular or visual aggression. A loudspeaker is mechanical device, and it has no mind or thought process in it. Recognition of the right of speech or expression is recognition accorded to a human faculty. A right belongs to human personality, and not to a mechanical device. One may put his faculties to reasonable uses. But, he cannot put his machines to any use he likes. He cannot use his machines to injure others. Intervention with a machine, is not intervention with, or invasion of a human faculty or right. No mechanical device can be upgraded to a human faculty. A computer or a robot cannot be conceded the right under Article 19 (though they may be useful to man to express his faculties). No more, a loudspeaker. The use of a loudspeaker may be incidental to the exercise of the right. But, its use is not a matter of right, or part of the right".*

117. We have referred to a few and not all available judgments. Suffice it to observe that Indian Judicial opinion has been uniform in recognizing right to

live in freedom from noise pollution as a fundamental right protected by Article 21 of the Constitution and noise pollution beyond permissible limits as an in-road on that right. We agree with and record our approval of the view taken and the opinion expressed by the several High Courts in the decisions referred to hereinabove."

21. In ***Farhd K. Wadia vs. Union of India and others (2009) 2 SCC 442***, it was held by the Hon'ble Supreme Court that the interference by the Court in respect of noise pollution is premised on the basis that a citizen has certain rights being "necessity of silence", "necessity of sleep", "process during sleep" and "rest", which are biological necessities and essential for health. It was further held that silence is considered to be golden and considered to be one of the human rights as noise is injurious to human health which is required to be preserved at any cost.

22. In ***Ramlila Maidan Incident, in Re: (2012) 5 SCC 1,*** it was held that the citizens/persons have a right to leisure, to sleep, not to hear and to remain silent. It was further held that right to privacy is a fundamental right of the citizen being an integral part of Article 21 of the Constitution of India. Illegitimate intrusion into privacy of a person is not permissible as right to privacy is implicit in the right to life and liberty guaranteed under the Constitution. The Courts can always impose a penalty on disturbing peace of others.

23. Yet again in a recent decision in ***Anirudh Kumar*** vs. ***Municipal Corporation of Delhi and others (2015) 7 SCC 779***, the Hon'ble Supreme Court while dealing with a Public Interest Litigation (PIL) on the ground of public health, safety and peace of local residents and safety of building, due to running of pathological lab in residential building in the locality held that noise generated upto unpleasant or obnoxious levels violates the rights of the people to a peaceful, comfortable and pollution-free life guaranteed under Article 21 of the Constitution. It was held:

"53. *The running the Pathological Lab by the respondent-owners air, sound pollution is created rampantly on account of which the public resident health and peaceful has been adversely affected. Therefore, public interest is affected and there is violation of rule of law. Hence, we have examined this appeal on all aspects of the matter and on merits. This position of law is well settled in the catena of decisions of this Court.*

24. The Government of India has enacted various legislations to ensure that the people residing in the country have an unfettered right to pollution free air, environment, water and also to ensure that the people are not exposed unpleasant or obnoxious levels of noise. Some of these enactments are Water (Prevention and Control of Pollution) Act, 1974, the Air (Prevention and Control of Pollution), Act, 1981, the Environment (Protection) Act, 1986 and the Noise Pollution (Regulation and Control) Rules, 2000.

25. Apart from the above, Chapter XIV of the Indian Penal Code relating to an offence affecting the public health, safety, inconvenience, decency and morals vests with the police the power for initiating action against any person(s) causing public nuisance.

26. Adverting to the facts, it would be noticed that it is only after filing of the reply that a licence has been granted by respondent No.8 to respondent No.9 under the Himachal Pradesh Shops and Commercial Establishments Act, 1969 (for short 1969 Act") on 7.10.2015. However, it would still have to be determined as to whether the premises where the painting work (if not denting) is being carried out, falls under the purview of 1969 Act.

27. Section 2 (iv) of the Act, 1969, defines "commercial establishment" and means:-

> "*any premises wherein any business, trade or profession is carried on for profit, and includes journalistic or printing establishment and premises in which business of banking, insurance, stocks and shares, brokerage or produce exchange is carried on or which is used as hotel, restaurant, boarding or eating house, theatre, cinema or other place of public entertainment or any other place which the Government may declare, by notification, to be a commercial establishment for the purposes of this Act.*"

Likewise "shop" has been defined in Section 2 (xxvii) means:

> "*any premises where any trade or business is carried on or where services are rendered to customers, and includes offices, store-rooms, godowns, sale depots or warehouses, whether in the same premises or otherwise, used in connection with such trade or business, but does not include a commercial establishment or a shop attached to a factory where the persons employed in the shop are allowed the benefits provided for workers under the Factories Act, 1948 (Central Act, 63 of 1948).*"

28. A similar question came up before the Hon'ble Supreme Court in ***Kalidas Dhanjibhai*** vs***. The State of Bombay AIR 1955 SC 62*** and it was held that the "workshop" would not be covered under the definition 'shop' as there was no buying or selling in the premises.

29. In view of the aforesaid exposition of law, respondent No.8 had no jurisdiction or authority to have registered the premises of respondent No.9 under the 1969 Act, that too, when this Court was already seized of the matter. That apart, the action of respondent No.8 clearly reflects that he without even caring to physically inspect the premises so as to see the nature of these premises, the activities being carried out therein, has straightway proceeded to register the same under the 1969 Act, which is only indicative of the casual and callous manner in which the respondent No.8 has discharged his official duties.

30. Here, even the stand of the Pollution Control Board cannot also be countenanced for the simple reason that once its official had proceeded to actually inspect the premises, then we see no reason why only the monitoring under the Noise Pollution (Regulation and Control) Rules, 2000 had been carried out, when admittedly, the area in question is one where denting and painting work on large scale is being carried out on the national highway abutting the premises of the petitioner. In such scenario, we fail to understand as to how the extensive air and environmental pollution being generated there has gone totally unnoticed. We are at a complete loss to understand and appreciate as to how the toxic and noxious material of paint being emitted from the nozzle of the spray gun which is otherwise highly volatile apart from being toxic and having very strong pungent odour, which adversely affects the quality and ambiance of the air has gone totally unnoticed.

31. The case of the Municipal Corporation is also no better as inspite of passage of 12 years of the merger of the area in question with the municipal limits, it has failed to get the records from the Town and Country Planning Department. We are at a complete loss to understand as to how in absence of any record the taxes in these areas are being collected and at what rate, whether it is commercial or domestic? This only indicates that there is a total lack of co-ordination and cooperation amongst the different organs, wings, departments and functionaries of the Government.

32. As is evident from the aforesaid discussion, here is a case which clearly reflects total insensitivity and callousness on the part of the respondents in dealing with the cases of the most cherished of all fundamental rights i.e. Article 21 of the Constitution of India. We are constrained to observe that entire efforts made in furtherance to Articles 21, 48A and 51A (g) of the Constitution by introducing various legislations to give the citizen a right to enjoy a pollution free life (some of which we have noticed above) has been given a complete go-bye at the hands of those responsible for implementing the same.

33. In such circumstances we are left with no option but to allow the writ petition and consequently we proceed to pass the following directions:

(i) that the respondent No.9 is restrained from carrying out the denting and painting works in the premises in question;

(ii) the licence granted by respondent No.8 to respondent No.9 for the purpose of denting and painting under the Himachal Pradesh Shops and Commercial Establishments Act, 1969, is quashed and set-aside. However, in case respondent No.9 changes his trade, profession, business or vocation which may fall under the provisions of 1969 Act, he shall be free to apply for a licence, which needless to say shall be considered by respondent No.8 strictly in accordance with the provisions of law, being totally uninfluenced by the observations made in this judgment.

(iii) the respondents No. 1 to 8 are directed to ensure that no vehicles are parked near the premises of the petitioner for denting and painting and other repair works and they are further directed to remove all junk vehicles along the road-sides.

(iv) the respondents No. 1 to 8 are directed to regularly monitor the quality and ambiance of the quality of air and noise levels as per the mandate of the various enactments referred to in para 24 supra.

(v) the respondent No.1 is directed to ensure that the records of the subsequently merged area with the Municipal Corporation are handed over to it within a period of three months, whereafter the Municipal Corporation will take follow up action in terms of its reply within a further period of six months.

With the aforesaid observation, the petition is disposed of so also the pending application(s) if any, leaving the parties to bear their costs.

****

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

LPA No.16 of 2012 with LPA No.32 of 2012
Decided on: December 31, 2015.

LPA No.16 of 2012

Dr.(Ms.) Monica Sharma .....Appellant.

versus

Dr.Y.S. Parmar University and others .....Respondent.

LPA No.32 of 2012

Dr.Y.S. Paramar University .....Appellant.

versus

Dr.Manica Tomar and others .....Respondents.

Constitution of India, 1950- Article 226- The grievance of the writ petitioner was redressed during the pendency of the LPA- however, an apprehension was expressed on behalf of the writ petitioner that financial benefit may not be granted to the writ petitioner and liberty may be reserved to seek appropriate remedy by resorting to appropriate proceedings- in view of this LPA disposed of as settled, with liberty to seek appropriate remedy at appropriate stage. (Para- 2 and 3)

LPA No.16 of 2012:

For the Appellant:	Mr.Dilip Sharma, Senior Advocate, with Ms.Nishi Goel, Advocate.
For the Respondents:	Ms.Ranjana Parmar, Senior Advocate, with Ms.Komal Kumari, Advocate, for respondent No.1. Ms.Jyotsna Rewal Dua, Senior Advocate, with Ms.Amrita Messie, Advocate, for respondent No.2. Nemo for respondents No.3 and 4.

LPA No.32 of 2012:

For the Appellant:	Ms.Ranjana Parmar, Senior Advocate, with Ms.Komal Kumari, Advocate.
For the Respondents:	Ms.Jyotsna Rewal Dua, Senior Advocate, with Ms.Amrita Messie, Advocate, for respondent No.1. Mr.Dilip Sharma, Senior Advocate, with Ms.Nishi Goel, Advocate, for respondent No.2. Nemo for respondents No.3 and 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

Ms.Amrita Messie, learned counsel for Dr.Manica Tomar, (respondent No.2 in LPA No.16 of 2012 and respondent No.1 in LPA No.32 of 2012), stated at the Bar that the University has redressed the grievance of the said respondent rendering both the Letters Patent Appeals infructuous. The only apprehension expressed by the learned counsel for Dr.Manica Tomar is that the University may not grant the financial benefits to Dr.Manica Tomar at par with Dr.Monica Sharma (appellant in LPA No.16 of 2012 and respondent No.2 in LPA No.32 of 2012) and therefore, prayed that liberty may be reserved to Dr.Manica Tomar to seek appropriate remedy by resorting to appropriate proceedings. Her statement is taken on record.

2. Ms.Nishi Goel, learned counsel for Dr.Monica Sharma (appellant in LPA No.16 of 2012) stated that the writ petition as well as both the Letters Patent Appeals may be disposed of as settled. Her statement is taken on record.

3. In view of the above, coupled with the orders passed by this Court from time to time and the order issued by the University, the writ petition and the Letters Patent Appeals are disposed of as settled, with liberty to Dr.Manica Tomar to seek appropriate remedy at appropriate stage.

4. Pending CMPs, if any, also stand disposed of.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

ELICO Ltd. .....Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

CWP No.2929 of 2015.
Judgment reserved on: 16.12.2015.
Date of decision: December 31, 2015.

Constitution of India, 1950- Article 226- Respondent No. 2 placed an order with respondent No. 3 for procurement of Mobile Soil Testing Lab (MSTL) – petitioner informed respondent No. 2 that it was manufacturing MSTL and could offer the same at comparatively less price- however, order was supplied to the petitioner- held, that power of judicial review will apply only in case the process adopted or decision making process is wrong and in order to prevent arbitrariness or favouritism- the award of contract by the State is commercial transaction which must be determined on the basis of considerations that are relevant to such commercial decisions- no person has a right to insist that State Government must enter into a contract with him- respondent No. 3 is a 100% government undertaking and the funds would be going from one pocket of the Government to another pocket of the Government- the process alone is not a determinative factor- however, past record of the tenders, the quality of goods or services assessing such quality on the basis of past performance, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded- past experience of respondent No. 2 with the petitioner was far from good- respondent No. 3 had supplied two mobile soil testing labs which are working satisfactorily- hence, in these circumstances, the decision to award contract to respondent No. 3 cannot be faulted- petition dismissed. (Para-7 to 18)

Cases referred:

Maa Binda Express Carrier and another versus North-East Frontier Railway and others, (2014) 3 SCC 760

Global Energy Ltd. and another versus Adani Exports Ltd. and others (2005) 4 SCC 435.

Raunaq International Ltd. versus I.V.R. Construction Ltd. and others, (1999) 1 SCC 492

For the Petitioner : Mr.Sanjeev Bhushan, Senior Advocate with Mr.Rajesh Kumar, Advocate.

For the Respondents: Mr.Shrawan Dogra, Advocate General with Mr.V.S.Chauhan, Additional Advocate General, Mr.Vikram Thakur, and Mr. J.K.Verma, Deputy Advocate Generals, for respondent No.1 and 2.

Mr.Tek Chand Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

By means of present writ petition, the petitioner has called in question the purchase order placed by respondent No.2 i.e. Director of Agriculture, Himachal Pradesh, for procurement of Mobile Soil Testing Lab (for short 'MSTL') with respondent No.3 i.e. Electronic Corporation of India Ltd.

