THE
INDIAN LAW REPORTS
HIMACHAL SERIES, 2016

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

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

April, 2016

Vol. XLVI (II)

Pages: HC 626 TO 1558

Mode of Citation : I L R 2016 (II) 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

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Arbitration and Conciliation Act, 1996 - Section 34(2)- Respondent was awarded the work amounting to Rs. 1,72,26,850/- completion period of work was 18 months- respondent had executed work of more than Rs. 10,43,401/- - Arbitrator was appointed due to dispute between the parties- arbitrator announced the award in favour of the respondent- aggrieved from the award, arbitration petition was filed- held, that petitioner had asked the respondent to stop the execution of work for want of clearance and permission of the forest department- department ought to have taken permission before entering into the agreement – Arbitrator had rightly held that respondent was entitled for the refund of the earnest money – respondent had deployed the machinery for execution of the work- he is entitled to amount paid by him for hiring machinery- he is also entitled for the amount paid to the labourer at the site- he was prevented from completing the work and is entitled for the loss of profit- objection dismissed. Title: State of H.P. & another Vs. Suresh Verma Page-1403

Arbitration and Conciliation Act, 1996- Section 9- Application was filed for restraining the respondent No. 2 from releasing any amount in favour of the respondent No. 1 and to attach the amount pending to be disbursed to respondent No. 1 in the first running bill submitted by respondent No. 1 to respondent No. 2- it was contended that parties have chosen to confer jurisdiction solely and exclusively upon the Courts of South 24 Pargana, Alipore, Kolkata- held, that application under Section 9 is to be filed before the principal Civil Court of original jurisdiction which includes the High Court in exercise of original civil jurisdiction- application for arbitration is to be made before the Court which will have jurisdiction- notice inviting tender was issued from Kolkata where the registered office of respondent No. 1 is situated- parties have confined the jurisdiction to the Courts located at Kolkata- quotation was also submitted at Kolkata- cause of action had arisen at Kolkata- hence, Courts at Himachal Pradesh will have no jurisdiction- application is not maintainable before the Court and is directed to be returned to the Court for presentation before the Court having jurisdiction. Title: Sanjay Aggarwal Vs. BLCCO Lawrie Limited & another Page-849

'C'

Code of Civil Procedure, 1908- Section 10 - Proceedings were instituted by the respondent under Section 12 of the Hindu Marriage Act- application was filed under Section 10 of CPC on the ground that earlier petition instituted by the petitioner under Section 13 was pending - similar plea had been raised in that petition- application was dismissed by the trial Court- held, that fundamental test to attract Section 10 is, whether final decision in the previous suit would operate as res-judicata in the subsequent suit or not- Section 10 will apply if there is identity of the matter in issue in both the suits- respondent has not filed any counter-claim and no decree of annulment can be passed in favour of the respondent in the proceedings under Section 13 of Hindu Marriage Act- scope of the petition under Sections 12 and 13 are different- petition dismissed. Title: Veepul Lakhanpal Vs. Pooja Page-972

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Code of Civil Procedure, 1908- Section 100- Plaintiff filed a suit pleading therein that he is a private contractor- he had carried out the construction of the building of the defendant- a sum of Rs. 62,965/- was due to the plaintiff from the defendant - defendant has paid Rs. 17,000/- only- suit was filed for recovery of remaining amount along with interest- defendant pleaded that he had agreed to pay for the construction at the rate of Rs. 11/- per square feet for laying slab and at the rate of Rs. 10/- per square feet for the construction of column and beams- he had already paid Rs. 18,500/- to the plaintiff on different occasions- plaintiff had also taken 20 bags of cement for which he is liable to pay Rs. 2,640/- to the defendant- suit was dismissed by the trial Court- appeal was preferred which was dismissed- appellant had offered to pay Rs. 60,000/- in lump sum before the Appellate Court but the respondent had not appeared and he was proceeded exparte- matter could have only been settled if the respondent had agreed to accept the amount- hence, no error was committed by the District Judge - there is no merit in this appeal and the same is dismissed. Title: Dinesh Singh Thakur Vs. Prem Gazta Page-1264

Code of Civil Procedure, 1908- Section 114- Order 6 Rule 17- Application was moved by the defendant No. 2 for amendment of written statement which was allowed by the trial Court- it was pleaded in the application that defendant No. 2 came to know that neither K nor present plaintiff was the owner of the suit premises- they were falsely claiming themselves to be the owners- held in revision that issues were framed by the trial court on 4.6.2012- defendant No. 2 wants to change the entire character of written statement- he had recognized plaintiff as landlord- he was estopped from changing his stance – he cannot be permitted to deny the title of the plaintiff- application was wrongly allowed by the trial court- revision accepted- application dismissed. Title: Sumeer Nath Vs. Hari Singh and another Page-1532

Code of Civil Procedure, 1908- Section 114- Order 47 Rule 1- Civil suit was dismissed by the Court under Order XVII rules 2 and 3 read with Order IX rule 3 CPC **–** case was earlier listed for the evidence but no evidence was produced- hence, suit was dismissed- it was pleaded that Courts were closed for winter vacation- major fire broke out in the sister concern of petitioner and in the fire total plant and machinery along with records and stocks were reduced to ashes- held, that this plea is duly supported by affidavit and no objection was filed by other side- therefore, application is allowed subject to payment of cost of Rs. 3,000/-. Title: M/s Maja Unipac Vs. HP Financial Corporation Ltd. Page-986

Code of Civil Procedure, 1908- Section 151- Plaintiff sought to produce in evidence the certified copy of registered sale deed, spot inspection report allegedly prepared by 'R' after conducting spot inspection, and also to examine said 'R' as witness in the suit- case was listed for recording the evidence of the plaintiff in rebuttal- plaintiff instead of producing the evidence in rebuttal filed an application to allow her to lead additional evidence-application was allowed by trial court - held, that spot inspection report is dated 17.4.2015 which was prepared after 12.3.2015 on which date, plaintiff had failed to produce the evidence and had sought opportunity for this purpose- allowing the plaintiff to produce the report of spot inspection and to record the statement of 'R'- when the evidence has already been closed would amount to filling up the lacuna left by the plaintiff- plaintiff could have been permitted to produce the certified copy of the registered sale deed which is per se admissible- trial Court had erred in permitting the plaintiff to lead evidence- application partly allowed- plaintiff permitted to lead additional evidence by filing certified copy of the sale deed. Title: Devi Ram Vs. Kaushalya Devi & ors. Page-1214

Code of Civil Procedure, 1908- Section 152- Suit of the plaintiff was decreed by Sub Judge- RSA was dismissed by the High Court- matter was taken to Hon'ble Supreme Court

and the Civil Appeal was dismissed for non-prosecution- during execution, it was found that suit was filed for possession of the land measuring 11 marlas- however, by mistake half share of the land measuring 2 kanal 1 marla i.e. 1 kanal was not mentioned in the judgment and decree- khasra No. 3800 was wrongly typed as 3890- application for correction was filed which was dismissed- revision was preferred but was dismissed as withdrawn- held, that no party should suffer due to the mistake committed by the Court and whatever is intended by the Court must be duly reflected while passing order or decree- Court is competent to correct decree irrespective of the fact, whether the error had occurred due to mistake of the parties in their pleading or due to the mistake of the court- when the judgment has been upheld, doctrine of merger is applicable and the Court which passed the judgment in appeal is competent to correct the same- it was apparent from the judgment that Khasra number was wrongly typed as 3890- hence, same ordered to be corrected to 3800 - land recorded in Khewat No.71, Khatauni Nos. 484 and 485, measuring 2-01 kanal was not mentioned in the pleading- allowing the application would amount to modification of the judgment and decree which is not permissible- application partly allowed. Title: Ram Raksh Pal Singh (dead) through his LRs. Vs. Sarla Devi & others Page-1012

Code of Civil Procedure, 1908- Order 6 Rule 17- Defendant filed an application seeking amendment of the written statement for taking a plea that suit was not maintainable and in case the court concludes that defendant was a licencee, licence being permanent cannot be revoked- application was allowed by the trial Court- held, that plea sought to be raised by the defendant was available to him at the time of filing the written statement- defendant has failed to show as to why the proposed amendment could not be incorporated earlier despite due diligence- application was filed when the defendant was leading evidence- allowing the application will delay the decision of the suit and will cause prejudice to the plaintiff- trial Court had wrongly allowed the application- application dismissed. Title: Surindra Devi & ors. Vs. Parkash Chand Page-1293

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaint was amended during the pendency of suit- however, Appellate Court relied upon the pleadings mentioned in the original plaint rather than those made in the amended plaint- held, that once plaint has been allowed to be amended, unamended portion cannot be taken into consideration and decision can not be made on the basis of unamended pleadings - direction issued to adjudicate the matter on the basis of amended plaint. Title: Vishwa Nath Vs. State of H.P. and another Page-1553

Code of Civil Procedure, 1908- Order 6 Rule 17- Tenant filed an application seeking amendment, which was partly dismissed by the trial court - held, that amendment sought in reply on the ground that in view of amendment in Section 14 of H.P. Urban Rent Control, Act, reply is to be amended cannot be allowed as the provisions of the Act need not to be pleaded in the reply but can be pointed out during the course of final hearing in the rent petition - further, amendment sought that the landlord cannot seek eviction of the tenant for rebuilding premises without sanctioned map is not necessary as the preparation and sanction of the plan are not conditions precedent to seek the eviction of the tenant- prayers were rightly rejected by the trial Court- revision dismissed. Title: Ashok Kumar(deceased) through his LRs and others Vs. Neena Mittal and another Page-627

Code of Civil Procedure, 1908- Order 7 Rule 11- Application for rejection of the plaint has been filed pleading that suit has been valued at Rs. 70,00,00/- for the purpose of Court fees and jurisdiction, Court fees of Rs. 72,560/- has been paid on the same but this valuation is contrary to paras-6 and 7 of the plaint, wherein it has been pleaded that market value of the suit property is more than rupees Six crores and plaintiff is required to affix the court fees on the market value assessed by the plaintiff at Rs. 6 crores- held, that deficiency of court

fee is not a ground to reject the plaint- plaint can only be rejected if the plaintiff fails to pay the deficient court fee despite having been called upon to do so- suit has been filed for cancellation of the deed- if the executant wants the deed to be annulled, he has to seek cancellation of the deed and to pay ad valorem Court fee on the consideration, but if a non-executant seeks annulment of deed then he has to pay court fees as per Article 17(iii) of the Second Schedule of the Act- if the non-executant is not in possession, he has to seek consequential relief of possession and has to pay Court fees as provided under Section 7(iv) (c) of the Act- in the present case, plaintiff has sought the cancellation of the deed and he has to pay the court fee on the amount mentioned in the deed and not on the market value – the price mentioned in the deed is 70 lakh and, therefore, Court fee has correctly been paid on that amount. Title: Deepti Gupta & ors. Vs. Karam Singh Page-1051