2. The facts, in brief, are that pursuant to interse communication between respondents No.2 and 3 regarding the supply of 'MSTL', respondent No.2 without calling for any further tenders or quotations on 19.01.2015 placed an order with respondent No.3 for supply of said 'MSTL'. On coming to know, the petitioner vide letter dated 22.01.2015 informed respondent No.2 that it was also manufacturing such 'MSTLs' and could offer the same at a comparatively less price. The petitioner further informed that it participated in the tenders invited by the State of Bihar at Patna and had infact received nine orders of 'MSTLs'.

3. The precise case of the petitioner is that once it was ready to offer the same 'MSTLs' at a far less price, then there was no reason why respondent No.2 should still insist on purchasing the same from respondent No.3 that too without inviting tenders or resorting to any other legitimate or recognized mode of competitive bidding so as to ensure that it gets the best price. Since the petitioner has been denied the right of participation, therefore, the action of the respondents is illegal and arbitrary and deserves to be quashed and set aside.

4. All the respondents have filed their replies. Respondents No.1 and 2 in their joint reply have specifically stated that their past experience with the petitioner has been far from satisfactory inasmuch as during the year 1999-2000, the department purchased two Atomic Absorption Spectrophotometer from the petitioner through open tender for its soil testing, but these instruments did not work smoothly and in spite of repeated requests, the engineers of the petitioner-company failed to rectify the problems. Resultantly, the work in these Labs suffered badly and finally these were disposed of through buyback offer to the petitioner.

5. Insofar as placing the order with respondent No.3 is concerned, respondents No.1 and 2 have stated that the Government of India, Ministry of Agriculture, Department of Agriculture and Cooperation, New Delhi, had launched a Central sponsored scheme on balance and integrated use of fertilizers in which strengthening of soil testing Labs was one of the components to be funded on a pattern of 75:25 assistance. The Expert Scientists of Ministry of Atomic Energy in a meeting held on 23.12.2008 expressed that respondent No.3 had launched a composite 'MSTLs' specially designed for vibration/shock free enclosure for glassware to avoid frequent breakage and in terms of such recommendations, the department was of the view that preference to full component unit may be procured from one single supplier instead of assembling the vehicle and fabricating it from the local fabricator. It was further averred that respondent No.3 had given an undertaking of maintenance and, therefore, it placed its order with respondent No.3 for which the petitioner could possibly have no objection.

6. Respondent No.3 in its reply has taken various preliminary objections wherein it has accorded reasons as to why the costs of the 'MSTL' to be supplied in Himachal were in excess to the one supplied in Bihar and it is stated that the final cost of the Lab is not Rs.68,00,000/-, but is Rs.60,68,500/-.

We have heard the learned counsel for the parties and have also gone through the records of the case.

7. By now it is well settled that 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. The Government is the guardian of the finances of the State and is, therefore, expected to protect the financial interests of the State. The right to accept a low rate or refusal to accept a contract in its

entirety is always available to the Government. Judicial review is concerned not with the decision, but with the decision making process and unless that restriction on the power of the Court is observed, the Court under the guise of preventing the abuse of power would be itself guilty of usurping power.

8. The scope, ambit and nature of jurisdiction exercised by the Court in matters of awarding a contract has repeatedly come up before the Hon'ble Supreme Court. In this context in order to avoid repetition, we may only refer to a recent decision in ***Maa Binda Express Carrier and another*** *versus* ***North-East Frontier Railway and others, (2014) 3 SCC 760***, wherein it was held that award of contract by the State is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that the terms subject to which tenders are invited are not open to judicial scrutiny unless it is found that the same has been tailor-made to benefit a particular tenderer or class of tenderers. So, also the authority inviting tenders can enter into negotiations or grant relaxation for bonafide and cogent reasons provided such relaxation is permissible under the terms governing the tender process. It was further held that the Government and its agencies have to act reasonably and fairly at all points of time. To that extent, the tenderer has an enforceable right in the Court which is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. It was held that:-

> "8. The scope of judicial review in matters relating to award of contract by the State and its instrumentalities is settled by a long line of decisions of this Court. While these decisions clearly recognize that power exercised by the Government and its instrumentalities in regard to allotment of contract is subject to judicial review at the instance of an aggrieved party, submission of a tender in response to a notice inviting such tenders is no more than making an offer which the State or its agencies are under no obligation to accept. The bidders participating in the tender process cannot, therefore, insist that their tenders should be accepted simply because a given tender is the highest or lowest depending upon whether the contract is for sale of public property or for execution of works on behalf of the Government. All that participating bidders are entitled to is a fair, equal and non-discriminatory treatment in the matter of evaluation of their tenders. It is also fairly well-settled that award of a contract is essentially a commercial transaction which must be determined on the basis of consideration that are relevant to such commercial decision. This implies that terms subject to which tenders are invited are not open to the judicial scrutiny unless it is found that the same have been tailor made to benefit any particular tenderer or class of tenderers. So also the authority inviting tenders can enter into negotiations or grant relaxation for bona fide and cogent reasons provided such relaxation is permissible under the terms governing the tender process.
>
> 9. Suffice it to say that in the matter of award of contracts the Government and its agencies have to act reasonably and fairly at all points of time. To that extent the tenderer has an enforceable right in the Court who is competent to examine whether the aggrieved party has been treated unfairly or discriminated against to the detriment of public interest. (See: Meerut Development Authority v. Association of Management Studies (2009) 6 SCC 171 and Air India Ltd. v. Cochin International Airport Ltd. (2000) 1 SCR 505).
>
> 10. The scope of judicial review in contractual matters was further examined by this Court in Tata Cellular v. Union of India (1994) 6 SCC 651, Raunaq

International Ltd. v. I.V.R. Construction Ltd. (1999) 1 SCC 492 and in Jagdish Mandal v. State of Orissa (2007) 14 SCC 517 besides several other decisions to which we need not refer.

11. In Michigan Rubber (India) Ltd. v. State of Karnataka and Ors. (2012) 8 SCC 216 the legal position on the subject was summed up after a comprehensive review and principles of law applicable to the process for judicial review identified in the following words: (SCC p.229, paras 23-24)

> "23. From the above decisions, the following principles emerge:
>
> (a) the basic requirement of Article 14 is fairness in action by the State, and non-arbitrariness in essence and substance is the heartbeat of fair play. These actions are amenable to the judicial review only to the extent that the State must act validly for a discernible reason and not whimsically for any ulterior purpose. If the State acts within the bounds of reasonableness, it would be legitimate to take into consideration the national priorities;
>
> (b) fixation of a value of the tender is entirely within the purview of the executive and courts hardly have any role to play in this process except for striking down such action of the executive as is proved to be arbitrary or unreasonable. If the Government acts in conformity with certain healthy standards and norms such as awarding of contracts by inviting tenders, in those circumstances, the interference by Courts is very limited;
>
> (c) In the matter of formulating conditions of a tender document and awarding a contract, greater latitude is required to be conceded to the State authorities unless the action of tendering authority is found to be malicious and a misuse of its statutory powers, interference by Courts is not warranted;
>
> (d) Certain preconditions or qualifications for tenders have to be laid down to ensure that the contractor has the capacity and the resources to successfully execute the work; and
>
> (e) If the State or its instrumentalities act reasonably, fairly and in public interest in awarding contract, here again, interference by Court is very restrictive since no person can claim fundamental right to carry on business with the Government.
>
> 24. Therefore, a Court before interfering in tender or contractual matters, in exercise of power of judicial review, should pose to itself the following questions:
>
> (i) Whether the process adopted or decision made by the authority is mala fide or intended to favour someone; or whether the process adopted or decision made is so arbitrary and irrational that the court can say: "the decision is such that no responsible authority acting reasonably and in accordance with relevant law could have reached"? and
>
> (ii) Whether the public interest is affected.
>
> If the answers to the above questions are in negative, then there should be no interference under Article 226."
>
> (emphasis supplied)

9. Similar reiteration is found in a number of judgments of the Hon'ble Supreme Court as also the judgments rendered by this Court in CWP No.765/2014, titled as Namit Gupta versus State of Himachal Pradesh and others, decided on 27.03.2014, CWP No.9337/2013, titled as Ashok Thakur versus State of Himachal Pradesh and others, decided on 06.05.2014, CWP No. 4112/2014 titled as Minil Laboratories Pvt. Ltd versus State of Himachal Pradesh and another, decided on 15.07.2014, CWP No. 4897/2014 titled as Mahalaxmi Oxyplants Pvt. Ltd. versus State of Himachal Pradesh and another, decided on 10.09.2014, CWP No.6953/2014 titled as M/s Kausal Air Products versus State of Himachal Pradesh and others, decided on 05.11.2014, CWP No.1007/2015 titled as Sandeep Bhardwaj versus State of Himachal Pradesh and others, decided on 01.09.2015.

10. It is vehemently argued by the learned Senior counsel for the petitioner that the action of respondent No.2 in placing the order of 'MSTL' with respondent No.3 lacks transparency and is in contravention to the Order No.23/7/07 issued by the Central Vigilance Commission on 5th July, 2007 on the subject Transparency in Works/Purchase/ Consultancy contracts awarded on nomination basis. He further contended that the only reason which weighed with respondent No.2 for purchasing the 'MSTL' from respondent No.3 was that it was a full component unit and would not require to be assembled or fabricated. Whereas, the 'MSTL' being supplied by respondent No.3 was not a fabricated unit and even the major components of the unit were being procured from the petitioner, who were the pioneers and national award winners in manufacturing of such 'MSTL' and its components. It is lastly argued that respondents No.2 and 3 were unnecessarily trying to justify the difference in the rates offered by respondent No.3 in State of Bihar vis-à-vis respondent No.2 when the sum total of the additional components is hardly `3,63,246/- for which an additional whopping amount of Rs.9,00,000/- is being charged.

11. At the outset, it may be observed that no person has a right to insist that the State Government must enter into a contract with him. It is not in dispute that respondent No.3 itself is a hundred percent government undertaking and, resultantly, the funds in this case would be going from one pocket of the Government to the other and, therefore, in such circumstances, there can be no hanky-panky as suggested by the petitioner nor can the action of the respondents be said to be lacking bonafides or an act of favourtism.

12. The learned Senior counsel for the petitioner has taken us through the guidelines issued by the Central Vigilance Commission on 5th July, 2007 on the subject Transparency in Works/Purchase/Consultancy contracts awarded on nomination basis, more particularly, clause-3, which reads thus:-

> "3. It is needless to state that **tendering process or public auction** is a basic requirements for the award of contract by any Government agency as any other method, especially award of contract on nomination basis, would amount to a breach of Article 14 of the Constitution guaranteeing right to equality, which implies right to equality to all interested parties."

13. Having gone through the aforesaid provisions, we find nothing therein to indicate that there is any kind of prohibition for one government department in placing a direct order with another government department. While awarding contracts, the State and its agencies can always be treated as a separate class as held by the Hon'ble Supreme Court ***Global Energy Ltd. and another*** *versus* ***Adani Exports Ltd. and others (2005) 4 SCC 435.***

14. Even if, it is assumed without conceding that the petitioner is ready to supply the 'MSTL' at a far cheaper rate, it is not the price alone which would be single determinative factor as it is even the confidence and trust built up over a period of time

which would normally determine any contract. Price in itself need not always be the sole criteria for awarding a contract. At times, even the past records of the tenderers/applicants, the quality of the goods or services which they offered, assessing such quality on the basis of the past performance, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. This legal position has been succinctly dealt with by the Hon'ble Supreme Court in ***Raunaq International Ltd.*** *versus* ***I.V.R. Construction Ltd. and others, (1999) 1 SCC 492,*** wherein it was held as under:-

> "15. Where the decision-making process has been structured and the tender conditions set out the requirements, the court is entitled to examine whether these requirements have been considered. However, if any relaxation is granted for bona fide reasons, the tender conditions permit such relaxation and the decisions is arrived at for legitimate reasons after a fair consideration of all offers, the court should hesitate to intervene.
>
> 16. It is also necessary to remember that price may not always be the sole criterion for awarding a contract. Often when an evaluation committee of experts is appointed to evaluate offers, the expert committee's special knowledge plays a decisive role in deciding which is the best offer. Price offered is only one of the criteria. The past record of the tenderers, the quality of the goods or services which are offered, assessing such quality on the basis of the past performance of the tenderer, its market reputation and so on, all play an important role in deciding to whom the contract should be awarded. At times, a higher price for a much better quality of work can be legitimately paid in order to secure proper performance of the contract and good quality of work-which is as much in public interest as a low price. The court should not substitute its own decision for the decision of an expert evaluation committee.
>
> 17. Normally before such a project is undertaken, a detailed consideration of the need, viability, financing and cost, effectiveness of the proposed project and offers received takes place at various levels in the Government. If there is a good reason why the project should not be undertaken, then the time to object is at the time when the same is under consideration and before a final decision is taken to undertake the project. If breach of law in the execution of the project is apprehended, then it is at the stage when the viability of the project is being considered that the objection before the appropriate authorities including the Court must be raised. We would expect that if such objection or material is placed before the Government the same would be considered before a final decision is taken. It is common experience that considerable time is spent by the authorities concerned before a final decision is taken regarding the execution of a public project. This is the appropriate time when all aspects and all objections should be considered. It is only when valid objections are not taken into account or ignored that the court may intervene, Even so, the Court should be moved at the earliest possible opportunity. Belated petitions should not be entertained.
>
> 18. The same considerations must weigh with the court when interim orders are passed in such petitions. The party at whose instance interim orders are obtained has to be made accountable for the consequences of the interim order. The interim order could delay the project, jettison finely worked financial arrangements and escalate costs. Hence the petitioner asking for interim orders, in appropriate cases should be asked to provide security for

any increase in cost as a result of such delay, or any damages suffered by the opposite party in consequence of an interim order. Otherwise public detriment may outweigh public benefit in granting such interim orders. Stay order or injunction order, if issued, must be moulded to provide for restitution.

19. A somewhat different approach may be required in the cases of award of a contract by the Government for the purchase of times for its use. Judicial review would be permissible only on the established grounds for such review including mala fides, arbitrariness or unreasonableness of the Wednesbury variety. Balance of convenience would play a major role in moulding interim relief."

15. As observed earlier, the past experience of respondent No.2 with the petitioner has admittedly been far from good. Whereas, on the other hand, respondent No.2 has specifically stated that it had procured two Mobile Soil Testing Labs for Hamirpur and Kangra Districts through respondent No.3 and the same are working satisfactorily alongwith instruments. Apart from that, respondent No.3 has also been providing annual maintenance service and repair regularly as and when required by respondent No.2.

16. That apart, this Court cannot sit in appeal over the soundness of the decision and can only examine whether the decision making process was fair, reasonable and transparent. Unfortunately, the petitioner has not even questioned the same.

17. Thus, judged on the parameters of the limited scope of judicial review of this Court under Article 226 of the Constitution of India in the contractual matters, it cannot be said that respondent No.2 by placing the order with respondent No.3 has caused any perceptible injury to the public interest or that its decision is not bonafide. After-all, respondent No.2 must have freedom of contract and there has to be fair play in the joints as a necessary concomitant for an administrative body functioning in an administrative sphere.

18. Having said so, we find no merit in this petition and accordingly the same is dismissed, leaving the parties to bear their own costs. Pending application(s), if any, also stands disposed of. Interim directions also stand vacated.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

High Court of Himachal Pradesh ..... Appellant.
Versus
Shri P.D. Goel .... Respondent.

LPA No. 34 of 2009.
Reserved on: 30.11.2015.
Date of decision: December 31, 2015.

Constitution of India, 1950- Article 226- **H.P. Judicial Services Rules, 2004-** Rules 14 and 15- Writ petitioner was retired compulsorily on attaining the age of 58 years, whereas, his date of retirement is shown to be 60 years in the gradation list- he filed a writ petition which was allowed- an appeal was preferred against the order of the writ Court- High Court had considered the service record of the petitioner and had decided not to grant him extension after 58 years- the benefit of increase in the retirement age to 60 years shall not

be available automatically to all judicial officers and will depend upon their continued utility to the judicial system in case of their continuation- order was rightly passed by the High Court. (Para-10 to 20)

Constitution of India, 1950- Article 226 and 235- An entry was recorded in the ACR of the petitioner that he did not enjoy good general reputation and the net result was average- it was held by the writ Court that remarks were subjective and had no basis- the representation against the remarks could not have been rejected without communicating any reason- held, that Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer at any point of time to discipline the black sheep or to weed out the dead wood, while considering the case of an officer as to whether he should be continued in service or not- his entire service record has to be taken into account- mere fact that after an adverse entry officer was promoted or was given selection grade will not preclude the authority from considering the earlier entry- if the general reputation of the employee was not effective, he may be compulsorily retired, even if there is no tangible material against him- ordinarily, exercise undertaken by the full Court is not amenable to judicial review except under the extra ordinary circumstances- it is not necessary to give specific instances of shortfalls, supported by evidence – the record of officer is to be seen individually, therefore, even if ACRs of another Officer were far interior to the Officer under consideration that may have relevance to grant of extension to the Officer without conferring any right of entitlement to him- the grant of selection grade is a single instance and will not wipe out the entire carrier of the Officer- Governor alone has the power to pass an order of dismissal, removal or termination on the recommendations of the High Court – the order was passed by the High Court which is not competent but the same is ordered to be treated as recommendations to the State Government- petition dismissed. (Para-21 to 43)

Cases referred:

All India Judges' Association vs. Union of India and others (1992) 1 SCC 119

All India Judges' Association and others vs. Union of India and others (1993) 4 SCC 288

Ramesh Chandra Acharya vs. Registrar, High Court of Orissa (2000) 6 SCC 332

Biswanath Prasad Singh vs. State of Bihar (2001) 2 SCC 305

N.C.Das vs. Gauhati High Court through Registrar and others (2012) 2 SCC 321

Rajendra Singh Verma vs. Lt. Governor (NCT of Delhi) and others (2011) 10 SCC 1 (in paras 80, 81 & 82)

Syed T.A. Naqshbandi and others vs. State of Jammu and Kashmir and others (2003) 9 SCC 592

High Court of Judicature, Patna vs. Shiveshwar Narayan and another (2011) 15 SCC 317

Registrar General, Patna HighCourt vs. Pandey Gajendra Prasad and others AIR 2012 SC 2319

High Court of Judicature of Patna, through Registrar General vs. Shyam Deo Singh and others (2014) 4 SCC 773

S.D. Singh vs. Jharkhand High Court through Registrar General and others (2005) 13 SCC 737

T. Lakshmi Narasimha Chari vs. High Court of A.P. and another (1996) 5 SCC 90

Registrar (Admn.) High Court of Orissa, Cuttack vs. Sisir Kanta Satapathy (dead) by LRs and another (1999) 7 SCC 725

For the Appellant : Ms.Jyotsna Rewal Dua, Senior Advocate, with Ms. Amrita Masssey Advocate.

For the Respondent : Mr. R. L. Sood, Senior Advocate, with Mr. Arjun Lall and Mr. Sunil Mohan Goel, Advocates.

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 09.01.2009 whereby the petition filed by the writ petitioner (respondent herein) for the grant of following reliefs came to be allowed:

(i) Quash the entry in column 13 of the Annual Confidential Record of the petitioner for the year 2003-2004 (Annexure P-4) which is to the effect that 'does not enjoy good general reputation.

(ii) Quash the order Annexure P-15 vide which it was conveyed to the petitioner that his representation against the above entry was rejected.

(iii) Quash the notification/order dated 20.4.2005 (Annexure P-16) vide which it has been ordered that the petitioner shall stand retired from service on and with effect from 31st July, 2005 i.e. the last day of the month in which he attains the age of 58 years under Rule 14 of the Himachal Pradesh Judicial Service Rules, 2004.

(iv) Direct the respondent to permit the petitioner to serve as member of Himachal Higher Judicial Service till the age of superannuation i.e. 60 years.

2. The parties to the lis shall be referred to as the writ petitioner and writ respondent.

The facts, in brief, may be noticed.

(i) The writ petitioner joined the Himachal Judicial Service as Sub Judge on 14.1.1975 and was thereafter inducted into the Himachal Higher Judicial Service on 19.4.1995. He was granted selection grade on 20.11.2003. Vide letter dated 30.10.2004 the writ petitioner was informed that the following advisory / adverse remarks had been recorded in his Confidential Report for the year 2003-2004 (ending March 31, 2004) for future guidance.

"13. General Reputation: Does not enjoy good general reputation.

14. Net Result : Average."

(ii) The writ petitioner sought a clarification from the writ respondent as to whether the aforesaid remarks were advisory or adverse in nature. The writ respondent vide letter dated 1.12.2004 conveyed that the remarks "Does not enjoy good general reputation" against column No. 13 was "adverse" whereas the remarks in column No. 14 "Average" was advisory in nature. The writ petitioner thereafter, requested the Registrar (Vigilance) to make available the relevant record on the basis of which this entry/remark had been made so as to enable him to make a proper representation.

(iii) After prolonged correspondence, the writ petitioner vide letter dated 5.3.2005 was conveyed that upon consideration of the entire matter the Hon'ble Full Court felt that the adverse entry "Does not enjoy good general reputation" in column No. 13 was not specifically relatable as such to any particular record nor it had any specific genesis to any particular record of his service. Such an adverse entry as it often happens normally came to be recorded on the basis of the perception that the Hon'ble Members of the Full Court might

have been having about the writ petitioner's functioning and the reputation that he had been enjoying as a Judicial Officer.

(iv) As per the gradation list of officers of the Himachal Pradesh Judicial Service as it stood on 1.1.2005, the date of retirement of the writ petitioner was shown as 31.7.2007 which was consistent with Rule 14 of the Himachal Pradesh Judicial Service Rules, 2004 (hereinafter referred to as the 'Rules') wherein the age of superannuation was fixed at 60 years. The writ petitioner was however shocked to receive the order/notification dated 20.4.2005 wherein it was stated that Hon'ble the Chief Justice and the Hon'ble Judges of the High Court of Himachal Pradesh were pleased to order that the writ petitioner shall stand retired from service on and w.e.f. the afternoon of 31st July, 2005 i.e. the last day of the month in which he attains the age of superannuation i.e. 58 years under Rule 14 of the Rules.

(v) This action according to the writ petitioner had been prompted and preempted because of the adverse entry in the Annual Confidential Report for the year 2003-2004 (ibid). It was further alleged that the writ petitioner had been granted annual increment vide office order dated 18.11.2004, which was sufficient proof of the fact that his records was satisfactory or otherwise this increment could have been stopped. It was also alleged that the judicial officers who had inferior records than the writ petitioner had been permitted to serve upto 60 years, whereas the writ petitioner had been singled out for discriminatory treatment in violation of Article 14 of the Constitution.

3. The writ respondent opposed the petition by filing reply wherein it was averred that the decision to retire the writ petitioner on completion of 58 years (Annexure P-16) was not issued just on the basis of one adverse entry in the ACR of the writ petitioner for the year 2003-2004 but his entire record was considered by the Hon'ble Full Court for forming the opinion with regard to his potential for continued useful service. It was after considering the entire record that the Hon'ble Full Court decided not to grant an extension to the writ petitioner beyond 58 years of age and to retire him at the age of 58 years. It was further averred that the remarks in the ACRs of the writ petitioner for the year 2003-04 had been recorded on the basis of the perception of the Hon'ble Full Court vis-à-vis the reputation of the writ petitioner during the relevant period and did not relate to any particular service record of the writ petitioner.

4. Insofar as the grant of selection grade is concerned, it was averred that just because due selection grade is granted to an officer or annual increment due is released in his favour, the same does not mean that the judicial officer has earned the right to extended age of superannuation. The grant of extension in service is not a vested right and is governed by Rule 14.

5. Based on the pleadings and argument of the parties, the learned writ Court allowed the writ petition by holding:

(i) That the retirement age of judicial officer is 60 years and any retirement prior to this age, amounts to compulsory retirement ;

(ii) It is only the Governor and not the High Court, who could have issued the notification regarding retirement ;

(iii) That the consideration by the Full Court in not granting extension was violative of Article 14 and 16 of the Constitution as the petitioner was singled out, whereas the extension was granted to other similarly situated judicial officers;

(iv) That there was no material available whereby the petitioner could be denied extension upto the age of 60 years ;

(v) That the adverse remarks regarding reputation of the petitioner was subjective and had no basis whatsoever ;

(vi) That the representation against the adverse remarks could not have been summarily rejected without communicating any reasons ; and

(vii) Once selection grade had been granted to the petitioner it proved that there was nothing adverse against him as the same could be granted only pursuant to the recommendation of the Committee after assessing the merit/combined seniority of the petitioner and other similarly situated persons.

We have heard learned counsel for the parties and have gone through the records of the case carefully.

6. At the outset, it may be observed that Mr. Arjun Lall, learned counsel for the writ respondent has fairly submitted that the writ petitioner does not press the ground regarding discrimination in matters of extension granted to the other judicial officers.

7. The learned counsel for the writ respondent while assailing the judgment passed by the learned writ Court has mainly raised the following arguments:-

(i) That the learned writ Court erred in concluding that since the services of the writ petitioner were not continued beyond 58 years of age, therefore, he was compulsorily retired from service.

(ii) That the writ Court had no power to review the decision passed by the Full Court.

(iii) Mere granting of selection grade in favour of the writ petitioner did not prove that there was nothing adverse against him.

(iv) That the writ Court erred in holding that it was the Governor alone and not the High Court which could have issued the notification regarding the retirement of the writ petitioner.

8. On the other hand, the learned counsel for the writ petitioner has vehemently argued that the order passed by the learned writ Court is perfectly in tune with the law and, therefore, deserves to be upheld.

9. What emerges from the arguments of the respective parties is that it would be necessary for this Court to formulate the following questions which arise for consideration:-

(i) Whether the retirement age of 60 years was automatically available to the writ petitioner irrespective of his past record of service and evidence of his continued utility to the judicial system?

(ii) Whether the decision of the Full Court in not granting the extension to the writ petitioner beyond 58 years of age based upon his entire service record with regard to his potential for continued useful service was open to judicial review except on well settled principles?

(iii) Whether mere granting of selection grade would itself prove that there was nothing adverse against the petitioner?

(iv) Whether it was the High Court or the Governor, who was competent to have passed the final order of the retirement of the writ petitioner w.e.f. 31st July, 2005?

Question No.1.