Code of Civil Procedure, 1908- Order 7 Rule 11- Loan was taken from defendant No. 1 by defendant no. 2 who mortgaged the property in favour of defendant no. 1- suit was instituted for restraining defendant No. 1 from dispossessing the plaintiff from rented premises- defendant No. 1 filed an application seeking rejection of the plaint on the ground that Civil Court does not have jurisdiction in view of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- application was dismissed by trial court - held, that plaintiff is in occupation of the mortgaged property as tenant and his rights are protected under Rent Control Act- Civil suit to protect the rights of the tenant is fully maintainable- application was rightly dismissed by the trial Court- petition dismissed. Title: India Bulls Housing Finance Ltd. Vs. Rakesh Kumar Banta and another Page-832

Code of Civil Procedure,1908- Order 9 Rule 13- An ex-parte decree was passed which was put to execution- the decree was sent to District Judge, Gurgaon for execution - application for staying the execution petition was filed at Gurgaon - an application under Order 9 Rule 13 for setting aside the ex-parte decree was also filed- it was pleaded in the application that J.D has resigned from the company- he was wrongly impleaded as Managing Director, whereas the liability was that of the Company- held, that initially JD had appeared on behalf of the defendants in the main suit - time was sought for filing written statement- written statement was not filed and the defendants were proceeded ex-parte- it was admitted by J.D that summons were received by him- this shows that J.D had intentionally absented from the Court- application was to be filed within 30 days from the date of decree- further, no material was placed on record to show that J.D has ceased to be Director of the Company- petition dismissed. Title: Vinod Gupta Vs. M/S Navkar Poly Plast Co. & ors. Page-975

Code of Civil Procedure, 1908- Order 22 Rule 4- Court dismissed the application for substitution of legal representatives of deceased defendant No. 1 on the ground that it is barred by limitation- held, that no sufficient cause was shown in the application for delay in filing the application- therefore, Court was justified in dismissing the application- however, liberty granted to file the application for setting aside the abatement and for condonation of delay. Title: Hargopal Singh and others Vs. Prem Sagar & others Page-1216

Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel submitted that parties have entered into compromise and have no objection if orders of the trial Court and First Appellate Court are set aside – in view of this statement, judgment of the trial Court and Appellate Court are set aside. Title: Tilak Raj Vs. Surinder Kumar Minhas Page-1553

Code of Civil Procedure, 1908- Order 26 Rule 9- A civil suit was filed pleading that plaintiff was owner in possession of the suit land, defendant No. 2 had destroyed the boundary marks and was bent upon to demolish and damage the building of the plaintiff- a local

commissioner was appointed during the pendency of the suit- suit was decreed by the trial court- in appeal report was set aside and the suit was dismissed- held, in second appeal that once the report of local commissioner was set aside, it was obligatory to appoint a fresh local commissioner- boundary dispute was raised before the court- once the Court entertained doubt about the correctness of the demarcation given by the Naib Tehsildar, fresh Local Commissioner should have been appointed to demarcate the disputed area- case remanded with the direction to appoint a fresh Local Commissioner. Title: Vishwa Nath Vs. State of H.P. and another Page-1553

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Defendant purchased the suit land by means of sale deed- another sale deed was executed in favour of the plaintiff- it was contended by the plaintiff that sale deed was executed in favour of vendee of the defendant by a minor and he was not competent to execute the sale deed- however, this plea was not taken in the plaint but was taken only in the reply to the application under Order 39 Rules 1 and 2 filed by the defendant- parties are recorded to be joint owners in the suit land- a certificate showing that amount of Rs. 4,27,888/- was paid by the plaintiff to defendant for sale of plots carved out on the suit land, was brought on record which shows acquiescence on part of plaintiff- defendant was put in possession as per sale deed – plaintiff had not come to the Court with clean hands- petition dismissed. Title: Raj Kumari Vs. M/s Shakun Infrastructure Development Private Limited Page-1066

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a suit for seeking permanent prohibitory injunction for restraining the defendant from raising any construction over the best, valuable and exclusive portion of the land- an application seeking interim relief was also filed- defendant pleaded that land was partitioned during the life time of 'B'- trial Court allowed the application- appeal was preferred which was dismissed- held, that mere fact that property is joint is not sufficient to seek an injunction- every case is to be decided on the basis of facts and circumstances of that particular case- law regarding the injunction in a case of co-owners has been settled in ***Ashok Kapoor Vs. Murthu Devi***, **I L R 2015 (III) HP 1312 –** order set aside and Courts directed to decide the application in accordance with the parameters laid down in ***Ashok Kapoor Vs. Murthu Devi's*** case. Title: Jatinder Kumar Vs. Kusum Lata Page-718

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff claimed right of passage over the suit land and that defendants were causing obstruction to the same- hence, relief of the injunction was sought- defendants denied the claim of the plaintiff and pleaded that boundary wall was constructed in the year 2009- application for seeking injunction was also filed which was dismissed by the trial Court- appeal was preferred which was allowed- held, in revision that plaintiff has no right over the Government land- he cannot be permitted to enter inside the school as safety of the girls would be prejudiced - Appellate Court had wrongly allowed the application- application dismissed. Title: State of Himachal Pradesh and another Vs. Narinder Chand and others Page-1282

Code of Civil Procedure, 1908- Order 47 Rule 1- Section 114- High Court had ordered that evidence on additional issues framed by the Appellate Court will be recorded by the Appellate Court itself- it was further ordered that only two chances will be given to each of the parties to produce their evidence- appeal will be disposed of within three months- review petition was filed pleading that there was no necessity to frame the additional issues- there is dispute between the parties on which issues were rightly framed by the Appellate Court- once the issues had been framed, it was obligatory to give opportunity to both parties to lead evidence- there was no error apparent on the face of the record- petition dismissed. Title:

Hussain Mohammed w/o late Sh. Noor Mohammed & Others Vs. Gurdas s/o Sh. Masandu Page-1452

Code of Civil Procedure, 1908- Order 47 Rule 1- Section 114- No error apparent on the face of the record was shown in the review petition- hence, no case for review is made out- petition dismissed. Title: Oriental Insurance Co. Ltd. Vs. Jai Chand and others Page-1500

Code of Civil Procedure, 1908- Order XVIII Rule 3-A- Plaintiff filed an application to appear as his own witness after examination of other witnesses pleading that suit is based upon record which is to be proved by examining witnesses- application was opposed by the defendants- held, that plaintiff can be permitted to examine himself after othe witnesses only on medical ground, he being out of station due to compelling reasons, death of relative and marriage ceremony of daughter or son- examination of the plaintiff before other witnesses is a rule and deviation is exception- exemption sought on the ground that suit is based upon the document is no explanation at all- application dismissed. Title: H.P.State Cooperative Bank Ltd. having its Head Office at The Mall Shimla through its Managing Director Shri Amit Kashyap Vs. National Insurance Company Ltd. and another Page-979

Code of Criminal Procedure, 1973- Section 156(3)- Complainant filed a complaint pleading that the complainant had deposited Rs.1,62,500/- as security amount by means of a bank draft which was issued through the bank account of the accused- complainant had paid Rs. 1,65,000/-, the demand draft was returned after the completion of work and was presented for encashment- it was returned by the bank with the endorsement- 'DD has been reported lost/Out of date'- it was found out that accused had filed an affidavit in which it was averred that draft had been lost/mis placed and should not be encashed- police concluded that no action was required to be taken as the dispute was of civil nature and of mutual financial transaction- complainant filed a complaint under Section 156(3) before the Magistrate which was forwarded to the police for investigation in accordance with law- aggrieved from the order, accused filed a petition under Section 482 for cancellation of FIR- held, that police was within its power to conduct the investigation and to conclude that no case was made out- direction should not have been issued to register the FIR, unless investigation was shoddy, one sided and contrary to all norms and procedure- Magistrate should have called the report from the police before proceeding further- complaint was filed to get the accused blacklisted the police had also found that contents of the complaint were baseless- High Court can cancel the FIR in exercise of its inherent powers- petition allowed and FIR cancelled. Title: K.C. Sharma Vs. State of Himachal Pradesh and others Page-1188

Code of Criminal Procedure, 1973- Section 378 (4)- Appellant was convicted by the trial Court- appeal was preferred against the conviction before the High Court- held, that only an appeal lies against the acquittal and no appeal lies against the conviction- further, the plea that convict should have been sentenced to undergo simple imprisonment for a period of two years is not acceptable as purpose of Section 138 is not retributory but compensatory- Magistrate had directed the convict to pay twice the amount of cheque, which is sufficient to meet ends of justice- appeal dismissed. Title: Shyam Lal Chauhan Vs. Baldev Singh Page-1307

Code of Criminal Procedure, 1973- Section 385- Appellate Court had dismissed the appeal in default for non prosecution- held, that criminal appeal cannot be dismissed in default for non-prosecution. Title: Pankaj Thakur Vs. State of Himachal Pradesh Page-1298

Code of Criminal Procedure, 1973- Section 397 read with Section 401- Trial Court framed charge for the commission of offence punishable under Section 420 Indian Penal Code

against the accused- held, in revision that at the time of framing of charge meticulous sifting of evidence is not required- Magistrate is under legal obligation to consider the police report and the documents sent with police report under Section 173 of Cr.P.C.- it was duly mentioned in the statements recorded by the police that accused was Managing Director of the company - he had put stickers of army on his vehicles- he was not retired army official- accused had represented that he had retired from army as Colonel to deceive the people – accused had taken boxes of apples and mangoes by representing himself as army official and had not paid money- thus, the cheating on the part of the accused was prima facie proved - revision dismissed. Title: Rajeshwar Sabarwal son of Shri O.P. Sabarwal Vs. State of H.P Page-1100

Code of Criminal Procedure, 1973- Section 397- Statement of prosecutrix was not recorded by learned Sessions Judge (Forests) Shimla H.P. - it is directed in revision with the consent of the parties that prosecutrix will appear before the trial Court on 28.4.2016 and her statement will be recorded in accordance with law – in case the Learned Sessions Judge is on leave on 28.4.2016, then statement of prosecutrix will be recorded on subsequent date fixed by learned Sessions Judge. Title: Shalini Singh Thakur D/o Sh. Ramesh Kumar Thakur Vs. State of H.P. & another Page-952

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 498-A, 307, 302, 34 Indian Penal Code, 1860- it was contended that accused had been falsely implicated in present case and his presence is not required- accused took the plea that there was no evidence against him- held, that sufficiency of evidence is not to be seen at the time of granting bail but will be seen at the conclusion of trial- 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 heinous- investigation is at initial stage and in case, bail is granted, investigation will be adversely affected- petition dismissed. Title: Pooja Devi wife of Shri Sanjay Sharma Vs. State of H.P. Page-1097

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 302, 452, 323, 506 IPC- petitioner pleaded that he has been falsely implicated- no recovery is to be effected from him- he will not temper with the prosecution witnesses and will join investigation as and when directed to do so- held that the fact that petitioner is innocent or not cannot be determined at this stage but will be determined at the conclusion of trial- 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 heinous and grave in nature qua the commission of culpable homicide amounting to murder- if bail is granted to the petitioner, he will threaten the prosecution witnesses and trial will be adversely effected- in these circumstances, bail cannot be granted to the petitioner- petition dismissed. Title: Roshan Lal (In jail) son of Shri Dhani Ram Vs. State of H.P. Page-909

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324 and 307 read with Section 34 Indian Penal Code, 1860- petitioner pleaded that he was innocent and

had not committed any offence, investigation is complete and he will abide by the terms and conditions which may be imposed by the Court- 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- investigation is complete- injured had been discharged from the hospital and the petitioner is a student – therefore, he is released on bail on conditions. Title: Mannwar son of Sh Iqbal Hussain Vs. State of Himachal Pradesh Page-1258

Code of Criminal Procedure, 1973- Section 482- Charge-sheet was filed against the accused for the commission of offences punishable under Sections 498A, 504 IPC read with Section 34 of Indian Penal Code, 1860- complainant stated that matter was compromised between the parties- wife appeared in person and stated that she was residing with her husband and had no objection for allowing the petition- held, that matrimonial dispute can be compromised when the parties are living together in harmonious manner- it would be expedient in the interest of justice to compound the matter- petition allowed. Title: Manish Kumar son of Tilak Raj and another Vs. State of Himachal Pradesh and others Page-907

Constitution of India, 1950- Article 226- Affidavits filed stating the steps taken by the Officers to comply with the directions issued by the Court - held, that prima facie all the officers had failed to comply with the direction made by the Court and orders passed by the Court from time to time- SIT directed to find out prima facie who are the officers involved in the commission of the offences - further direction issued to file the details of the deaths and the status of the investigation in respect of District Solan- all the concerned officials directed to file fresh status reports - all the Courts directed not to take up any matter which is directly or indirectly connected with the present writ petition- any order passed by any Court will be subject to the order passed by the Hon'ble Court in the writ petition. Title: Court on its own motion Vs. State of Himachal Pradesh and others (D.B.) Page-706

Constitution of India, 1950- Article 226- Government intended to create sub-Tehsil H to provide better service to nearby villages- some circles were excluded from another sub-Tehsil 'N' and were included in sub Tehsil H- report of Deputy Commissioner was called and government upgraded sub-Tehsil N - patwar circle C was excluded- a writ petition was filed pleading that decision was taken illegally without conducting inquiry or affording opportunity of hearing- held, that representations were received from residents of the patwar circle for including C in sub Tehsil N and the decision was taken on the basis of this resolution- further held, that it is not within the domain of the Court to inquire as to whether the particular public policy is wise or not - Court can only interfere if the policy framed is capricious, not informed by reasons, totally arbitrary or founded on ipse dixit- decision, to exclude C from sub Tehsil H and to include it in Sub Tehsil N was a policy decision- even a resolution was passed by Gram Panchayat - it was not shown as to how the decision was arbitrary, irrational, capricious or whimsical- petition dismissed. Title: Ranjan Singh & others Vs. State of Himachal Pradesh and others (D.B.) Page-1235

Constitution of India, 1950- Article 226- Judgment on the face of it is non-speaking- appeal is allowed- judgment is set aside and the writ petition is transferred to the Tribunal for disposal in accordance with law. Title: Akash Deep Sharma Vs. State of Himachal Pradesh and others (D.B.) Page-1380

Constitution of India, 1950- Article 226- K was working on daily wages- his services were terminated- an industrial dispute was raised- award was passed and State was directed to

re-engage the employee forthwith- aggrieved from the award, writ petition was filed- held, that no limitation is prescribed for seeking the reference- workman had worked for 254 days in the year 1996- therefore, he is entitled for regularization- no show cause notice was served upon the workman- Tribunal had rightly passed the award- writ petition dismissed. Title: The State of Himachal Pradesh through Secretary (IPH) to Govt. of H.P. Shimla and another Vs. Kailash Chand son of Shri Rijhu Ram Page-1322

Constitution of India, 1950- Article 226- Land of the petitioners was utilized for construction of Johron-Pipliwala-Kiratpur-Majra road without acquisition and payment of due and admissible compensation, whereas, such compensation was paid to the other land holders- respondents pleaded that road was constructed in the year 1994-97 and no objection was raised by the petitioners nor any compensation was demanded- petitioners are not entitled to invoke the jurisdiction of the Court after 25 years- held, that question regarding the consent of the petitioners cannot be determined in the writ petition- hence, petition disposed of with liberty to the petitioner to institute a suit in accordance with law- further, direction issued to exclude the period spent by the petitioners in pursuing the writ while computing period of limitation. Title: Mohan Lal and others Vs. State of H.P. and others Page-643

Constitution of India, 1950- Article 226- Learned Counsel for the applicant states that question determined in the appeal has already been determined by the High Court of Gujarat- every High Court must give due deference to the law laid down by other High Courts- since, matter is covered by the judgment of Gujarat High Court, therefore, appeal disposed of in terms of the judgment of Gujarat High Court. Title: Commissioner, Central Excise Chandigarh Vs. M/s Valley Iron & Steel Co. Ltd. (D.B.) Page-926

Constitution of India, 1950- Article 226- Lease hold rights were granted to the petitioner company for a period of 95 years by HIMUDA- respondent No. 3 availed credit limit from the bank and petitioner executed deed of mortgage in favour of bank- subsequently, accounts of respondent No. 3 were declared as Non-Performing Assets- notice was issued to the petitioner company bringing to its notice the default in payment made by respondent No. 3- petitioner was called upon to pay the amount within six days failing which property would be possessed and put to auction – it was contended that once the objections were filed to the notice, no action can be taken until the objections are decided- no action can be taken unless the owner is made a party- held, that SARFAESI Act is a self contained mechanism and a person has to invoke the remedies provided by the SARFAESI Act- writ petition to question the action taken under the Act is not maintainable- further, owner has to object to the issuance of the notice and the petitioner cannot be permitted to espouse the claim of the owner- petition dismissed with liberty to the petitioner to avail remedy provided under SARFAESI Act. Title: M/s Tube Expansion and Equipments Pvt. Ltd. Vs. District Magistrate, District Solan and others (D.B.) Page-1027

Constitution of India, 1950- Article 226- Petitioner claims that he is non-agriculturist and is not entitled to purchase the land in Himachal Pradesh except with the prior permission of the Government- he had earlier filed two writ petitions which were dismissed- an appeal was preferred before the Hon'ble Supreme Court which was disposed of with a direction to petitioner to produce the required documents before the State Authorities and State Authorities were directed to consider the case of the petitioner in accordance with law- petitioner was called upon to submit the document- petitioner assailed the same by filing the present writ petition- held, that petitioner had failed to comply with the directions of Apex Court and had failed to file the document specified by the Hon'ble Supreme Court within the prescribed time- co-owner had not given the No Objection Certificate to sell the

land- it was for the petitioner to attend to the queries raised by the State- he has filed the petition against the requirement mentioned in the letter- Court proceedings could not be abused by unscrupulous litigants- petition dismissed with cost of Rs.15,000/-. Title: Om Prakash Sharma Vs. State of H.P. and others (D.B.) Page-1224

Constitution of India, 1950- Article 226- Petitioner claims to be a registered education society recognized by the Sikkim Manipal University- private respondents filed a petition claiming refund of admission fee paid to the petitioner on the ground that the same was exorbitant and had never been approved by the State Government or by the UGC- petitioner was directed to refund the fee- petitioner challenged the order on the ground that respondent No. 2 had no jurisdiction to entertain the petition- private respondents did not fall within the definition of students- respondent No. 2 claimed that University established or incorporated by or under a State Act is to operate only within the territorial jurisdiction allotted to it under the Act and in no case can it operate beyond the territory of the State - private Universities and deemed Universities cannot affiliate any college or institution for conducting courses leading to award of diploma, degrees or other qualifications - Sikkim Manipal University is a private university and is not authorized to affiliate the petitioner- held, that a number of fraudulent boards and institutions are coming up in the country with a primary aim of duping the public in the field of education - right to establish an educational institution is not a business or trade for making profit but bears a clear charitable purpose- State should act as a regulator to maintain academic standard- petitioner is a private educational institution within the territorial jurisdiction of Himachal Pradesh and is amenable to the jurisdiction of respondent No. 2- private respondents had specifically averred that they were students of the petitioner institute- private respondents were competent to file the petition before respondent No. 2- petitioner was not granted affiliation by the UGC to run the institute as a distance education programme study centre – petitioner is no less than commercial shop- Sikkim Manipal University can operate only within jurisdiction of the State of Sikkim and it cannot operate beyond the territory of Sikkim - respondent No. 2 had rightly ordered the refund of the fee- in these circumstances, petition dismissed with cost of Rs.10,000/-- further, direction issued to the State to constitute a committee to carry out inspection of all the private educational institutions at all levels and to indicate whether the private institutions have the requisite infrastructure, parents teacher associations, qualified staff and to ensure that no private education institution is allowed to charge fee towards building fund, infrastructure fund, development fund and it displays the necessary information. Title: Business Institute of Management Studies Vs. State of Himachal Pradesh and others Page-1411

Constitution of India, 1950- Article 226- Petitioner filed a writ petition for seeking appointment for the post of Assistant Librarian from the date of her appointment as a Librarian Clerk with consequential relief of pay scale attached to the post of Assistant Librarian- respondents denied the claim of the petitioner- held, that claim of the petitioner was sponsored by the Employment Exchange for participating in the interview to be held by respondent for selection to the post of Assistant Librarian- he was selected for the post of Assistant Librarian- however, corrigendum was issued subsequently by the Principal pointing out the mistake in the letter and stating that post of Librarian Clerk was to be filled up- petitioner was aware that she was being selected for the post of Librarian Clerk- she cannot claim appointment against the post of Assistant Librarian- Writ petition dismissed. Title: Prem Lata Thakur Vs. State of H.P. & others Page-1204