10. It is not in dispute that the service of the writ petitioner is governed by the Himachal Pradesh Judicial Service Rules, 2004 (for short '2004 Rules'). The Rules relevant for the purpose are the Rules 14 and 15, which read thus:

> *"**Rule -14. Age of superannuation.** – The age of superannuation of a member of the service shall be sixty years.*
>
> *Provided that before the completion of fifty eight years of service, the High Court with reference to the record of the Officer, quality of his judgments and his potential of utility in service, shall decide either to retire the Officer on completion of fifty eight years of service or grant him extension upto sixty years.*
>
> ***Rule – 15. Retirement in public interest**. – (1) Notwithstanding anything contained in these rules, the Governor shall on the recommendations of the High Court, if he is of the opinion that it is in the public interest so to do, have the absolute right to retire any member of the service who has attained their age of fifty years by giving him notice of not less than three months, in writing, or three months pay and allowances in lieu of such notice.*
>
> *(2). Whether a member of the service should be retired in public interest under sub-rule (1) shall be considered at least three times, that is, when he is about to attain the age of 50 years, 55 years and 58 years.*
>
> *Provided that nothing in sub-rule (2) shall be construed as preventing the consideration of question of retirement of a member of the service in the public interest at any time other than those mentioned therein."*

11. The specific stand of the writ respondent(appellant herein) in its reply to the writ petition was that as per the mandatory requirement of proviso to Rule 14 of the 2004 Rules, the Hon'ble Full Court had considered the entire service record of the writ petitioner for forming the opinion with regard to his potential for continued useful service and it is only after considering the entire record that the Full Court decided not to grant an extension to the writ petitioner beyond 58 years of age and retired him at the age of 58 years. The order passed on the basis of such decision, reads thus:

> *"Hon'ble the Chief Justice and Hon'ble Judges of the High Court of Himachal Pradesh are pleased to order that Shri P.D. Goel, District and Sessions Judge, Chamba (a Member of Himachal Pradesh Judicial Service), shall stand retired from service on and with effect from the afternoon of 31st July, 2005 i.e. last day of the month in which he attains the age of superannuation, that is, 58 years, under Rule 14 of the Himachal Pradesh Judicial Service Rules, 2004."*

12. It would also be noticed that insofar as the compulsory retirement is concerned, the same is specifically dealt with under Rule 15 (supra) and has apparently not been invoked in the case of the writ petitioner.

13. The learned writ Court by placing reliance upon Rule 14 has held that once the age of retirement is 60 years, then the action of the writ respondent to retire the writ petitioner at 58 years, amounts to compulsory retirement and since the procedure for the same had not been followed, therefore, the order retiring the writ petitioner at the age of 58 years was liable to be set-aside.

14. The aforesaid view of the learned writ Court cannot be legally sustained in view of the fact that once the High Court had formed an opinion that the writ petitioner does not have utility for continued service so as to be retained beyond 58 years of age, then the writ petitioner cannot be said to have been compulsorily retired under Rule 15, but in fact

ordered to be retired at the age of 58 years by invoking Rule 14 and, therefore, the procedure as envisaged for compulsory retirement under Rule 15 was inapplicable and was thus not required to be followed.

15. The mere fact that the writ petitioner was retired at the age of 58 years would not bring his case under Rule 15 for the simple reason that in so far Rule 14 is concerned, the High Court would in reference to the record of the officer, quality of his judgment and his potential of utility in service, decide either to retire the officer on completion of 58 years of service or grant him extension upto 60 years. Whereas, in terms of Rule 15 the High Court was to form an opinion that it was in the public interest to retire a judicial officer on his attaining the age of 50 years, 55 years and 58 years by giving him notice not less than three months, in writing, or three months pay and allowances in lieu of such notice and then make the recommendation to the Governor to compulsory retire the incumbent.

16. In ***All India Judges' Association vs. Union of India and others (1992) 1 SCC 119*** the Hon'ble Supreme Court passed various directions for betterment of service conditions of subordinate judiciary which included the increase of retirement age of judicial officers to 60 years. The matter was thereafter brought before the Hon'ble Supreme Court in ***All India Judges' Association and others vs. Union of India and others (1993) 4 SCC 288*** wherein again the Hon'ble Supreme Court reiterated that the age of retirement of judicial officers should be increased to 60 years. However, it was made clear that the increase of the retirement age would not be available automatically to all the judicial officers irrespective of their past record of service and evidence of their continued utility to the judicial system. It is apt to reproduce paras 30 and 31 of the judgment which reads thus:

> *"30. There is, however, one aspect we should emphasise here. To that extent the direction contained in the main judgment under review shall stand modified. The benefit of the increase of the retirement age to 60 years, shall not be available automatically to all judicial officers irrespective of their past record of service and evidence of their continued utility to the judicial system. The benefit will be available to those who, in the opinion of the respective High Courts, have a potential for continued useful service. It is not intended as a windfall for the indolent, the infirm and those of doubtful integrity, reputation and utility. The potential for continued utility shall be assessed and evaluated by appropriate Committees of Judges of the respective High Courts constituted and headed by the Chief Justices of the High Courts and the evaluation shall be made on the basis of the judicial officers' past record of service, character rolls, quality of judgments and other relevant matters.*
>
> *31. The High Court should undertake and complete the exercise in case of officers about to attain the age of 58 years well within time by following the procedure for compulsory retirement as laid down in the respective Service Rules applicable to the judicial officers. Those who will not be found fit and eligible by this standard should not be given the benefit of the higher retirement age and should be compulsorily retired at the age of 58 by following the said procedure for compulsory retirement. The exercise should be undertaken before the attainment of the age of 58 years even in cases where earlier the age of superannuation was less than 58 years. It is necessary to make it clear that this assessment is for the purpose of finding out the suitability of the concerned officers for the entitlement of the benefit of the increased age of superannuation from 58 years to 60 years. It is in addition to the assessment to be undertaken for compulsory retirement and the*

compulsory retirement at the earlier stage/s under the respective Service Rules."

17. In ***Ramesh Chandra Acharya vs. Registrar, High Court of Orissa (2000) 6 SCC 332*** it was again reiterated by the Hon'ble Supreme Court that the benefit of increase in the retirement age to 60 years shall not be available automatically to all judicial officers irrespective of their past record of service and there must be evidence of their continued utility to the judicial system in case they are to be continued.

18. In ***Biswanath Prasad Singh vs. State of Bihar (2001) 2 SCC 305,*** the Hon'ble Supreme Court took note of the expression "compulsory retirement" used in paragraph 31 of the ***All India Judges' Association*** case (supra) and then drew a clear distinction between "compulsory retirement" and "continued utility in service" and it was held as under:

"*11. The use of the words compulsory retirement for the judicial officers allowed to superannuate at the age of 58 years and the expressions such as compulsory retirement on attaining the age of 58 years according to the procedure for compulsory retirement under the rules have emboldened the petitioner to raise the plea that subsequent to the judgment of this court in 1993 case, the retirement of a judicial officer at the age of 58 years is not retirement in ordinary course but compulsory retirement and therefore the procedure for compulsory retirement has to be followed. In our opinion such a submission cannot be entertained on an overall reading of the judgment of this court in 1993 case.*

15. In the first case, the only follow-up action required by the High Court is to inform the Government of its decision so that the Government knows that the officer which, according to its records, was going to retire on completing the age of 58 years would be continuing upto the age of 60 years. The officer concerned may also be informed so as to feel assured that he has to serve upto the age of 60 years and also feel encouraged that his performance in office, honesty, uprightness and hard work have earned him the benefit of holding the post for another two years beyond the normal age of superannuation; the judicial system acknowledges his utility for continuing the association ahead. In the second case, the High Court, having followed the statutory procedure applicable to compulsory retirement in public interest, shall communicate its finding by way of recommendation to the State Government and the State Government shall act on the recommendation as required by Article 235 of the Constitution and pass the consequential order of compulsory retirement whereupon the compulsory retirement shall take effect. In the third case, no order is required to be passed or communicated either to the State Government or to the officer concerned. The officer would be retiring on his reaching the normal superannuation age. The State Government and the officer both know as soon as the officer enters the service as to what his date of retirement is. However, for the sake of convenience and by way of courtesy, the High Court may inform the officer that he was not being given the benefit of extended age of superannuation under the 1993 case.

16. The word compulsory retirement is not a very appropriate expression to be employed in the cases covered by category (iii) because the officer has neither been given the benefit of extended age of superannuation nor was being retired prematurely nor was being compulsorily retired in the sense the expression is known to service jurisprudence but was being allowed to retire

simplicitor at the age of superannuation appointed by the service rules governing him. His length of service was neither being extended nor snapped mid-way. In this third category of cases, the employment of words compulsory retirement denotes only this much that the High Court having undertaken the exercise of evaluation in the terms of 1993 case and having formed the opinion that the officer was not entitled to benefit of extension, there was no other option left available except to allow the officer concerned to retire at the normal age of his superannuation. Even assuming, without conceding that the retirement at the normal age of superannuation, viz. 58 years, has been consciously called compulsory retirement in the 1993 case, the same would at the most be a compulsory retirement in public interest and certainly not by way of penalty casting any stigma. But in any case other than the exercise of evaluation undertaken by the High Court, an order of so called compulsory retirement would not need to be passed by the State Government in as much as such retirement was not under the service rules but only in terms of the judgment of the Supreme Court which judgment does not require an order by the State Government to be passed for its validity or efficacy. Thus, there is no scope for raising the pleas sought to be raised by the petitioner herein."

19. In ***N.C.Das vs. Gauhati High Court through Registrar and others (2012) 2 SCC 321*** the question posed before the Hon'ble Supreme Court was whether the amendment to the Rules made in the year 2006 in enhancing the age of superannuation from 58 to 60 years would be automatically available to the members of the Tripura Judicial Service, who had otherwise been retired at the age of 58 years and it was held as under:

"13. A bare perusal of clause (B) of amended Rule 20 leaves no manner of doubt that the High Court is empowered to assess and evaluate the record of a judicial officer for continued utility in service up to 60 years. Clause (B) has overriding effect over clause (A) of Rule 20. This is clear from the expression 'Notwithstanding anything contained in clause (A)' with which clause (B) begins. The mode and manner of assessment and evaluation of the potential of continued utility is prescribed in Rule 20 (B) (i) of the 2003 rules. No legal flaw has been pointed out to the exercise undertaken by the High Court in respect of the assessment and evaluation for the petitioner's service for continued utility in service up to 60 years. We are satisfied that the petitioner's service for continue utility in service up to 60 years. We are satisfied that the petitioner is not entitled to the relief claimed in the Interlocutory Application No. 5 of 2006. Interlocutory Application No.5 of 2006, is accordingly, dismissed."

20. From the aforesaid exposition of law, it can safely be concluded that the order passed under Rule 14 thereby retiring a person at the age of 58 years is not an order of compulsory retirement because there is no right of the judicial officer to continue beyond the age of 58 years unless the High Court on the administrative side finds him suitable to continue. If the judicial officer is not found suitable to be continued in service, he retires. The order is neither stigmatic nor can be said to be passed by way of punishment. The Court only looks at the utility and suitability of retaining the officer in service. Therefore, the findings recorded by the learned writ Court that the writ petitioner had been compulsorily retired only on account of his having not been allowed to continue to 60 years is unsustainable.

Question No.2.

21. It was vehemently argued by learned senior counsel for the writ respondent that the findings of the learned writ Court that the adverse remarks regarding reputation of

the writ petitioner were subjective and had no basis or that the representation against the adverse remarks could not have been summarily rejected without communicating any reasons, is contrary to the law and was otherwise beyond the scope of judicial review. It is further argued that the only adverse entry communicated to the petitioner was regarding his reputation and there was no requirement of law that before arriving at such a conclusion there should have been written material and it was also not necessary to communicate the reasons.

22. On the other hand, learned counsel for the writ petitioner would argue that before forming an opinion to be adverse, the Reporting Officer should have shared the opinion which admittedly was not part of the record with the other officers concerned and if this was not done, then the adverse entry had to be quashed. That apart, the opinion at best could be a perception which in any case could not have been made the basis of an adverse entry as the same was required to be founded on facts and material.

23. It would be noticed that the learned writ Court has itself sat in appeal over the decision made by the Hon'ble Full Court by concluding that the remarks made by the members of the Hon'ble Full Court were based on their perception and that such an opinion could only be formed objectively and not subjectively and the writ petitioner was required to be confronted with the material, if any, available on record and only thereafter the entries could have been incorporated.