Constitution of India, 1950- Article 226- Petitioner pleaded that his land was utilized for construction of road without acquiring the same- therefore, direction be issued to pay

compensation or to acquire land- state pleaded that no objection was raised at the time of construction of the road and petition was filed after 15 years, therefore, same be dismissed- held, that the plea of the state that petitioner had not raised any objection for construction of the road is to be adjudicated in the civil suit- hence, petition disposed of with liberty to the petitioner to institute a civil suit. Title: Roshan Lal Vs. State of H.P. and others Page-646

Constitution of India, 1950- Article 226- Petitioner was appointed as a Language Teacher by the Parent Teacher Association- petitioner denied grant-in-aid and the post was re-advertised- petitioner filed a writ petition which was disposed of with a direction to take a decision regarding the continuation of the petitioner- respondent claimed that petitioner did not possess the necessary qualification- she was engaged earlier to the promulgation of PTA Grant-in-Aid Rules, 2006- held, that petitioner had worked in the post for a fairly long period- her appointment cannot be held to stop-gap, fortuitous or purely on ad-hoc- petitioner had not only qualified Prabhakar but she was a Post Graduate in Hindi and thereafter had done B.Ed prior to her engagement- petitioner was appointed by PTA and PTA was competent to appoint the petitioner- she is eligible in terms of PTA Grant-in-Aid Rules, 2006 and cannot be denied grant-in-aid- respondent directed to release the grant-in-aid in favour of the petitioner from the date of notification and to consider her case for regularization in terms of policy. Title: Kamlesh Kumari Vs. State of HP & Ors Page-1268

Constitution of India, 1950- Article 226- Petitioner was appointed as Branch Post Master- he was placed under put off duty for keeping with himself the salary of J after forging signatures of J in the acquittance roll- he was ordered to be removed after inquiry- he filed original application before the Central Administrative Tribunal which was dismissed- held, that petitioner had confessed his guilt- Court cannot re-appreciate the evidence led in the inquiry- further, Court would only go into the question of proportionality of punishment only when it shocks its conscience. - once petitioner had confessed, no leniency could have been shown to him- writ petition dismissed. Title: Sher Singh Vs. Union of India and others (D.B.) Page-1396

Constitution of India, 1950- Article 226- Petitioner was appointed as a peon and was promoted as Process Server- respondents No. 3 and 4 were appointed as Process Servers- applications were invited for the two posts of clerk to be filled by selection/promotion from the amongst class-IV officials working in the Civil and Sessions Division having minimum 3 years service- petitioner along with respondents No. 3 and 4 had applied for the post and was invited for screening test- respondents No. 3 and 4 were promoted- writ petition was filed pleading that selection/promotion was to be made on the basis of seniority-cum-merit- respondent No. 2 had ignored seniority and had promoted the persons who were junior to the petitioner- respondent No. 1 stated that petitioner was appointed as Process Server in the year 2010, whereas, respondents No. 3 and 4 were appointed as Process Servers in the year 2005 and the petitioner was junior to respondents No. 3 and 4- held, that as per Himachal Subordinate Court Staff Recruitment (Recruitment, Promotion and Conditions of Service), Rules, 2012, seniority-cum-merit is to be determined on the basis of length of service in the feeder cadre- feeder cadre for the post of clerk is 10+2 class-IV court officials- Process Server, Daftri, Peon Orderly/Chowkidar, Safai Karamchari and Mali have been shown as 'Class-IV'- applications were invited from Class-IV and not from Process Server only- hence, entire service of employee as Class-IV is to be counted- legitimate right of the petitioner has been frustrated- writ petition allowed- promotion of respondents No. 3 and 4 quashed and respondent No. 2 directed to consider the case of the petitioner, respondents No. 3 and 4 along with other applicants in the light of observations made in the writ petition. Title: Raj Kumar Vs. State of Himachal Pradesh & others Page-1340

Constitution of India, 1950- Article 226- Petitioner was paying value added tax @ 5% on cell phone chargers, which were being sold along with cell phones in a single package, while the phones were taxable @ 13.75%- a notice was issued to the petitioner and it was asked to pay the differential VAT @ 8.75 % (13.75%-5%)- held, that there is an alternative and efficacious remedy available under the H.P. VAT Act, 2005 and the writ petition is not maintainable- petition dismissed. Title: M/s Micromax Informatics Ltd. Vs. State of Himachal Pradesh and others Page-749

Constitution of India, 1950- Article 226- Petitioner was running a Khokha on the land owned by Panchayat Samiti- Samiti entered into an agreement and agreed to allot a shop in a newly constructed complex subject to the petitioner vacating Khokha- Shop No. 17 was allotted to the petitioner but the possession was not delivered rather Shop No. 18 was allotted to him on which a writ petition was filed seeking direction to allot shop No. 17- respondent stated that petitioner was in occupation of shop No. 18 and he was paying rent- petitioner had not removed the debris of Khokha despite order- writ petition was allowed by the Court- held, in appeal that no party had questioned the order of allotment- appellant was allotted shop No. 18, whereas, writ petitioner was allotted shop No. 17- appellant was duty bound to hand over the possession of shop No. 17- petitioner was not only occupying shop No. 18 but he continued carrying on his business from unauthorized Khokha without paying any amount- parties wanted to get undue enrichment by raising untenable pleas- the person who comes to the Court must come with clean hands and no party can be allowed to take law in its hand- appeal dismissed with cost of Rs. 10,000/- to the appellant and Rs. 20,000/- to the writ petitioner. Title: Balbir Singh Vs. State of H.P. & ors. (D.B.) Page-1381

Constitution of India, 1950- Article 226-Petitioners appeared in the selection process for the post of Steno-Typist- they claimed that respondents have deviated from the terms and conditions of the advertisement and the whole process deserves to be declared null and void- petitioners had attained the requisite speed in shorthand and typing, - they were required to be awarded full marks and the candidate with a faster speed could not have been awarded higher marks than the petitioners-, deviating from the terms and conditions of the advertisement- respondents pleaded that evaluation has been carried out as per the prevalent formula approved by the respondents – the formula was hosted on the web page of the respondents as per the directions given by Public Service Commission- held, that advertisement lays down only a benchmark or bottom line i.e. the eligibility criterion for selection- a candidate after qualifying the minimum requirement should excel on merits to get appointment- the mere fact that petitioners had attained the prescribed speed would make them eligible for consideration, but will not entitle them for being awarded maximum marks- maximum marks will be awarded to the candidate having maximum speed coupled with error-less shorthand or typing speed as the case may be- petitioners were aware that they would have to compete in further test which would be evaluated on the basis of high speed and error-free shorthand and typing tests of the candidates- petitioners are presumed to be aware that the advertisement only prescribed the basic eligibility criteria and further details would be available in the rules- every candidate appearing in the test is deemed to be aware that he/she has to excel and only then he/she can be considered on merits- petitioners had participated in the selection process and cannot challenge the method of selection- petitioners have already approached Administrative Tribunal and have obtained interim order - same has not been assailed and fresh writ petition is not maintainable- petition dismissed.Title: Lata Devi Vs. Subordinate Selection Board Hamirpur and another (D.B.) Page-737

Constitution of India, 1950- Article 226- Petitioners are eligible for admission to the Post Graduation Courses- All India Medical Entrance Examination is conducted by the National Board of Examination and out of the total seats available in the various Medical Institutions in the country, 50% are filled-up on All India Basis, while the remaining 50% are filled-up in a manner prescribed by the States or the Institutions- respondent issued a prospectus-cum-application form stating that 66.6% State Quota seats will be filled-up by in- service Medical Officers and there will be a single merit to fill up 66.6% State Quota Seats- petitioners have sought quashing of the clause on the ground that respondents have failed to maintain the proportion of representation of in-service regular and contractual Medical Officers and have illegally treated the contractual Medical Officers as in-service candidates- held, that issue in question was already determined by the Court in ***Dr. Vivek Kumar Garg and others*** *versus* ***State of Himachal Pradesh and others,*** **I L R 2015 (III) HP 1111 (D.B.),** wherein it was held that in-service group consists of two further sub-groups i.e. one sub-group consisting of regularly appointed Medical officers and second sub-group consisting of Contractual and Rogi Kalyan Samiti ('RKS') appointees- distribution of seats between regular and those appointed on contract basis is to be made in the ratio proportionate to their number- prospectus has been issued in strict compliance of the direction passed by the Court in ***Dr. Vivek Kumar Garg's*** case- petition dismissed.Title: Rahul Bhardwaj and others Vs. State of Himachal Pradesh and others (D.B.) Page-1062

Constitution of India, 1950- Article 226- Petitioners are registered Class-B contractors - they are aggrieved by the issuance of the Enlistment of Contractor Rules- particularly, Rule 8.1 whereby a contractor has been made eligible to tender for his own class and one step below his class- they are further aggrieved by the eligibility criteria which provides that the minimum work condition should be one similar work done of amount not less than 40 % of the cost, without liquidated damages or compensation in the last five years- respondent denied the maintainability of the petition and pleaded that no injustice was caused to the petitioner- the necessity for incorporating Rule 8.1 arose because of the monopoly of Class 'A' and 'B' contractors which was affecting the rights of Class 'C' and 'D' contractors- held, that condition of having executed one similar work of amount not less than 40 % of the estimated cost is neither arbitrary nor irrational- respondents have every right to ensure that a party submitting the tender should have both the capacity and capability of executing the work – Court will interfere in the tender or contractual matters only in case the process adopted or decision made by the authority is mala-fide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision - rules were changed taking into consideration the changed circumstances in the State- it was done with the sole aim and objective to ensure that the big contractors confine themselves to class 'A' and 'B' and did not barge into the contracts otherwise reserved for class 'C' and 'D'- this will bring about a healthy competition and will ensure that equals may gain sufficient experience of work so that they can be upgraded to higher class to minimize monopoly of 'A' and 'B' class contractors- writ petition dismissed. (Para-4 to 15) Title: Rajesh Kumar and others Vs. State of H.P. and another (D.B.) Page-770

Constitution of India, 1950- Article 226- Petitioners have sought direction to the respondent to prevent the respondent No. 11 from causing any damage to the link road connecting Kandaghat Rest House with National Highway 22- further, direction has been sought to direct the respondent no. 11 to restore the road to its original condition - it was admitted in the reply that damage has been caused to the link road but it was asserted that the link road stands metalled and restored to its original condition and there is no hindrance to the smooth movement of the traffic- penalty was imposed upon respondent no.