24. The mandate of Article 235 of the Constitution is that the High Court has to maintain constant vigil on its subordinate judiciary. For that the judicial service is not a service in the sense of an employment as is commonly understood. Judges are discharging their functions while exercising the sovereign judicial power of the State and their honesty and integrity is expected to be beyond doubt. It should be reflected in their overall reputation. The nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility. Article 235 enables the High Court to assess the performance of any judicial officer at any point of time with a view to discipline the black sheep or weed out the dead wood, and this constitutional power of the High Court cannot be circumscribed by any rule or order. This was so held in ***Rajendra Singh Verma vs. Lt. Governor (NCT of Delhi) and others (2011) 10 SCC 1 (in paras 80, 81 & 82)*** which are quoted below:-

> *"80. The mandate of Article 235 of the Constitution is that the High Court has to maintain constant vigil on its subordinate judiciary as laid down by this Court in High Court of Judicature at Bombay through its Registrars Vs. Shirishkumar Rangrao Patil and Another (1997) 6 SCC 339. In the said case, this Court has explained that the lymph nodes (cancerous cells) of corruption constantly keep creeping into the vital veins of the judiciary and need to stem it out by judicial surgery lies on the judiciary itself by its self- imposed or corrective measures or disciplinary action under the doctrine of control enshrined in Articles 235, 124(6) of the Constitution, and therefore, it would be necessary that there should be constant vigil by the High Court concerned on its subordinate judiciary and self introspection.*
>
> *81. Judicial service is not a service in the sense of an employment as is commonly understood. Judges are discharging their functions while exercising the sovereign judicial power of the State. Their honesty and integrity is expected to be beyond doubt. It should be reflected in their overall reputation. There is no manner of doubt that the nature of judicial service is such that it cannot afford to suffer continuance in service of persons of doubtful integrity or who have lost their utility.*

> *82. As explained by this Court in Chandra Singh and others Vs. State of Rajasthan & another (2003) 6 SCC 545, the power of compulsory retirement can be exercised at any time and that the power under Article 235 in this regard is not in any manner circumscribed by any rule or order. What is explained in the said decision by this Court is that Article 235 of the Constitution of India enables the High Court to assess the performance of any judicial officer at any time with a view to discipline the black sheep or weed out the deadwood, and this constitutional power of the High Court cannot be circumscribed by any rule or order."*

25. While considering the case of an officer as to whether he should be continued in service or not, his entire service record up to that date on which consideration is made has to be taken into account. The mere fact that even after an earlier adverse entry an officer was promoted or given selection grade etc. by itself would not preclude the authority from considering the earlier adverse entry. The order not to grant extension beyond 58 years would be based on the material which means substance, material, stuff, something etc. While considering the case of a judicial officer, it is not necessary to limit the "material" only to written complaints or "tangible" evidence pointing finger at the integrity of the judicial officer. Such an evidence may not be forthcoming in such cases. After all making an adverse entry is not equivalent to imposition of a penalty which would necessitate an enquiry or the giving of a reasonable opportunity of being heard to the Government servant concerned. Further, in case where the Full Court of the High Court recommends compulsory retirement of an officer or non-extension of service beyond 58 years, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the Judges of the High Court who go into the question and it is possible that in all cases evidence would not be forthcoming about the reputation of the judicial officer. The Full Court acts on the collective wisdom of all the Judges and if the general reputation of an employee is not good, though there may not be any tangible material against him, he may either be compulsory retired or granted extension and judicial review of such order is permissible only on a limited ground. Normally, the adverse entry reflecting on the integrity or reputation would be based on formulations of impressions which would be the result of multiple factors. Therefore, if the authority bona fide forms an opinion about the reputation of a particular officer, the correctness of that opinion cannot be challenged before the Court as held in ***Rajendra Singh Verma*** case supra and it is apt to reproduce paras 183, 189, 190, 191 and 192 of judgment which read as under:

> "*183. It is well settled by a catena of decisions of this Court that while considering the case of an officer as to whether he should be continued in service or compulsorily retired, his entire service record upto that date on which consideration is made has to be taken into account. What weight should be attached to earlier entries as compared to recent entries is a matter of evaluation, but there is no manner of doubt that consideration has to be of the entire service record. The fact that an officer, after an earlier adverse entry, was promoted does not wipe out earlier adverse entry at all. It would be wrong to contend that merely for the reason that after an earlier adverse entry an officer was promoted that by itself would preclude the authority from considering the earlier adverse entry. When the law says that the entire service record has to be taken into consideration, the earlier adverse entry, which forms a part of the service record, would also be relevant irrespective of the fact whether officer concerned was promoted to higher position or whether he was granted certain benefits like increments etc.*

"189. The argument that material was not supplied on the basis of which "`C' Doubtful Integrity" was awarded to the appellants and, therefore, the order of compulsory retirement is liable to be set aside has no substance. Normally and contextually word `material' means substance, matter, stuff, something, materiality, medium, data, facts, information, figures, notes etc. When this Court is examining as to whether there was any `material' before the High Court on the basis of which adverse remarks were recorded in the confidential reports of the appellants, this `material' relates to substance, matter, data, information etc. While considering the case of a judicial officer it is not necessary to limit the `material' only to written complaints or `tangible' evidence pointing finger at the integrity of the judicial officer. Such an evidence may not be forthcoming in such cases.

190. As observed by this Court in R.L. Butail Vs. Union of India and Others, (1970) 2 SCC 876, it is not necessary that an opportunity of being heard before recording adverse entry should be afforded to the officer concerned. In the said case, the contention that an inquiry would be necessary before an adverse entry is made was rejected as suffering from a misapprehension that such an entry amounts to the penalty of censure. It is explained by this Court in the said decision that : (SCC p. 876)

> *"(ii)…making of an adverse entry is not equivalent to imposition of a penalty which would necessitate an enquiry or giving of a reasonable opportunity of being heard to the Government servant concerned."*

191. Further in case where the Full Court of the High Court recommends compulsory retirement of an officer, the High Court on the judicial side has to exercise great caution and circumspection in setting aside that order because it is a complement of all the judges of the High Court who go into the question and it is possible that in all cases evidence would not be forth coming about doubtful integrity of a Judicial Officer. As observed by this Court in High Court of Punjab & Haryana through R.G. Vs. Ishwar Chand Jain and Another, (1999) 4 SCC 579, at times, the Full Court has to act on the collective wisdom of all the Judges and if the general reputation of an employee is not good, though there may not be any tangible material against him, he may be given compulsory retirement in public interest and judicial review of such order is permissible only on limited grounds. The reputation of being corrupt would gather thick and unchaseable clouds around the conduct of an officer and gain notoriety much faster than the smoke. Sometimes there may not be concrete or material evidence to make it part of the record. It would, therefore, be impracticable for the reporting officer or the competent controlling officer writing the confidential report to give specific instances of shortfalls, supported by evidence.

192. Normally, the adverse entry reflecting on the integrity would be based on formulations of impressions which would be result of multiple factors simultaneously playing in the mind. Though the perceptions may differ in the very nature of things there is a difficulty nearing an impossibility in subjecting the entries in the confidential rolls to judicial review. Sometimes, if the general reputation of an employee is not good though there may not be any tangible material against him, he may be compulsorily retired in public interest. The duty conferred on the appropriate authority to consider the question of continuance of a judicial officer beyond a particular age is an absolute one. If that authority bona fide forms an opinion that the integrity of a particular

officer is doubtful, the correctness of that opinion cannot be challenged before courts. When such a constitutional function is exercised on the administrative side of the High Court, any judicial review thereon should be made only with great care and circumspection and it must be confined strictly to the parameters set by this Court in several reported decisions. When the appropriate authority forms bona fide opinion that compulsory retirement of a judicial officer is in public interest, the writ Court under Article 226 or this Court under Article 32 would not interfere with the order."

26. The Hon'ble Supreme Court further held that the exercise undertaken by the Full Court is not ordinarily amenable to judicial review except under extraordinary circumstances. The relevant observation reads thus:

"218.....In cases of such assessment, evaluation and formulation of opinions, a vast range of multiple factors play a vital and important role and no one factor should be allowed to be blown out of proportion either to decry or deify an issue to be resolved or claims sought to be considered or asserted. In the very nature of things, it would be difficult, nearing almost an impossibility to subject such exercise undertaken by the Full Court to judicial review except in an extraordinary case when the Court is convinced that some real injustice, which ought not to have taken place, has really happened and not merely because there could be another possible view or someone has some grievance about the exercise undertaken by the Committee/Full Court."

27. The scope of judicial review of an order passed by the High Court on administrative side came up for consideration of the Hon'ble Supreme Court in ***Syed T.A. Naqshbandi and others vs. State of Jammu and Kashmir and others (2003) 9 SCC 592*** wherein it was inter alia held thus:

"10.. ....*Neither the High Court nor this Court, in exercise of its powers of judicial review, could or would at any rate substitute themselves in the place of the Committee/Full Court of the High Court concerned, to make an independent reassessment of the same, as if sitting on an appeal. On a careful consideration of the entire materials brought to our notice by learned counsel on either side, we are satisfied that the evaluation made by the Committee/Full Court forming their unanimous opinions is neither so arbitrary or capricious nor can be said to be so irrational as to shock the conscience of the Court to warrant or justify any interference. In cases of such assessment, evaluation and formulation of opinions a vast range of multiple factors play a vital and important role and no one factor should be allowed to be overblown out of proportion either to decry or deify an issue to be resolved or claims sought to be considered or asserted. In the very nature of things it would be difficult, nearing almost an impossibility to subject such exercise undertaken by the Full Court, to judicial review except in an extraordinary case when the Court is convinced that some monstrous thing which ought not to have taken place has really happened and not merely because there could be another possible view or someone has some grievance about the exercise undertaken by the Committee/Full Court. Viewed thus, and considered in the background of the factual details and materials on record, there is absolutely no need or justification for this Court to interfere in the matter, with the impugned proceedings.*

28. In ***High Court of Judicature, Patna vs. Shiveshwar Narayan and another (2011) 15 SCC 317*** the Hon'ble Supreme Court held that once the Full Court had

unanimously accepted and approved the view of the Evaluation Committee in not extending the benefit of increase of retirement age to 60 years, then the High Court on the judicial side could not sit in appeal over the decision to go into the correctness of the decision itself taken by the High Court on the administrative side and would go only into the decision making process. It is apt to reproduce para 18 of the judgment which reads thus:

> *"18. In the backdrop of the above material, if the Evaluation Committee formed an opinion that Judicial Officer did not have potential for continued service and that decision has been accepted and approved by the Full Court unanimously, can it be said that the decision of the Full Court in not extending benefit of increase of retirement age to 60 years is based on irrelevant considerations or not material? In our view, the answer has to be no. The use of the expression by the Evaluation Committee in its resolution viz; further continuance in service will not be in public interest has to be read in the context of the subsequent expression immediately following i.e. 'as he does not have the potential for continued useful service'. The Evaluation Committee evaluated and assessed the case of the Judicial Officer with a primary object to find out as to whether Judicial Officer has potential for continued useful service and having regard to the entire service record, character rolls, quality of judgments and other relevant factors, concluded that he does not have potential for continued useful service. The Full Court unanimously accepted and approved the view of the Evaluation Committee. The decision making process is, thus, not at all flawed."*

29. In ***Registrar General, Patna HighCourt vs. Pandey Gajendra Prasad and others AIR 2012 SC 2319,*** the Hon'ble Supreme Court after reviewing the entire case law reiterated the principles laid down from time to time with regard to the scope of judicial review in such like cases and held that when the report of the Administrative Committee was put up before the Full Court which takes a conscious decision to award the punishment/dismissal from service then it would be very difficult rather almost impossible to subject such an exercise to judicial review except in extraordinary cases.

30. Yet again in recent decision in ***High Court of Judicature of Patna, through Registrar General vs. Shyam Deo Singh and others (2014) 4 SCC 773*** after referring to the earlier decision in Syed T.A. Naqshbandi vs. State of Jammu and Kashmir, (2003) 9 SCC 592, the limited judicial review that is permissible was reiterated by the Hon'ble Supreme Court in para 8 of the judgment which reads thus:

> *"8. The importance of the issue can hardly be gainsaid. The evaluation of the service record of a judicial officer for the purpose of formation of an opinion as to his/her potential for continued useful service is required to be made by the High Court which obviously means the Full Court on the administrative side. In all High Courts such evaluation, in the first instance, is made by a committee of senior Judges. The decision of the Committee is placed before the Full Court to decide whether the recommendation of the Committee should be accepted or not. The ultimate decision is always preceded by an elaborate consideration of the matter by the Hon'ble Judges of the High Court who are familiar with the qualities and attributes of the judicial officer under consideration. This is also what had happened in the present case. The very process by which the decision is eventually arrived at, in our view, should permit a limited judicial review and it is only in a rare case where the decision taken is unsupported by any material or the same reflects a conclusion which, on the face of it, cannot be sustained that judicial review would be permissible."*

31. What would emerge from the aforesaid exposition of law is that where the Full Court of the High Court recommends the retirement of an Officer, the High Court on the judicial side has to exercise with great caution and circumspection in setting aside that order because it's a complement of all the High Court Judges, who act on their collective wisdom and if the general reputation of an employee is not good, though there may not be any tangible material against him, he may be retired and judicial review of such order is permissible only on limited grounds. Sometimes, there may not be concrete or material evidence to make it a part of record. It would, therefore, be impracticable for the reporting Officer or the competent controlling Officer writing the confidential report to give specific instances of shortfalls, supported by evidence. Though, the perception may differ in the very nature of things, there is a difficulty nearing an impossibility in subjecting the entries in the confidential rolls to judicial review. Sometimes, if the general reputation of an employee is not good, though there may not be any tangible material against him, he may be ordered to be retired. The duty conferred upon the appropriate authority to consider the question of continuance of a Judicial Officer beyond a particular age is an absolute one. When the Full Court exercises its constitutional opinion on the administrative side, any judicial review thereon should be made with great care and circumspection and it must be strictly confined to the parameters laid down by the Hon'ble Supreme Court in the aforesaid cited cases. But, in no circumstance, can the High Court on the judicial side in exercise of its powers of judicial review substitute itself in the place of the Committee/Full Court of the High Court to make an independent assessment of the same as if sitting in appeal over the same.

32. As observed earlier, the learned writ Court in exercise of its powers of judicial review has substituted itself in the place of the Full Court of the High Court and made an independent reassessment of the same which is impermissible in law.

Question No. 3.

33. It is vehemently argued by learned counsel for the writ respondent that just because selection grade due is granted to the Officer or an annual increment is released in his favour, the same does not mean that the Officer has attained or acquired the extended age of superannuation. It is further argued that evaluation of service record of a Judicial Officer for the purpose of formation of an opinion as to his potential for continued useful service is required to be made by the High Court which obviously means the Full Court on the administrative side. The evaluation is first done by the Committee of Judges and the decision taken by this Committee is thereafter placed before the Full Court to decide whether the recommendations of the Committee should be accepted or not. The ultimate decision is always preceded by an elaborate consideration of the matter by the Hon'ble Judges of the High Court, who were familiar with the qualities and attributes of the Judicial Officer under consideration. This entitlement to continuation/extension of service of a Judicial Officer is not determined on the basis of one factor alone but on the basis of the entire service record of the petitioner and not on a comparative assessment with the record of the other Officer.

34. We find a great deal of force in the submissions made by learned counsel for the petitioner because this is what was precisely said in ***Shyam Deo Singh*** (supra) wherein it was categorically held that the entitlement to continuation/extension of service of a Judicial Officer beyond the age of 58 years has to be determined on the basis of the service record of a particular Officer and not on a comparative assessment with the record of other Officers. Therefore, even if, ACRs of another Officer were far interior to that of the Officer under consideration, the same, at best, may have relevance to grant of extension to the aforesaid Officer without conferring any right or entitlement to the Officer under consideration for a similar extension.

35. In ***S.D. Singh vs. Jharkhand High Court through Registrar General and others (2005) 13 SCC 737*** it was observed by the Hon'ble Supreme Court that merely because the judicial officer has been promoted superseding others did not establish that the petitioner was fit to be continued in service.

36. Thus, it can safely be concluded that the mere fact that selection grade had been granted to the writ petitioner could only be considered to be a single instance in his favour, but that itself alone could not lead to an inference that there was nothing adverse against him. It is after evaluation of the entire service record of the writ petitioner that an opinion as to his potential of continued useful service was made by the High Court which obviously means Full Court on the administrative side. There can be no doubt that the ultimate decision taken by the Hon'ble Judges of the Full Court was preceded by an elaborate consideration on the matter by the Hon'ble Judges, who were familiar with the qualities and attributes of the writ petitioner. The decision was a collective one and was not to be determined on the basis of one factor alone, but on the basis of the entire service record of the writ petitioner, that too without any comparative assessment with the record of the other Judicial Officers. Having observed so, the findings recorded by the learned writ Court that since one selection grade had been granted to the writ petitioner, it proved that there was nothing adverse against him, cannot be sustained.

Question No.4.

37. It is vehemently argued by learned counsel for the petitioner that under Article 235 of the Constitution, it is the Governor alone, who could have passed the order of retirement. While on the other hand, learned counsel for the writ respondent would argue that since the Constitution vests in the High Court administrative, judicial and disciplinary control over the members of the judicial service and its decision in this regard are binding on the State Government and, therefore, if the impugned order of retirement is passed by the High Court, the recommendations of the High Court to the Governor is just an empty formality.

38. Article 235 of the Constitution of India reads thus:-

> *"**235. Control over subordinate Courts.**- The control over district Courts and Courts subordinate thereto including the posting and promotion of, and the grant of leave to, persons belonging to the judicial service of a State and holding any post inferior to the post of district Judge shall be vested in the High Court, but nothing in this article shall be construed as taking away from any such person any right of appeal which he may have under the law regulating the conditions of his service or as authorizing the High Court to deal with him otherwise than in accordance with the conditions of his service prescribed under such law."*

39. In ***T. Lakshmi Narasimha Chari vs. High Court of A.P. and another (1996) 5 SCC 90*** the Hon'ble Supreme Court was seized of a case of judicial officers holding substantive rank of District Munsiff at the time of issuance of order of removal from service by the High Court itself and not by the Governor. After setting aside the order of removal made by the High Court, the Hon'ble Supreme Court treated the order passed by the High Court as a recommendation of the High Court to the Governor for removal from service by holding that the control over these judicial officers vested in the High Court by virtue of Article 235 of the Constitution of India and the Governor was bound in each of the case to act in accordance with the recommendation of the High Court and each of them has to be removed from service. It is apt to reproduce para 18 of the judgment which reads thus:

> *"18. The question now is of the kind of final order to be made in these cases. In the cases of both these officers, namely, T. Lakshmi Narasimha Chari and K. David Wilson, the order of removal made by the High Court is set aside for the reasons already given. However, the action of the High Court against both these judicial officers who held the substantive rank of District Munsiff, is to be treated as the recommendation of the High Court to the Governor for their removal from service. In view of the control over them vested in the High Court by virtue of Article 235 of the Constitution, the Governor is bound, in each case, to act in accordance with the recommendation of the High Court and each of them has to be removed from service for the misconduct found proved by the High Court against them. The Governor of the State of Andhra Pradesh is to proceed and make the necessary consequential orders in accordance with the recommendation of the High Court in each came, in accordance with law. It was submitted by learned counsel for T. Lakshmi Narasimha Chari that he has attained the age of superannuation in the meantime. Any such subsequent event is to be brought to the notice of the High Court and it is for the High court to consider and decide the effect thereof in making any further recommendation to the Governor. In formulating its recommendation, the High Court is to keep in view the relevant rules and the decisions relating to this aspect. No such question arises for consideration by us in this appeal and, therefore, we need not deal with this aspect any further. All consequential actions are to be considered and taken by the High Court in accordance with law."*

40. In ***Registrar (Admn.) High Court of Orissa, Cuttack vs. Sisir Kanta Satapathy (dead) by LRs and another (1999) 7 SCC 725***, the Hon'ble Constitution Bench of the Hon'ble Supreme Court held that though the absolute and exclusive control over the subordinate Courts vests with the High Court including the power to initiate disciplinary proceedings against judicial officers, place them under suspension and to impose punishment, but, when it comes down to question of dismissal, removal, reduction in rank or termination of services of a judicial officer, on any count whatsoever, the High Court becomes only a recommendatory body and formal order can only be issued by the Governor and not by the High Court itself. However, it was clarified that the recommendation of the High Court was binding on the State Government/Governor. It would be relevant to quote the following observations of the Hon'ble Supreme Court in paras 15, 16,17 and 24 of the judgment which read thus:

> *"15. On going through the judgments of this Court right from Shyam Lai v. State of U.P., [1955] 1 SCR 26 down to High Court of Judicature for Rajasthan v. Ramesh Chand Paliwal & Anr, [1998] 3 SCC 72, one cannot but reach one conclusion regarding the power of the High Court in the matter of ordering compulsory retirement. That conclusion is that the High Courts are vested with the disciplinary control as well as administrative control over the Members of the Judicial Service exclusively, but that does not mean that they can also pass orders of dismissal, removal, reduction in rank or termination from service while exercising administrative and disciplinary control over the Members of Judicial Service. Undoubtedly, the High Courts alone are entitled to initiate, to hold enquiry and to take a decision in respect of dismissal, removal, reduction in rank or termination from service, but the formal order to give effect to such a decision has to be passed only by the State Governor on the recommendation of the High Court. It is well settled again by a catena of decisions of this Court that the recommendation of the High Court is binding on*

the State Government/Governor [vide para 18 in Inder Prakash Anand's case (supra)].

16. We are clearly of the view that while the High Court retains the power of disciplinary control over the subordinate judiciary, including the power to initiate disciplinary proceedings, suspend them pending enquiries and impose punishment on them but when it comes to the question of dismissal, removal, reduction in rank or termination of the services of the judicial officer, on any count whatsoever, the High Court becomes only the recommending authority and cannot itself pass such an order [vide Inder Prakash Anand's case and Rajiah's case (supra)].

17. In the instant case, the decision of the Orissa High Court dated 4.2.87 (on the Administrative Side) was required to be forwarded to the Governor for passing an order of cornpulsorily retirement. That was not done. It was wrong for the High Court to have passed the order of compulsory retirement itself. The judicial side of the High Court rightly decided the Writ Petition in favour of the judicial officers and held the order dated 5.2.87 to be bad. In the words of the Division Bench of the High Court :

> *"There is a stronger constitutional objection to accept the submission of Shri Nayak for regarding the High Court as the appointing authority of the Chief Judicial Magistrate on the basis of what has been provided in rule 10 of the Orissa Superior Judicial Service Rules, 1963, inasmuch as it has been laid down in Article 234 of the Constitution that appointments of persons other than District Judges to the judicial service of a State shall be made by the Governor of the State in accordance with the rules made by him in that behalf. The aforesaid rules are one set of such rules. So, no provision in the rules could have altered the constitutional position that the Governor of the State is the appointing authority of persons other than District Judges also. Conferment of this power on the High Court by virtue of what is stated in rule 10 of the Orissa Superior Judicial Service Rules would have clashed with the constitutional mandate. We would therefore, not accept because of what is stated in rule 10 that the High Court is the appointing authority of a Chief Judicial Magistrate."*
>
> * * *
>
> *In view of all that is stated above, we would hold that the High Court is not the appointing authority of Chief Judicial Magistrates to clothe it with the power of compulsory retirement conferred by the First proviso to rule 71 (a) of the Orissa Service Code. In this connection, may we also point out that it would be really incongruous where, though the High Court cannot retire a Munsif, or for that matter a District Judge, as fairly conceded by Shri Nayak it would be in a position to retire a Chief Judicial Magistrate. We do not think if the concerned provisions permit us to take this view.*
>
> *Before closing this aspect of the discussion, we may say that we are conscious of the legal position that passing of an order of compulsory retirement by the Governor is a formal matter as stated in Rajiah 's case (supra) because, according to this decision, the Governor in such cases merely acts on the recommendation of the High Court by signing an order in that regard; but the procedure of the Governor formally passing an order of retirement has to be complied with. So long as*

there is no formal order of the Governor, the compulsory retirement as directed by the High Court cannot take effect, as opined in Rajiah's case itself.

Having come to the aforesaid conclusion, it is not necessary to deal with the second submission of Shri Ray that there were no materials in the present case to order for the compulsory retirement of the petitioner......"

24. Mr. Jayant Das, learned Advocate General, appearing for the State Government, as well as learned counsel appearing for the High Court rightly agreed with the suggestion made on behalf of the Judicial Officers that on the basis of the recommendation made by the Full Court of the High Court on 7.11.91, the Governor of State be requested to pass a formal order of compulsory retirement of Judicial Officers with effect from the date when the recommendation was received by the Government, i.e. 2.12.91. The Judicial Officers (which would include legal representatives in the case of deceased 1st respondent in C.A. No. 4751/92) would, thus, be entitled to their salary, allowances and all other consequential benefits till 2.12.91. This suggestion appeals to us also as it will balance the equities between the parties and set at naught a controversy which has unnecessarily remained pending for so long. The arrears as per the above terms shall be paid to the Judicial Officers within three months from the date of receipt of this judgment."

41. In view of the aforesaid exposition of law, it can safely be concluded that it is the Governor who alone has the power to pass an order of dismissal, removal or termination on the recommendations of the High Court which is made in exercise of powers of control vested in the High Court. However, the High Court under this control of its own cannot dismiss or remove, terminate the services of the District Judge. Here, it still needs to be clarified that where the High Court on the administrative side recommends compulsory retirement of an Officer, those recommendations are binding on the Government.

42. Admittedly, the order of retirement dated 20.04.2005 (Anneuxre P-16) has been passed by the respondent-High Court and not by the Governor and, therefore, the same cannot be sustained. However, taking cue from the law laid down by the Hon'ble Supreme Court in judgments cited above, the order/notification passed by the High Court dated 20.04.2005 (Annexure P-16) is to be treated as a recommendation of the High Court to the Governor for removal of the services of the writ petitioner. The Governor of the State of Himachal Pradesh is to proceed and make necessary consequential orders in accordance with the recommendations of the High Court in accordance with law.

43. In light of the aforesaid discussion, we find merit in this appeal and accordingly the same is allowed and the judgment passed by the learned writ Court on 09.01.2009, except in so far as it quashes the order of retirement dated 20.04.2005 (Annexure P-16) on the ground that the same was not passed by the competent authority, is set aside. However, even these findings shall stand substituted in the manner indicated above. Resultantly, the writ petition filed by the writ petitioner is ordered to be dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

****

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

Madan Mohan Sharma ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWP No. 4616 of 2011
Decided on: 31.12.2015

Constitution of India, 1950- Article 226- Petitioner had purchased a bus and was regularly plying the same- he could not ply it due to unhealthy competition and domestic problems – the bus remained parked and the petitioner was not in position to renew the documents and to pay the tax - penalty was imposed upon him- held, that allegation made by the petitioner that bus remained parked due to compelling circumstances was not denied specifically and is deemed to have been admitted- Competent Authority directed to consider the case of the petitioner in the light of the averments made by him. (Para- 2 to 9)

For the petitioner: Ms. Jyotsna Rewal Dua, Senior Advocate, with Ms. Amrita Messie, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with M/s Anup Rattan, V.S. Chauhan, and Romesh Verma, Additional Advocate General.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Writ petitioner has sought writ of mandamus commanding the respondents to relax the tax liability and penalty and exempt him from paying the token tax on the grounds taken in the memo of the writ petition.

2. It appears that the writ petitioner had purchased bus, bearing registration No. HP-18-4100, in the year 1996, financed by M/s Tirupati Services Ltd. Head- Office at Kanpur and M/s Tata Finance Ltd., and was regularly plying the bus, but unfortunately, due to unhealthy competition and domestic problems, he was not in a position to ply the bus, the same remained parked and idle and that was the reason, he was not in a position to renew the documents and to pay taxes including token tax, constraining him to make representations, which were considered, but penalty was imposed upon him. Further, pleaded that he has availed all the remedies, but in vain. That is how the writ petitioner was constrained to file the writ petition.

3. This Court has passed the interim directions from time to time and in compliance to the said directions, the writ petitioner has deposited the entire tax except the token tax and penalty and the respondents have allowed the writ petitioner to ply the bus.

4. The only question is - whether the penalty and token tax is to be recovered or the competent authority is to be directed to examine the case of the writ petitioner and pass appropriate order after hearing the writ petitioner?

5. At this stage, learned senior counsel appearing on behalf of the writ petitioner submitted that the averments contained in the writ petition have remained

unrebutted and it is a hard fact that the bus remained parked due to the compelling circumstances, the details of which have been given in para 2 (iii) of the writ petition.