11, which has been realized from him – held that respondent No. 11 had raised construction without seeking necessary permission from the concerned authority - action should be taken against the person who has raised unauthorized construction- Chief Secretary directed to conduct an inquiry and to pinpoint the officers who had not taken action against the respondent No. 11.(Para-6 to 15) Title: Ramesh Kumar and another Vs. State of H.P. and others (D.B.) Page-776

Constitution of India, 1950- Article 226- Petitioners were working as Superintendents and on account of increase in court work they were deputed to discharge the functions of Court Secretaries, which they did from 2.4.2007 to 7.1.2009- they preferred a representation claiming salary and allowances payable to the Court Secretaries but this representation was turned down by the respondent- petitioners claimed salary for the post of Court Secretaries- held, that a person merely asked to discharge the duties of higher post cannot be treated on promotion and cannot get the salary of the higher post- fundamental Rule 49 also does not provide that additional pay is admissible to government servant who is asked to hold current charge of urgent duties of another post, irrespective of the duration of this charge- petition dismissed. Title: Faryad Bhatti Vs. High Court of H.P. (D.B.) Page-710

Constitution of India, 1950- Article 226- Property of the petitioner was damaged by the construction of new road known as Sainj to Manham Road for Parbati Hydro Electric Project- respondents denied the claim of the petitioner- held, that claim of the petitioner was that his property was damaged on 27.6.2008- however, claim was filed on 25.11.2013 after 5 ½ years of the incident- claim for compensation was barred by limitation and writ petition was filed for avoiding the question of limitation- the person who approaches the Court should approach the court at the earliest- further, there are disputed questions and compensation cannot be awarded without deciding them- petition dismissed.Title: Gian Chand Sharma Vs. State of Himachal Pradesh and others Page-1185

Constitution of India, 1950- Article 226- Respondent No. 1 suffered a fall from a electric pole and sustained injuries - he was found to have suffered traumatic paraplegia- Administrative Tribunal directed the writ petitioner to consider the grant of pension by relaxing the mandatory condition of 10 years of service and to pay all the benefits and arrears as if respondent No. 1 has put in 10 years of service- aggrieved from the order, writ petition was filed- held, that Rule 88 of the Pension Rules confers the power to relax the qualifying service of 10 years- when respondent No. 1 had suffered 100% disability in the course of his employment, direction was properly issued to invoke Rule 88 for relaxing the mandatory condition of 10 years of service- writ petition dismissed. Title: H.P. State Electricity Board & another Vs. Mitter Dev Sharma & another (D.B.) Page-632

Constitution of India, 1950- Article 226- Writ petitioner was held entitled to regularization subject to availability of a vacancy- earlier orders of regularization passed in respect of similar persons were upheld by the Division Bench - Special Leave Petitions were dismissed- hence, order passed by the Writ Court upheld- however, payment of arrears restricted to three years prior to filing of the writ petition. Title: Municipal Corporation, Shimla Vs. Ramesh Chand Thakur (D.B.) Page-932

Constitution of India, 1950- Article 227-respondent no. 1 was ordered to be transferred to a non-difficult area as he was nearing the age of 55 years- it was submitted that respondent No. 1 had not attained the age of 55 years when the transfer order was made- held, that respondent No. 1 had not attained the age of 55 years and provision of posting of employee in a tenure station will not be applicable to him- however, he had attained age of 55 years during the pendency of the petition- hence, order maintained but a direction issued not to

treat it as a precedent. Title: Bharat Sanchar Nigam Limited and Ors. Vs. Darshan Lal and Anr. (D.B.) Page-883

'D'

Drugs and Cosmetics Act, 1940- Section 18(a)(i) read with Section 27(d)- A complaint was filed against the petitioner on the basis of the report declaring Diclofenac Sodium Gel as "not of standard quality" by the Government Analyst, RDTL, Chandigarh- it was contended that Gel was made for export purpose and was found to be conforming to the standards by laboratories of the countries, where it was to be exported- held, that petitioners have failed to place on record any material to show that they are exempted from manufacturing the Gel as per standard laid down in the Indian Pharmacopoeia and are only required to comply with the standards laid down in the Pharmacopoeia applicable to the country exporting the Gel from the petitioners- petition dismissed. Title: M/s Caplin Point Laboratories Ltd. and others Vs. Union of India and another Page-927

'H'

H.P. Urban Rent Control Act, 1987- Section 13- Petitioner filed an application for seeking permission to carry out necessary repairs on the ground that landlord has failed to repair the same for the last 22 years- respondent denied the claim of the petitioner and pleaded that petitioner is a habitual defaulter- application was allowed by the Rent Controller – order was reversed in appeal – held, that it was duly proved that shutter of the premises was damaged in the year 1999- the fact that petitioner is habitual defaulter and estimate has not been prepared unnecessarily weighed with Appellate Authority- landlord directed to repair the shutter of the premises within a month, failing which the tenant granted liberty to repair/replace the same and to adjust the cost of repair/ replacement towards the future rent. Title: Hussan Lal Vs. Data Ram Page-626

Himachal Pradesh Panchayati Raj Act, 1994- 12 (1) (a) (i)- Petitioner started raising construction of his house- notice was issued to him by Gram Panchayat- Gram Panchayat passed a conditional order directing the petitioner to stop the construction and remove the construction material within 7 days- petitioner preferred an appeal before ADM, Pooh which was dismissed- held, that petitioner has not led any tangible evidence to establish his possession over the disputed land except referring to the jamabandi- according to *Shajra Nasab* the mother of the petitioner came in the village after settlement – she had house and compound in the *abadi deh* which is far away from the disputed land- disputed land was chosen for construction of Bus Stand- proceedings of the Gram Panchayat were carried strictly in accordance with law- oral and documentary evidence were correctly appreciated- petition dismissed. Title: Tandub Chhering alias Dharama Nand Vs. Additional District Magistrate, Pooh & ors. Page-868

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized on 8.7.1992- one son and one daughter were born from the wedlock- wife brought her two brothers and five sisters to live with the appellant and completely devoted herself to their education, upbringing and other responsibilities towards them and she started shirking from her matrimonial duties -she avoided to look after her children and refused to perform any of the duties towards her children- she stopped fulfilling her conjugal duties since the year 2000- she used to abuse her husband- she left matrimonial home and started living separately at Mashobra- hence, divorce was sought- wife denied the contents of the petition- petition for divorce was dismissed by the trial Court- held in appeal, allegations of cruelty were not proved- son and daughter were not cited as witnesses- incidents narrated by

husband are not grave rather ordinary wear and tear of the married life- parties were residing under one roof in US Club- wife was thrown out of the house by the husband- he cannot be permitted to take advantage of his own wrongs- petition was rightly dismissed by the trial Court- appeal dismissed.Title: Ratti Ram Sharma Vs. Satya Devi Page-947

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized on 5.12.1994- a daughter was born from the wedlock- wife left the company of the husband- husband had filed a petition for restitution- wife also filed a petition for maintenance in which maintenance @ Rs. 2,500/- per month was granted to wife- contents of the petition were denied by the wife pleading that husband had extra marital affair and he had asked the wife to reside separately- she was being maltreated by the husband and his family members- petition was dismissed by the trial Court- held, in appeal that wife was ready and willing to stay with the husband but the husband had never taken her with him- she was maltreated by husband and his relatives on which she had to file a complaint- she was not being maintained and had to file a petition for maintenance- husband had forced the wife either to live with his or her parents – husband cannot be permitted to take advantage of his own wrongs- merely because wife had failed to prove that husband was living adulterous life will not amount to cruelty- trial Court had rightly dismissed the petition- appeal dismissed. Title: Param Deep Vs. Sushma Rani Page-1334

'I'

Indian Evidence Act, 1872- Section 32- Deceased had made two dying declarations- in her first statement, she stated that she was burning Bhatti- as soon as she increased the oil in the Bhatti, all of a sudden, the fire flamed up and engulfed her body- in her second statement, she stated that accused had beaten her and set her on fire – held, that Court has to scrutinize the dying declarations to find out if each one of them passes the test of trustworthiness- if there are more than one dying declarations and there is no inconsistency between them, all can be used against the accused for proving the guilt - Court has to examine dying declaration to find out whether it is voluntary, truthful, made in a conscious state of mind without being influenced by any person- in case of more than one dying declarations, the intrinsic contradictions are extremely important- accused had brought the deceased to the hospital- her statement was recorded by the police and bears the signature of Medical Officer- she was conscious, co-operative and well oriented in time and space- deceased was all alone when inquiry was made from her- when her second statement was recorded , parents of the deceased were present- the parents of the deceased had impressed upon the police to register the case- Doctor in whose presence, second statement was made was not examined- hence, it is difficult to rely upon the dying declaration-accused was rightly acquitted. Title: State of H.P. Vs. Dalip Singh and others (D.B.) Page-1456

Indian Evidence Act, 1872- Section 45- Plaintiff filed an application for conducting DNA test by expert for determining the paternity of minor- it was subsequently asserted in the plaint that defendant had withdrawn from the society of the plaintiff from 28.11.2004 till filing of the suit- therefore, minor baby delivered on 26.08.2007 was not begotten from his loins – application was dismissed by the trial Court- held, that in a dispute concerning the paternity of the child, court had jurisdiction to pass an order for conducting DNA profile of the person who denies the fatherhood- DNA profiling would settle the controversy regarding the infidelity of the defendant- presumption of paternity can be rebutted by non access- application allowed. Title: Kuldeep Vs. Sunita Devi and another Page-1199

Indian Penal Code, 1860- Section 147, 451, 323 and 506 read with Section 149- accused came to the house of the complainant and uprooted the fencing of her house - when the complainant objected, the accused gave beatings to her with sticks- she fell down- accused also gave beatings to mother-in-law and father-in-law of the complainant- accused were tried and acquitted by the trial Court- held, in appeal that prosecution had not examined any witnes from the neighbourhood- dispute is regarding the user of the passage- there are exaggerations in the statements of the prosecution witnesses- statements of closely related witnesses did not inspire confidence- litigation is pending between the parties- cause of quarrel was not established – in these circumstances, view taken by the trial Court was plausible-appeal dismissed. Title: State of Himachal Pradesh Vs. Neetu Devi & ors. Page-911