6. The respondents have not specifically denied the averments contained in para 2 (iii) of the writ petition.

7. It is beaten law of land that if the averments have not specifically been denied, are deemed to have been admitted.

8. In the given circumstances, we deem it proper to dispose of this writ petition by directing the competent authority to examine the case of the writ petitioner in light of the averments contained in para 2 (iii) of the writ petition and pass appropriate orders, after hearing the writ petitioner, within six weeks.

9. We hope and trust that the competent authority shall consider the case of the writ petitioner sympathetically.

10. It goes without saying that in case the decision is made against the writ petitioner, he is at liberty to challenge the same.

11. The writ petition is disposed of accordingly alongwith all pending applications.

****

BEFORE HON'BLE MR. JUSTICE P.S. RANA, J.

Pardeep Kumar Ohari son of Smt. Ram Dulari & another ....Revisionists/Tenants

Versus

Purna Devi wife of Kishori Lal & others. ....Non-Revisionists/Landlady

Civil Revision No. 142 of 2012
Order Reserved on 1st October 2015
Date of Order 31st December 2015

H.P. Urban Rent Control Act, 1987- Section 14- Landlady filed an eviction petition against the tenants on the ground that tenants had not paid or tendered the rent due from revisionists w.e.f. 1.12.1980- demised premises is required bonafide by landlady for the purpose of rebuilding which could not be carried out without eviction of the tenants- petition was allowed by the Rent Controller partly- an appeal was preferred which was dismissed by the Appellate Court- held, that landlady had a legal right to increase the economic value of the demised premises – the demised premises is required bonafide by landlady for the purpose of rebuilding or making substantial addition or alteration to increase economic utility of demised premises – she had got the construction plan approved by the Competent Authority- however, approval of construction plan is not sine qua non for passing eviction order on ground of bonafide requirement for reconstruction- orders passed by Rent Controller and the Appellate Authority affirmed- revision dismissed. (Para-11 to 18)

Cases referred:

Prem Chand @ Prem Nath vs. Shanta Prabhakar, (1998)1 SCC 274
Jagat Pal Dhawan vs. Kahan Singh (dead) through LRs. and others, (2003)1 SCC 191
State of M.P. vs. State of Maharashtra, AIR 1977 SC 1466

Kewal Singh vs. Lajwanti, AIR 1980 SC 161
A.L. Gupta vs. M.M.Suri, AIR 1973 SC 207
Tara Dutt Sharma vs. Sanjeev Dutt., Latest HLJ 2011 H.P.High Court
Sarla Ahuja vs. United India Insurance Company Ltd., (1998)8 SCC 119
Ajit Singh and another vs. Jit Ram and another, (2008)9 SCC 699
Vinod Kumar vs. Rajesh Kumar, 1995(1) SLC 452
Balwant Rai vs. Surjit Singh and others, 1996(2) SLC 275

For the Revisionists: Mr. G.D. Verma, Sr.Advocate with Mr.B.C.Verma, Advocate
For Non-Revisionist No.1: Mr. Atul Jhingan, Advocate.
For Non-revisionists Nos.2 to 5: None.

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 against order of learned Appellate Authority-I Kangra at Dharamshala announced in Rent Appeal No. 6-KXIV of 2009 titled Pardeep Kumar and others vs. Purna Devi and others whereby learned Appellate Authority affirmed the order passed by learned Rent Controller (I) Kangra (H.P.). in Rent Petition No. 5 of 2001 titled Purna Devi vs. Ram Dulari and others.

Brief facts of the case

2. Smt. Purna Devi landlady filed eviction petition against revisionists under Section 14 of H.P. Urban Rent Control Act 1987 on the ground that tenants have not paid or tendered the rent due from revisionists w.e.f. 1.12.1980 and tenants are in arrears of rent and on the ground that demised building is required bonafide by landlady for the purpose of rebuilding which could not be carried out without eviction of tenants. Landlady further pleaded that demised building is in dilapidated condition and is one of the oldest building of the locality. Landlady further pleaded that landlady has sufficient means to rebuilt the same. Landlady further pleaded that construction plan was sanctioned from Nagar Parishad vide resolution No. 806 dated 30.11.1999 and vide resolution No. 46 dated 31.3.2001. Landlady further pleaded that reconstruction is also required to supplement the income of landlady. Landlady further pleaded that demised building is old fashioned premises and now landlady required to reconstruct the building in modern design with latest fittings and facilities in order to increase economic value of demised premises. Landlady further pleaded that reconstruction is not possible without eviction of tenants. Landlady further pleaded in petition that tenants have sublet the demised premises without her written consent.

3. Per contra response filed on behalf of tenants pleaded therein that eviction petition legally as well as factually is not maintainable. It is pleaded that landlady has no cause of action and locus standi to file the present petition. It is pleaded that landlady is estopped by her act conduct and acquiescence to file the petition and further pleaded that landlady has not come to Court with clean hands and has suppressed the material facts from Court. It is pleaded that present petition for eviction is barred under the principles of resjudicata and under Order 2 Rule 2 CPC. It is pleaded that present petition is bad for non-joinder of parties. It is pleaded that Shanti Devi @ Sudarshan, Chand Rani wife of Tarsem Lal and Kanta Devi d/o Shri Butalia Mal have no concern with premises. It is pleaded that Smt. Shanti Devi, Chand Rani and Smt. Kanta Devi did not remain in possession of disputed shop at any point of time. It is pleaded that Smt. Ram Dulari daughter of Butalia

Mal is in physical possession of disputed shop as tenant and is running the business in disputed shop. It is pleaded that Smt. Ram Dulari is mother of Vinod Kumar, Pardeep Kumar and Parmod Kumar. It is denied that Vinod Kumar, Pardeep Kumar and Parmod Kumar are sub-tenants. It is denied that revisionists are in arrears of rent. It is pleaded that earlier Butalia Mal was paying the rent and thereafter Smt. Ram Dulari who is in physical possession of demised premises is paying the rent of shop regularly but landlady did not issue any receipt in favour of tenant after receiving the rent. It is pleaded that demised shop is not required bonafide by landlady for the purpose of rebuilding. It is denied that shop in dispute is in dilapidated condition. It is also denied that building is the oldest building in locality. It is pleaded that demised shop is not in bad condition and it is pleaded that demised premises is not required bonafide for rebuilding purpose. It is also denied that landlady has sufficient means to rebuilt the demised premises. It is also denied that demised premises is of old fashion. It is also denied that construction plan already stood sanctioned in favour of landlady. It is further pleaded that landlady and her husband have made their best efforts to dispossess the tenants from disputed premises by way of hook and crook and even tried to remove roof forcibly and also tried to make holes in demised premises. Prayer for dismissal of eviction petition sought.

4. Landlady also filed rejoinder and re-asserted the allegations as mentioned in petition. On the pleadings of parties learned Rent Controller on 2.7.2005 framed following issues:-

(i) Whether respondents are in arrears of rent w.e.f. 1.12.1980 as alleged? ....OPP

(ii) Whether suit premises is required bonafidely by petitioner for the purpose of re-building as alleged? ....OPP

(iii) Whether building is in dilapidated condition as alleged? ....OPP

(iv) Whether respondents have sublet the suit premises without the consent of petitioner, as alleged? ...OPP

(v) Whether petition is not maintainable in the present form? ....OPR

(vi) Whether petitioner has no cause of action to file the present petition? OPR

(vii) Whether petitioner is estopped by her act and conduct from filing the present petition? .....OPR

(viii) Whether the petition is barred under Order 2 Rule 2 CPC and principle of res-judicata? ....OPR

(ix) Whether the petition is bad for non-joinder and mis-joinder of necessary parties? .....OPR

(x) Relief.

5. Learned Rent Controller decided issues Nos. 1 and 2 in affirmative and decided issues Nos. 5,6,7,8 and 9 in negative. Learned Rent Controller held that issues Nos. 3 and 4 not pressed at the time of arguments.

6. Feeling aggrieved against the order of learned Rent Controller tenants filed rent appeal No. 6-KXIV/2009 titled Pardeep Kumar and others vs. Purna Devi and others before learned Appellate Authority and learned Appellate Authority Kangra at Dharamshala dismissed the appeal filed by tenants.

7. Feeling aggrieved against the orders of learned Rent Controller and learned Appellate Authority revisionists filed the present civil 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 carefuly.

9. Following points arise for determination in civil revision petition:-

1. Whether civil revision is liable to be accepted as mentioned in memorandum of grounds of revision petition?

2. Final order.

10. ***Reasons for findings upon point No.1***

10.1 PW1 Vipin Kumar Manager Union Bank of India Branch Kangra has stated that Purna Devi wife of Kishori Lal and Kishori Lal son of Bhagat Ram have accounts in their branch and further stated that he has brought the original record. He has stated that FDR No. 8545114 dated 8.9.2008 is in the name of Purna Devi amounting to Rs.62343/- (Rupees sixty two thousand three hundred forty three only) and further stated that photocopy of same is Ext.PW1/A which is correct as per original record. He has stated that FDR No. 15371 is also in favour of Purna Devi and Kishori Lal amounting to Rs.68397/- (Rupees sixty eight thousand three hundred ninety seven only) and photocopy is Ext.PW1/B which is correct as per original record. He has stated that FDR No. 15370 is in favour of Kishori Lal and Purna Devi amounting to Rs.68397/- (Rupees sixty eight thousand three hundred ninety seven only) and photocopy is Ext.PW1/C which is correct as per original record. He has further stated that FDR No. 14590 is also in favour of Kishori Lal amounting to Rs. 45782/- (Rupees forty five thousand seven hundred eighty two only) and photocopy is Ext.PW1/D which is correct as per original record. He has stated that Kishori Lal has saving account No. 2018567 and there is balance of Rs.2,75,199/- (Rupees two lacs seventy five thousand one hundred ninty nine only) and photocopy is Ext.PW1/E which is correct as per original record. He has stated that all copies Ext.PW1/A to Ext.PW1/E have been certified by him. He has stated that there is total deposit of Rs. 5,20,318/- (Rupees five lacs twenty thousand three hundred eighteen only). He has stated that if any party desires to take loan from the bank then bank will provide loan facility. He has stated that if Purna Devi will apply for loan facility then loan would be provided to Purna Devi by bank. He has stated that loan is granted against FDRs for personal use and commercial use.

10.2. PW2 V.K. Sharma Assistant Manager UCO Bank has stated that Purna Devi and Kishor Lal are account holders in their UCO bank and he has brought the original FDRs. He has stated that FDRs Nos. 394768, 394770 and 542530 dated 16.9.2008, 17.9.2008 and 8.8.2007 respectively were issued by the bank. He has stated that amount to the tune of Rs.50,000/- (Rupees fifty thousand only), Rs.50,000/- (Rupees fifty thousand only), and Rs.1,31,820/- (Rupees one lac thirty one thousand eight hundred twenty only) are deposited in above said FDRs and further stated that certified copies are Ext.PW2/A, Ext.PW2/B and Ext.PW2/C. He has stated that Kishori Lal has account No. 2833 in bank and Rs.60300/- (Rupees sixty thousand three hundred only) were deposited in bank and copy is Ext.PW2/D which is correct as per original record. He has stated that entire deposited amount is Rs.2,92,120/- (Rupees two lacs ninety two thousand one hundred twenty only). He has stated that bank also used to provide loan facility. He has stated that if Purna Devi would apply for loan then loan facility would be provided to Purna Devi. He has stated that bank loan is given on the basis of security.

10.3 PW3 Kishori Lal has stated that Purna Devi is his wife and demised premises is in ownership of Purna Devi. He has stated that Purna Devi has filed eviction petition against the tenants. He has stated that demised premises is situated in ward No.7. He has stated that Purna intended to construct the demised premises with latest design. He has

stated that he and Purna Devi are residing jointly. He has stated that he would provide money to Purna Devi for reconstruction of demised premises. He has stated that he has bank accounts in banks. He has stated that demised premises is 80-90 years old. He has stated that shop was constructed after earthquake of 1905. He has stated that shop is in very bad condition and shop would fall at any time. He has stated that shop comprised of two storeys. He has stated that in lower portion of shop Batalia was the tenant. He has stated that thereafter Brindavan came in possession of shop. He has stated that cracks have developed in walls of shop and further stated that shops adjoining to disputed shop have been re-constructed with latest design. He has stated that Purna Devi intended to construct the shop with latest design and construction plan already approved in favour of landlady. He has stated that reconstruction is not possible without eviction of tenants and after new construction of demised premises rent would be enhanced. He has stated that after death of Batalia Mal his four daughters have become his legal heirs and Ram Dulari is also one of them. He has stated that Chand Rani, Shanti and Kanta Devi are also legal heirs but they are not in possession of premises in dispute. He has stated that Vinod, Pardeep and Parmod are legal representatives of Ram Dulari. He has denied suggestion that condition of shop is proper. He has denied suggestion that construction plan was approved in forged manner. He has denied suggestion that landlady has no sufficient source to reconstruct the demised premises. He has denied suggestion that construction is possible without eviction of tenants.