Indian Penal Code, 1860- Section 302- 'B' was married earlier- accused brought her and started residing with her as her husband- she brought four children born from her previous husband- PW-2 came to the house and started consuming liquor with 'B' and the accused- accused pushed the deceased, gave her beatings and leveled allegation of adultery- PW-2 tried to save 'B'- 'B' ran out of the house but was brought back by the accused and beaten- 'B' suffered injuries and died - accused was tried and convicted by the trial Court- held, in appeal that the dead body was found inside the residential house- there is no possibility that some other persons had entered inside the house and had committed murder- Medical Officer had found 28 ante mortem injuries which proved to be fatal- it was suggested in cross-examination that 'B was found naked and R was running away from residential house which furnishes the motive to kill the deceased- accused admitted that he ran away on the date of incident and stayed through the night in the school- no explanation was given as to why accused had left his home and had stayed in the school- possibility of sustaining injuries by way of fall is not established - minor contradictions are bound to come with the passage of time and are not fatal for the prosecution case – no plea was taken that offence was committed under sudden and grave provocation- trial Court had properly appreciated the evidence- there is no reason to interfere with the judgment- appeal dismissed.Title: Khim Raj son of Shri Piare Lal Vs. State of H.P. Page-835

Indian Penal Code, 1860- Section 302- Accused had murdered S- he was tried and acquitted by the trial Court- prosecution witnesses have not supported the prosecution version- Medical Officer deposed that deceased died due to hanging- chain of circumstances was not established- held, that in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Raj Kumar (Cr. Appeal No. 327 of 2010)(D.B.) Page-1148

Indian Penal Code, 1860- Section 302- Complainant had gone to attend the marriage where a quarrel took place – accused came out with iron object and started beating 'S', when the complainant tried to save 'S' he was also beaten - dead body of 'S' was found subsequently- accused were tried and acquitted by the trial Court- held, in appeal that PW-1 should have tried to save the deceased but he ran away which is unusual conduct- PW-6 denied the prosecution version- there are contradictions in the testimony of PW-1 in the Court and statement recorded before the police- there was no mention of administering beatings in the inquest report- last seen theory was also not established- in these circumstances, trial Court had rightly acquitted the accused. Appeal dismissed. Title: State of Himachal Pradesh Vs. Manoj Kumar and others (D.B.) Page-1210

Indian Penal Code, 1860- Section 302- One V had taken room in Hotel for the night stay - accused stayed with V- room was found locked in the morning- Manager opened the lock and found dead body of V- matter was reported to police- FIR was registered- accused were

tried and acquitted by the trial Court- held, in appeal that register regarding entry of visitors was not proved - Medical Officer admitted that deceased had died due to asphyxia after consuming phosphide poison- Phosphide poison emits pungent smell and because of pungent smell of the poison any person would resist the attempt of administering poison to him- no marks of injuries were found on the person of the accused- accused were not properly identified in the court- all these circumstances leading to the guilt of the accused were not established- trial Court had taken a reasonable view- appeal dismissed. Title: State of Himachal Pradesh Vs. Hakim Singh and another (D.B.) Page-1132

Indian Penal Code, 1860- Section 302 and 201- Complainant was present in his Dhaba at Lalori Jot – deceased and accused were consuming liquor- complainant heard noise - he came out and found deceased and accused quarreling with each other- accused hit the deceased with stone and blood started oozing out- complainant and deceased followed the accused - deceased asked the accused not to follow him, and deceased returned- accused came with knife and stabbed him on the left side of the chest and ran away- deceased was taken to hospital, where he was declared brought dead- matter was reported to the police- FIR was registered- accused was tried and acquitted by the Court- held, in appeal that motive to commit the crime was not proved- investigation was not conducted properly as the cotton swab used to clean the wound was not collected- T-Shirt, Pants and coat of the accused did not bear any blood stain falsifying the version of the prosecution that accused had hit the deceased with stone- complainant had not informed the deceased that accused was carrying knife with him, although, he had a mobile phone with him- deceased was taken to the hospital in a car, however, blood stains were not lifted from the car- there is discrepancy in the medical evidence- complainant had not disclosed the incident for 13 hours to any person which makes his version doubtful- weapon of offence was also not recovered- all these circumstances, make the prosecution case doubtful- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Shyam Lal (D.B.) Page-1169

Indian Penal Code, 1860- Section 302 and 201 read with Section 34- PW-2 had rented out a hotel along with three rooms to accused Sunita who was running a Dhaba- accused N, A and S were working in Dhaba as workers- accused B son of accused Sunita was residing with her- M was frequently visiting the Dhaba of accused Sunita- workers did not like it- M brought a gas cylinder to Dhaba – accused N, S and A assaulted M- M died at the spot- accused B, S and Sunita tried to remove the blood stains from the wall- body was taken from the Dhaba and was disposed of- subsequently dead body was recovered- FIR was registered- accused were tried and convicted by the trial Court- held, in appeal that the motive projected by the prosecution that accused did not like the visit of M is not believable as they were simply workers of accused Sunita- accused took up a defence that M had entered into a room of Sunita and had tried to outrage her modesty- she raised alarm on which other accused came and gave fist blows to the deceased M- PW-10 did not support the prosecution version but supported the version of the accused – deceased was found to be drunk having 111.52 mg% alcohol in his blood- recovery of gas cylinder was also not proved- call details records were not proved in accordance with the Section 65-B of Indian Evidence Act- room was not sealed immediately and possibility of other people entering into the room cannot be ruled out- accused had a right of private defence to protect the modesty of accused Sunita- prosecution case was not proved beyond reasonable doubt- appeal accepted- accused acquitted. Title: Anil Kumar Vs. State of Himachal Pradesh (D.B.) Page-1534

Indian Penal Code, 1860- Section 302 and 498A- Marriage of the sister of the complainant was solemnized with the accused- she was admitted in the hospital as she had sustained burn injuries- she gained consciousness and disclosed that accused had sprinkled kerosene on her and had set her on fire- incident was witnessed by her children- she succumbed to injuries- accused was tried and acquitted by the trial Court- held, in appeal that Medical Officer had certified that deceased was not fit to make the statement, therefore, prosecution version that deceased had told the witnesses that accused had put her on fire cannot be believed- prosecution case was not supported by son of the deceased- Medical Officer admitted that in case of pouring of kerosene, whole body will catch fire and there would be burn injuries all over the body - injuries were found only on front portion- the possibility of getting burn injuries while sitting near the kerosene stove cannot be ruled out- trial Court has taken a correct view- appeal dismissed- accused acquitted. Title: State of Himachal Pradesh Vs. Bhagat Ram (D.B.) Page-1348

Indian Penal Code, 1860- Section 302, 120B and 201- Accused had hired taxi of A- A did not return- the taxi was found parked and the shoes of the deceased were found lying in the Taxi- it was found during investigation that accused had an altercation with the deceased- they had cut his neck with the knife and had thrown his dead body- accused was tried and convicted by the Court, whereas, co-accused was acquitted- held in appeal that case is based upon circumstantial evidence - theory of last seen was not proved satisfactorily- recovery of dead body at the instance of the accused was not believable as the body was visible from the edge of the road – no disclosure statement was made by the accused – recovery of knife was also not proved- it was also not established that injuries were sustained by the use of knife- motive was also not sufficient to commit murder – prosecution was not proved beyond reasonable doubt-accused acquitted. Title: Suresh Kumar Vs. State of Himachal Pradesh (D.B.) Page-918

Indian Penal Code, 1860- Section 302, 201 and 120-B- **Indian Arms Act, 1959**- Section 25- Accused murdered 'K' at Androla bridge- accused 'S' was found in possession of fire arm with which 'K' was murdered – accused were tried and convicted by the trial Court- held, in appeal that case was based upon circumstantial evidence- many of the prosecution witnesses have not supported the prosecution version- ballistics expert stated that no opinion regarding firing of used cartridge from country made pistol could be given- disclosure statement is corroborative piece of evidence and is not sufficient by itself to convict the accused- chain of circumstances was not complete- accused 'S' was wrongly convicted by the trial Court- appeal accepted and accused 'S' acquitted. Title: Sanjeev Kumar s/o Sh. Mangal Singh Vs. State of H.P. (D.B.) Page-1106

Indian Penal Code, 1860- Section 302, 307, 323 read with Section 34- L, P and D had gone to Mundan ceremony of grand-son of P- L and P were having conversation after taking meals when accused M and G arrived at the spot and started quarreling with L and P- accused M was holding a glass bottle in his hand and he struck bottle on the head of L- accused G gave beatings to P and L with stick- L died in the incident- accused were tried and convicted by the trial Court for the commission of offences punishable under Sections 302, 307, 323 read with Section 34 of IPC- aggrieved from the judgment, appeal was preferred pleading that accused were to be convicted of the commission of offence punishable under Section 302 of IPC and that sentence imposed upon the accused was inadequate – held, in appeal that there was no pre-meditation nor common intention to kill deceased- accused were not seen carrying any sticks in their hands when they arrived in the courtyard - sticks used by accused were fuel wood- the incident had taken place at the spur of moment – hence, it cannot be said that accused had no intention to cause the death of L but they had

knowledge that injuries were likely to cause death of L- hence, trial Court had rightly convicted the accused of the commission of offences punishable under Sections 302, 307, 323 read with Section 34 of IPC. Title: State of Himachal Pradesh Vs. Manjeet Singh & ors. (D.B.) Page-685

Indian Penal Code, 1860- Section 302, 392 and 201- Accused had committed murder of 'C'- he had also committed robbery and had caused disappearance of evidence to save himself from legal punishment- accused was tried and acquitted by the trial court- held, in appeal that case against the accused is based upon circumstantial evidence- prosecution has relied upon the fact that the accused was last seen with the deceased- however, this fact was not satisfactorily established- no test identification parade was held to test the power of the eye witnesses to identify the accused- recovery of earring and sandals of the deceased was also not established satisfactorily- disclosure statement was not proved- finger impressions on the bruises were not matched with the finger impressions of the accused- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Sanjay Kumar (D.B.) Page-914

Indian Penal Code, 1860- Section 304 (Part-II)- Accused owns an apple orchard- his son had sold the crop to contractor H, who had directed his employees C and D to carry the apple boxes to the road- they engaged the services of a mule contractor and went to the orchard – accused pelted stones at them without any provocation- one cement brick hit deceased causing injuries- deceased succumbed to the injuries and died at the spot – accused was tried and convicted by the trial Court- held, in appeal that deceased had died as a result of injury sustained by him on vital portion- it was duly proved that injury could have been caused with the brick- weapon of offence was recovered from the spot in the presence of independent witnesses- crop was sold to the contractor which was to be plucked, packed and transported/carried by the Contractor- Contractor had plucked and packed the crop and he had a right to remove the crop- accused had given him beatings without any reason- evidence was rightly appreciated by the trial Court- further, considering the age of the accused, the sentence reduced to the period already undergone. Title: Kuldeep Singh Vs. State of Himachal Pradesh Page-1442