10.4 PW4 Purna Devi has stated that she is owner of demised premises and further stated that shop is situated in ward No. 7 at Kangra. She has stated that shop was rented to Batalia Mal on rent of ` 21/- (Rupees twenty one only) per month. She has stated that she purchased the shop 28 years ago. She has stated that after death of Batalia Mal Brindavan came in possession of shop in dispute. She has stated that thereafter she filed the suit against Brindavan which was decided in her favour. She has stated that when she filed the execution petition then law came for inheritance of daughter and she could not acquire the possession of demised premises. She has stated that thereafter she filed the eviction petition. She has stated that Batalia has four daughters. She has stated that Ram Dulari died during pendency of case. She has stated that disputed premises comprised of two storeys. She has stated that in lower portion tenants are in possession and in upper portion she is in possession. She has stated that tenants are running the business of confectionery. She has stated that shop is 80-90 years old and shop was constructed after earthquake of 1905. She has stated that demised premises is in very bad condition and demised premises would fall at any point of time. She has stated that floor of demised premises also uprooted and wooden of demised premises also uprooted. She has stated that cracks have developed in walls and demised premises is oldest premises in locality. She has stated that she intended to construct demised premises afresh with new design and further stated that construction is not possible without eviction of tenants. She has stated that construction plan already approved by competent authority. She has stated that tenants did not pay rent w.e.f. 1.12.1980. She has stated that she and her husband have 8/10 lacs bank balance. She has stated that all adjoining shops have been reconstructed with latest design and further stated that her income would also increase by way of reconstruction of demised premises. She has stated that she has purchased the shop 20 years ago from Hari Chand. She has denied suggestion that she has received upto date rent from tenants. She has stated that as of today tenants are Vinod Kumar, Pardeep Kumar and Parmod Kumar. She has denied suggestion that demised premises was repaired in the year 1991. She has denied suggestion that demised premises was constructed about 40 years ago with concrete material. She has denied suggestion that demised premises is in proper condition. She has stated that she has kept stationery in upper portion of demised premises. She has denied suggestion that demised premises could be reconstructed without eviction of tenants.

10.5 PW5 Sujata Sharma record keeper MC Kangra has stated that construction plan was approved in favour of Purna Devi vide resolution No. 46 dated 31.3.2001 which is Ext.PW5/A and is correct as per original record. She has stated that validity date of construction plan has been expired as of today. She has stated that she does not know that construction plan was approved in collusion with Municipal Committee office.

10.6 RW1 Smt. Sujata Sharma record keeper municipal committee has stated that she has brought the summoned record and she has seen the original application filed by Purna Devi and copy Ext.DW1/A is correct as per original record. She has stated that she has also brought original record of application dated 14.9.1999 filed by Purna Devi before M.C. Kangra and further stated that copy is Ext.DW1/B which is correct as per original record. She has stated that application was signed by Purna Devi. She has admitted that construction plan was passed for reconstruction vide resolution No. 46 dated 31.3.2001. She has stated that construction plan was approved after proper verification. She has stated that even legal adviser has advised for approval of construction plan.

10.7 RW2 Pardeep Kumar has stated that he and his brothers are tenants of demised premises. He has stated that prior to them Ram Dulari was tenant. He has stated that prior to his mother his maternal grandfather was tenant. He has stated that demised premises is constructed of concrete material. He has stated that upper portion of demised premises is in possession of Purna Devi landlady. He has stated that demised premises was constructed 40-42 years ago. He has stated that earlier Batalia was tenant of shop and thereafter his mother became tenant. He has stated that his mother has paid the rent to landlady till 1991. He has stated that thereafter money order was sent but same was refused by landlady. He has stated that landlady did not supply any receipt of rent. He has stated that length of demised premises in dispute is 37.8 sq.feet and breadth is 12-13 sq. feet. He has stated that demised premises in dispute is in Khasra No. 2305. He has admitted that demised premises is situated in ward No.7 opposite to police station. He has admitted that Purna Devi is landlady of demised premises. He has admitted that Purna Devi has purchased the demised premises on 29.11.1980. He has stated that his maternal grandfather was tenant of demised premises since 40-45 years. He has stated that his maternal grandfather died in the year 1978. He has stated that his mother used to reside with his maternal grandfather. He has stated that his mother died on 13.10.2007. He has stated that his mother conducted business in demised premises for the last 36-37 years. He has stated that he used to sit in demised premises along with his mother. He has denied suggestion that demised premises is 80-90 years old. He has denied suggestion that demised premises was constructed after earthquake of 1905. Self stated that demised premises was constructed 40-45 years ago. He has admitted that rent after 1991 has not been paid. He has stated that if demised premises would be reconstructed then enhanced rent would be acquired by landlady. He has denied suggestion that demised premises has outlived its life.

10.8 RW3 Jagdish has stated that parties are known to him and he has seen the demised premises. He has stated that Pardeep Kumar is tenant of demised premises and Purna Devi is landlady of demised premises. He has stated that sons of Ram Dulari are the tenants of demised premises. He has stated that earlier Batalia was tenant of demised premises. He has stated that daughter of Batalia used to reside with him. He has stated that demised premises is of concrete. He has stated that demised premises was constructed 40 years ago. He has stated that landlady is in possession of upper portion of demised premises. He has stated that he does not know that tin of demised premises has rotten.

11. Submission of learned Advocate appearing on behalf of revisionists that requirement of landlady is not bonafide and landlady has not approached the learned Rent

Controller with clean hands and has filed the present eviction petition on account of previous litigation between the parties and landlady during the course of arguments did not press issue No. 3 relating to dilapidated condition of premises and adverse inference should be drawn against landlady and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is true that learned Rent Controller has specifically mentioned in order that landlady has not pressed issue No. 3 at the time of arguments. Court is of the opinion that landlady has legal right to increase the economic value of demised premises and Court is also of the opinion that when demised premises is required bonafide by landlady for the purpose of rebuilding or making substantial addition or alteration to increase economic utility of demised premises which could not be carried out without eviction of tenant then there is no requirement to go into condition of building. ***See (1998)1 SCC 274 titled Prem Chand @ Prem Nath vs. Shanta Prabhakar. See (2003)1 SCC 191 titled Jagat Pal Dhawan vs. Kahan Singh (dead) through LRs. and others.*** In present case landlady has specifically stated when she appeared in witness box that she wanted to reconstruct the demised premises in order to increase the economic utility of demised premises and it is proved on record that economic utility of demised premises would not be increased without eviction of tenants.

12. Submission of learned Advocate appearing on behalf of non-revisionists that landlady has levelled false allegations of subletting upon Vinod Kumar, Pardeep Kumar and Parmod Kumar who are sons of Ram Dulari daughter of Batalia Mal and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. There is recital in order of learned Rent Controller that landlady did not press issue No.4 relating to subletting of demised premises without consent of landlady during the course of argument. In view of the fact that landlady did not press issue of subletting before learned Rent Controller relating to subletting Court is of the opinion that it is not expedient in the ends of justice to give any findings relating to plea of subletting at the revisional stage before H.P. High Court.

13. Submission of learned Advocate appearing on behalf of revisionists that eviction petition was barred under Order 2 Rule 2 CPC and on the principle of resjudicata is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that Ram Dulari filed civil suit No. 317 of 1991 titled Ram Dulari vs. Purna Devi before learned Civil Judge Kangra for declaration and injunction and suit filed by Ram Dulari was dismissed by learned Civil Judge Kangra. It is proved on record that thereafter Ram Dulari filed civil appeal No. 91-K of 1998 titled Ram Dulari vs. Purna Devi and others before learned Additional District Judge Kangra at Dharamshala and learned Additional District Judge Kangra at Dharamshala on 6.1.2001 partly accepted the appeal filed by Ram Dulari and decree of permanent injunction restraining the defendants not to cause any damage to disputed premises was granted in favour of Ram Dulari and against Purna Devi and Kishori Lal. Civil suit against Smt. Purna Devi and Kishori Lal filed by Ram Dulari mother of revisionists/tenants. Title, nature and cause of action of former civil suit No. 317 of 1991 were different from present eviction petition. In former civil suit No. 317 of 1991 relief of declaration and injunction was sought under Specific Relief Act 1963 and in present eviction petition Purna Devi has sought relief under H.P. Urban Rent Control Act 1987. It is held that when reliefs sought under different special Acts are different and when cause of actions are also different then concept of resjudicata would not apply. In present case provisions of Order 2 Rule 2 of CPC would also not apply because cause of action and relief in rent eviction petition is different and cause of action and relief in civil suit No. 317 of 1991 was different. In order to attract provisions of Section 11 of resjudicata and in order to attract provisions of Order 2 Rule 2 CPC matter must be directly and substantially in issue in former suit. If matter is not in issue either directly and substantially in previous suit then

concept of resjudicata and concept of Order 2 Rule 2 CPC will not apply. Three factos should be satisfied. (1) Previous suit and subsequent legal proceedings should arise out of same cause of action. (2) Parties should be same. (3) Matter should be decided on merits in former suit. In present case cause of action in former civil suit and subsequent legal proceedings under H.P. Urban Rent Control Act 1987 are entirely different. ***See AIR 1977 SC 1466 titled State of M.P. vs. State of Maharashtra. See AIR 1980 SC 161 titled Kewal Singh vs. Lajwanti. See AIR 1973 SC 207 titled A.L. Gupta vs. M.M.Suri.***

14. Submission of learned Advocate appearing on behlaf of revisionists that learned Rent Controller had committed grave error by deciding issue No. 2 on the ground that landlady required the demised premises bonafide for purpose of rebuilding is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that proposed sanctioned plan is approved by competent authority of law and it is also proved by way of oral as well as documentary evidence placed on record that landlady has sufficient sources of income for reconstruction. It is well settled law that landlady has legal right to reconstruct the demised premises for increasing economic utility of demised premises. It is held that tenants have no legal right to stop the reconstruction of demised premises when landlady wanted to reconstruct the demised premises for increasing economic utility of premises.

15. Submission of learned Advocate appearing on behalf of revisionists that landlady failed to plead and prove on record that what kind of new building landlady proposed to construct and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record by way of oral as well as documentary evidence placed on record that proposed construction plan is already approved by competent authority of law. PW5 Sujata Sharma record keeper from MC Kangra has appeared in witness box and has stated in positive manner that construction plan is approved by competent authority of law in favour of landlady. Testimony of PW5 Sujata Sharma posted in office of MC is trustworthy reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW5 Sujata Sharma. Even PW1 Vipin Gupta Manager of Union Bank of India Kangra and PW2 V.K. Sharma Assistant Manager UCO bank have stated in positive manner that landlady has sufficient amount in her bank accounts. PW1 Vipin Gupta Manager of Union Bank of India Kangra and PW2 V.K.Sharma Assistant Manager posted in UCO bank have stated in positive manner that banks are ready to provide financial assistance to landlady on the basis of deposits of FDRs. Testimonies of PW1 Vipin Gupta Manager Union Bank of India and PW2 V.K.Sharma Assistant Manager UCO bank are trustworthy reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of PW1 Vipin Gupta Manager Union Bank of India and PW2 V.K.Sharma Assistant Manager UCO bank. There is no evidence on record in order to prove that PW1 Vipin Gupta Manager Union Bank of India and PW2 V.K.Sharma Assistant Manager UCO bank have hostile animus against revisionists at any point of time. It is well settled law that approval of construction plan is not *sine qua none* for passing eviction order on ground of bonafide requirement of construction. ***See Latest HLJ 2011 H.P.High Court titled Tara Dutt Sharma vs. Sanjeev Dutt. Also see Civil Appeal No. 4127 of 2013 titled Hari Dass vs. Vikas Sood (Apex Court of India) decided on 29.4.2013. Also see CA No. 4128 of 2013 titled Hari Dass vs. Kesri Devi (Apex Court of India) decided on 29.4.2013. Also see CA No. 4129 of 2013 titled Hari Dass Sharma vs. Shiv Prasad (Apex Court of India) decided on 29.4.2013.***

16. Submission of learned Advocate appearing on behalf of revisionists that learned first Appellate Authority has not decided all grounds of appeal and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter

mentioned. Court has perused the order of learned first Appellate Authority carefully. It is held that learned first Appellate Authority has considered all submissions of revisionists while disposing of appeal. It is held that no interference is warranted by revisional Court in present case. It is well settled law that scope of revisionists in rent Act is very limited. ***See (1998)8 SCC 119 titled Sarla Ahuja vs. United India Insurance Company Ltd. See (2008)9 SCC 699 titled Ajit Singh and another vs. Jit Ram and another.***

17. Submission of learned Advocate appearing on behalf of revisionists that learned Rent Controller did not properly appreciate the oral as well as documentary evidence placed on record is rejected being devoid of any force for the reasons hereinafter mentioned. It is held that learned Rent Controller has properly appreciated the oral as well as documentary evidence placed on record and it is further held that no miscarriage of justice has been caused to revisionists in present case by order of learned Rent Controller and by order of learned first Appellate Authority under H.P. Urban Rent Control Act 1987. It is proved on record that demised premises is commercial in nature and it is well settled law that when demised premises is commercial in nature then right of succession is governed by Succession Act and is not governed by Section 2(j) of H.P. Urban Rent Control Act 1987 in view of rulings reported in ***1995(1) SLC 452 titled Vinod Kumar vs. Rajesh Kumar. See 1996(2) SLC 275 titled Balwant Rai vs. Surjit Singh and others.*** In view of above stated facts and case law cited supta point No.1 is answered in negative against the revisionists.

Point No. 2 (Relief)

18. In view of findings on point No.1 above revision petition is dismissed. Orders of learned Rent Controller and learned first Appellate Authority are affirmed. However revisionists will have right of re-entry as provided under proviso of Section 14(3) of H.P. Urban Rent Control Act 1987 in accordance with law. It is held that landlady will reconstruct the demised premises within six months in accordance with law. File of learned Rent Controller and file of learned first Appellate Authority be sent back forthwith along with certiified copy of this order. No order as to costs. Revision petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

****