Indian Penal Code, 1860- Section 304 Part I- Accused inflicted injuries on the person of A who died – accused was tried and convicted by the trial Court- prosecution version was duly proved by PW-2- it was corroborated by PW-6 to PW-8 and PW-10- cause of death was shock and haemorrhage- accused had given beatings on the vital part of the body- incident had taken place inside the jail- no independent witness could have been examined- statements of official witnesses are natural and confidence inspiring - they have duly corroborated the prosecution version- accused was rightly convicted by the trial Court- appeal dismissed. Title: Amrish Rana Vs. State of Himachal Pradesh (D.B.) Page-1077

Indian Penal Code, 1860- Section 304 Part II- Son of the complainant had left to the house of his friend stating that there was a party and he would not return during the night- a telephonic message was received that son of the complainant was not feeling well and was brought to IGMC- when the complainant reached IGMC, he found his son dead- injuries were noticed on the body of the deceased with sharp edged weapon- accused were tried – accused 'A' was convicted, whereas, other accused were acquitted of the commission of offence punishable under Section 304 Part-II – aggrieved from the judgment, separate appeals were preferred by the complainant and accused- held, that witnesses had consistently deposed about the fact that convict had stabbed the deceased with knife- testimony of PW-11 was corroborated by the testimony of PW-12- Medical Officer noticed stab/incised wound, which could have been caused by means of a knife- opinion of Medical

Officer is not sufficient to doubt the testimony of eye-witness- knife was recovered at the instance of convict which further corroborates the prosecution version- convict was armed with deadly weapon and had repeatedly attacked an unarmed person which shows his intention to commit the murder of the deceased- conviction of convict under Section 304 Part-II IPC is modified to Section 302 of IPC. Title: Atul Thakur Vs. State of H.P. (D.B.) Page-697

Indian Penal Code, 1860- Section 306- Deceased was married to the accused- accused maltreated the deceased- deceased had attempted to commit suicide earlier- she was sent to her matrimonial home at the instance of the accused - accused had coerced the deceased to prepare meals for him and his friends but there was no ration in the home- accused started abusing and beating the deceased on which she poured kerosene upon herself and set herself on fire- PW-10 and 11 stated that they had taken their meals in the house of the accused- they denied the prosecution version that there was no ration and accused had given beatings to the deceased- other prosecution witnesses had not supported the prosecution case and were declared hostile- proximate cause for taking life was not established- harassment of wife by husband or in-laws does not attract Section 306- prosecution has to prove something more than that- trial Court had taken a right view- appeal dismissed. Title: State of Himachal Pradesh Vs. Raj Kumar (D.B.) Page-1363

Indian Penal Code, 1860- Section 306 and 498-A- A was married to accused V- V went abroad- she was treated well for sometime after the marriage but thereafter accused started ill treating and taunting her about domestic chores- she complained to her parents regarding the harassment- matter was also brought to the notice of V who assured that he would ask his mother not to harass A- A consumed poison on 15.3.2004- accused were tried and acquitted by the trial Court- held, in appeal that father of the deceased had admitted that he used to visit the home of the deceased- PW-2 also admitted that deceased used to visit her parents twice or thrice in a year- complainant had never lodged any complaint with police, Panchayat or any other relatives- no inquiry was made from the neighbourhood about the cause of the death- all these circumstances, make the prosecution case doubtful- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Sharda Devi (D.B.) Page-1345

Indian Penal Code, 1860- Section 324, 307, 454, 392, 397 read with Section 34- Complainant had withdrawn Rs. 75,000/- and had kept this amount in his room- accused came and gave beatings to him- he became unconscious- when he regained consciousness, he found that his money was missing- accused N surrendered before the police and handed over Rs. 54,440/- a sum of Rs.20,708/- was deposited by D- accused also confessed about giving beatings and running away with money- accused were tried and acquitted by the trial Court- held, in appeal that name of the accused were not mentioned in FIR, therefore, it cannot be believed that identity of accused was known to the witnesses- Medical Officer had noted simple injuries and recovery was not proved- accused could not be connected with the commission of crime- trial Court had rightly dismissed the appeal. Title: State of Himachal Pradesh Vs. Nirat Singh and another (D.B.) Page-1358

Indian Penal Code, 1860- Section 341, 323, 325, 307 and 504 read with Section 34- S and her niece G were bringing pieces of wood for stacking hay- accused asked S as to why she wanted to raise haystack at that place- complainant replied that she had been stacking hay at the same place every year since long being the owner- accused gave beatings to S- incident was narrated to police on which FIR was registered- accused were tried and acquitted by the trial Court- held, in appeal that PW-12 had admitted in his cross-examination that place where the dispute arose was owned by the State of Himachal

Pradesh—there were discrepancies regarding the prosecution version- PW-3 had not supported the same- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Pano Devi & ors. (D.B.) Page-811

Indian Penal Code, 1860- Section 341, 332, 333, 353 & 506 IPC read with Section 34- Complainant was driver in HRTC- he overtook a private bus- driver of private bus over took the bus of the complainant and halted the same diagonally in front of the bus of the complainant- driver, conductor and another person got down from the private bus and gave beatings to the complainant- accused were tried and acquitted by the trial Court- held, in appeal that no independent witness was joined, only persons from HRTC were associated as witnesses- view adopted by the trial Court cannot be said to be perverse- appeal dismissed. Title: State of Himachal Pradesh Vs. Sanjay Kumar & ors. (D.B.) Page-1165

Indian Penal Code, 1860- Section 341, 342, 506 and 376 IPC read with Section 511- Accused attempted to commit rape on the prosecutrix aged 9 years and threatened to kill her- he was tried and acquitted by the Court- held, in appeal that testimony of prosecutrix is trustworthy, reliable and inspires confidence- her testimony is corroborated by other witnesses- minor prosecutrix was threatened by the accused which is proper explanation for the delay- litigation is two edged weapon and will not help the accused- minor contradictions are bound to come with the passage of time- they will not make the prosecution version doubtful- absence of injuries on the private parts or elsewhere upon the person of the minor prosecutrix is of no consequence- the case of the prosecution was proved beyond reasonable doubt- accused convicted and sentenced. Title: State of H.P. Vs. Sri Ram son of Roop Lal (D.B.) Page-854

Indian Penal Code, 1860- Section 342- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Prosecutrix was found sleeping- when her mother returned prosecutrix was wearing her clothes inside out- on inquiry, she disclosed that accused had taken her to a room and had forcible sexual intercourse with her- matter was reported to police- FIR was registered- accused was tried and acquitted by the trial Court- prosecutrix was proved to be minor by the birth certificate and abstract of parivar register- testimony of PW-1 corroborated by PW-3- however, testimony of PW-1 was contradicted by the statement of PW-3- PW-3 had also not deposed that prosecutrix was wearing clothes in unnatural and odd fashion – version of PW-1 in cross-examination that she had noticed the blood stains on the clothes of the prosecutrix is an improvement as she had not deposed this fact in examination-in-chief – PW-3 had also not deposed any such fact- medical evidence also does not corroborate the prosecution version- prosecution case was not proved beyond reasonable doubt- accused acquitted. Title: Lal Singh @ Lala Vs. State of H.P. (D.B.) Page-648

Indian Penal Code, 1860- Section 363, 366A, 376, 506- **Protection of Children From Sexual Offences Act, 2012-** Section 4- Accused came to the house of prosecutrix with a proposal to marry her - her family members refused their marriage as she was under age- accused subsequently kidnapped the prosecutrix- father of the prosecutrix moved an application before the Dy. S.P. Paonta Sahib on which FIR was registered- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had stated that she was taken to the house of the accused twice, but her mother stated that prosecutrix was taken only once- prosecutrix had not raised any alarm when she was being forcibly taken away- original parivar register was not brought on record- prosecutrix had filed an application against her father that he was demanding Rs.10,000/- from the family of the accused- all these circumstances, create doubt regarding the prosecution version- trial Court had

wrongly convicted the accused- appeal accepted- accused acquitted. Title: Pradeep Kumar Vs. State of H.P. Page-1303

Indian Penal Code, 1860- Section 363, 376 and 120-B- Prosecutrix was returning from Satsang along with the co-accused N –accused were following them – 'N' tied the hands of prosecutrix - accused A carried the prosecutrix towards the Dehri, where she was raped- PW-2 came towards the Kunde-Wala-Choe in search of the prosecutrix- accused ran away on seeing her- accused were tried and acquitted by the trial court- held, in appeal that Medical Officer had not noticed any injury on her person- prosecutrix claimed that she was dragged to a distance of more than 400 meters, therefore, she would have sustained injuries by dragging- it is difficult to believe that prosecutrix would not have protested when her hands were being tied by 'N'—it was admitted by PW-2 that there are two groups in the village- he and his family belong to one group and the family of accused belongs to other – in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Arun Kumar alias Ashu & anr. (D.B.) Page- 953

Indian Penal Code, 1860- Section 363,366 and 376- Prosecutrix was found missing in the morning- accused was also found missing- matter was reported to police and the prosecutrix was recovered from the company of the accused- accused was tried and acquitted by the trial Court- held, in appeal that no witness had seen the accused while taking away the prosecutrix- prosecutrix had also not raised any alarm on the way to Jalandhar from where she was recovered- this shows that prosecutrix had left home at her own- no injuries were found on her person- she had not narrated the incident to any person in the neighbourhood- all this shows that she was a consenting party- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Ravinder Kumar (D.B.) Page-1368

Indian Penal Code, 1860- Section 376- Prosecutrix and accused had developed proximity with each other- accused had committed sexual intercourse with the prosecutrix without her consent by administering alcohol in cold drink- accused had promised prosecutrix to marry her and had continued physical relations with the prosecutrix- prosecutrix conceived and abortion was carried out by the accused by administering some medicine- compromise was effected in which accused promised to marry the prosecutrix- however, after compromise, family members of the accused refused to marry the prosecutrix with the accused- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had told the Doctor that she was pregnant but the development of the child was not proper- she had told another Doctor that she had noticed slight bleeding - on sonography missed abortion was doubted- however, prosecutrix had not reported back to the Doctor- prosecutrix had approached the Doctor to verify the termination of pregnancy- possibility of prosecutrix aborting herself cannot be ruled out- prosecutrix had not complained for almost three years despite conceiving and suffering three abortions- FIR was lodged against the accused after due deliberations- prosecutrix was in relationship with the accused and had been allowing access to the accused at her residence in the absence of her mother without any resistance - she had even stayed with the accused- prosecutrix was 21 years old and was prudent enough to understand the consequences of relationship- hence, prosecution version that accused had raped the prosecutrix is not believable- accused was rightly acquitted by the trial Court. Title: State of Himachal Pradesh Vs. Pawan Kumar (D.B.) Page-1480

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix was alone in her house, when the accused came and raped her- accused also threatened to kill the prosecutrix in case of disclosure to this fact to any person- accused also raped her subsequently on different occasions- incident was narrated to her mother by the prosecutrix on which FIR was

registered – accused was tried and acquitted by the trial court- held, in appeal that prosecutrix was major at the time of incident- the version that she was repeatedly raped and had not disclosed the incident to any person cannot be believed as the prosecutrix was supposed to narrate the incident to her mother- accused had handed over a letter to her which shows that accused and prosecutrix were closely known to each other- there were discrepancies in the testimonies of witnesses recorded by the police and as deposed in the Court- prosecutrix was not willing for medical examination earlier- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Raj Kumar (D.B.) Page-1207

Indian Penal Code, 1860- Section 376, 342, 498 and 323- Prosecutrix, wife of the complainant was raped by the accused- prosecutrix was suffering from mental retardation to the extent of 42%- accused was tried and acquitted by the trial Court- held, in appeal that Medical Officer had clarified that a person suffering from seizure is abnormal only during the period of attack – she was examined in the year 2008 and not after the incident- there is no evidence that prosecutrix suffered from any epileptic attack prior to the incident- her husband had not stated that prosecutrix was suffering from mental retardation/ailment- no injuries were found on her person - clothes were also not found to be torn- prosecutrix did not resist the action of the accused- the place where the incident had taken place was not visible from the place where complainant is stated to have peeped in- according to prosecutrix one more person was present but his identity was not revealed- he was not examined- she admitted that her husband and the accused had argument which probablizes the defence of the false implication- there was delay in reporting the matter to the police- in these circumstances, acquittal of the accused was justified- appeal dismissed. Title: State of Himachal Pradesh Vs. Kishori Lal (D.B.) Page-803

Indian Penal Code, 1860- Section 376, 366 and 417- Prosecutrix was learning tailoring- she did not return to her home- on inquiry a colleague told the father of the prosecutrix that she was seen with the accused- matter was reported to the police- FIR was registered- prosecutrix was recovered- accused was tried and acquitted by the trial Court- prosecutrix stated that she was overpowered by accused and was raped in Nallah- she went to the shop and when she was returning she was again raped at the same place- she was taken to the house of B, where she was again raped- prosecutrix was aged 20 years at the time of incident- she had not revealed this incident to any person, not even to B- she met many person on the way- she stayed in the house of the accused- when the wife of the accused came, prosecutrix was forced to leave the house of the accused – prosecutrix had voluntarily gone with the accused – trial Court had rightly acquitted the accused- appeal dismissed. Title: State of H.P. Vs. Pradeep Kumar (D.B.) Page-1047

Indian Penal Code, 1860- Section 376, 366-A, 506- **Protection of Children From Sexual Offences Act, 2012-** Section 4- Prosecutrix had left home and on inquiry it was found that she had not even attended the school- she delivered a female child- according to DNA test, accused is biological father and prosecutrix is biological mother of the baby- accused was tried and convicted by the Court- prosecutrix was less than 18 years of the age at the time of incident- prosecutrix supported the prosecution version- her testimony was duly corroborated by the prosecution witnesses- report of DNA duly proved that prosecutrix was biological mother and accused was biological father of the baby- prosecution case was duly proved and the accused was rightly convicted by the trial Court. Title: Yagya Dutt alias Rinku Vs. State of H.P. Page-870

Indian Penal Code, 1860- Section 380- Door of the computer room was found open in the morning and computer was found missing- accused was arrested and he made a disclosure

statement- accused was tried and convicted by the trial Court- judgment was set aside by the Sessions Court- held, in appeal that recovery was not satisfactorily proved- police had gone to the shop and had recovered the computers- making of the disclosure statement was also not established satisfactorily- no local witness was associated- the findings arrived at by the trial Court cannot be said to be perverse- appeal dismissed. Title: State of Himachal Pradesh Vs. Rajeev Kumar @ Lovely (D.B.) Page-1291

Indian Penal Code, 1860- Section 395, 147, 323, 324, 342, 427 read with Section 149- accused came for purchasing diesel to Petrol Pump- they paid currency notes of Rs.500/-- when M went inside the office, accused entered into the office room and attacked him with kicks and fist blows- accused gave a stick blow on the head of M while another employee was also beaten- accused entered into the office room and removed the entire cash- glass door was also broken- telephone sets were also taken away by the accused- FIR was registered against the accused- accused were tried and convicted by the trial Court- held, in appeal that testimonies of prosecution witnesses corroborated each other- medical examination corroborated the ocular version- test identification of the accused was conducted but the accused refused to participate in the same- adverse inference is to be drawn against the accused to the same- telephone sets were recovered in pursuance to the disclosure statement made by the accused- prosecution case was duly proved beyond reasonable doubt- however, sentence of 7 years was modified to a term of imprisonment already undergone by the accused. Title: Lakhan Singh Vs. State of Himachal Pradesh Page-1329

Indian Penal Code, 1860- Section 409, 420, 467, 468, 471- Accused had misappropriated the wheat supplied to him by the Department for further supply to the Depot Holders- he had failed to perform the duty to keep the accounts of receipt, demand and supply of the wheat and had misappropriated the wheat which was to be supplied to Depot Holders through him- accused had deposited lesser amount in comparison to the amount supposed to be deposited by him for supplying wheat- prosecution had failed to prove the quantity of entrustment of wheat, supply of the same by the accused and deficiency in the stock- original record was also not produced before the Court- written complaint made by Accounts, stock verification report and stock register were also not produced in the Court- evidence of the prosecution does not prove that the accused has caused wrongful gain or loss – accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Krishan Kumar (D.B.) Page-1144

Indian Penal Code, 1860- Section 409, 420, 467, 468, 471 of the IPC - **Prevention of Corruption Act, 1988-** Section 13(2)- Accused was posted as Naib Tehsildar- there were extensive rains and snow fall due to which houses of several persons were damaged and there was heavy loss of property and crop – Rs. 15 lac was sent by cheque for disbursement – Rs. 5 lakh was sent by cash- a complaint was received regarding the misuse of the amount- it was found on investigation that accused had misappropriated amount of Rs. 61,000/- and had prepared forged/false document regarding the disbursement of this amount- accused was tried and acquitted by the trial Court- held, in appeal that there was no comparison of signature or thumb impression of the accused with the disputed thumb impression and signature- hence, it cannot be inferred that accused had forged document- PW-25 and 29 admitted their signatures on the receipt but denied the receipt of the money- once signatures are admitted, the person putting his signatures cannot deny the contents of the same in view of Sections 91 and 92 of Indian Evidence Act- testimonies of other witnesses were not satisfactory-_trial Court had rightly acquitted the accused-appeal dismissed. Title: State of Himachal Pradesh Vs. Kunju Ram (D.B.) Page-786

Indian Penal Code, 1860- Section 452, 376, 354 and 323 read with Section 34- Accused entered inside the house of the prosecutrix and raped her- they also intended to rape the daughter of prosecutrix - matter was reported to the police- accused were tried and convicted by the trial Court- Medical Officer had not found any mark of injury on the person of the prosecutrix- according to Medical officer no forcible sexual intercourse had taken place – disclosure statements were not proved satisfactorily- PW-2 stated that accused R had not dragged her nor he had raped her which casts doubt on the prosecution version- view taken by the trial Court was probable one and does not require interference- appeal dismissed. Title: State of Himachal Pradesh Vs. Ravi Kant son of Surya Kant & others Page-1311

Indian Penal Code, 1860- Section 498 A and 304-B- L was married to accused N- she was subjected to beatings and maltreatment on account of demand of dowry- case was registered by her against the accused which was compounded- vehicle of accused N met with an accident- accused asked the deceased to bring an amount of Rs.50,000/- from her parents- she was again subjected to beatings and maltreatment by the accused persons and it was suspected by the complainant that his daughter was done to death by the accused persons due to non fulfilling the demands of dowry- accused were tried and acquitted by the trial Court- held, in appeal that there was discrepancy regarding the demand of dowry- according to P, deceased was beaten prior to her death, but no injuries were found on her person- no complaint was made to the police or gram Panchayat regarding beatings- there are contradictions in the testimonies of prosecution witnesses- evidence was rightly appreciated by the trial Court- prosecution case was not proved beyond reasonable doubt – appeal dismissed. Title: State of H.P. Vs. Narian Singh and others (D.B.) Page-1471

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to accused J- S and R are her parents in law- accused started maltreating the deceased after 5-6 months of marriage- deceased told her mother that accused was asking her to construct two rooms but the parents of the deceased were unable to fulfill the demand- she telephonically informed her mother that accused had beaten her on account of the demand and she had consumed poison- mother of the deceased went to CHC and found her daughter dead – accused were tried and acquitted by the trial Court- held, in appeal that it was duly proved on record that accused J and deceased were residing in different portions of the house- ration cards of accused and his father were separate and deceased never made any complaint of harassment to Panchayat- father of the deceased was not cited as witness- no marks of external injuries were noticed by Medical Officer- accused J used to visit in-laws on every important festival- no satisfactory evidence of cruelty was proved on record- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Jagbir Singh and others (D.B.) Page-1140

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- R was married to accused P- accused started torturing, harassing, giving beatings and not providing proper meals to R- R committed suicide by hanging herself- accused was tried and acquitted by the trial Court – held, in appeal that PW-2 had admitted that R had not made any complaint after her marriage- PW-4 brother of R also admitted that he had not filed any complaint against the accused before Panchayat- PW-6 also admitted that he had not lodged any complaint against the accused during the life time of R- PW-11, mother of R had not narrated any specific incident of torture by accused- R used to reside with her husband at Ludhiana – no investigation was made as to what had happened at Ludhiana – in these

circumstances, trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Pawan Kumar and others (D.B.) Page-815

Industrial Disputes Act, 1947- Section 25- Services of the workmen were terminated- Labour Court held that workmen were entitled to relief - held, that awards passed by the Labour Court are based on the facts- Writ Court cannot sit as an Appellate Court – Appellate Court set aside the award made by the Labour Court- the question of fact cannot be interfered with by the Writ Court- such findings can be questioned if it is shown that the Tribunal has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which influenced the impugned findings - it was not pleaded that inadmissible evidence was recorded or it was made foundation of the awards or the awards were passed without any evidence- appeal dismissed. Title: The State of H.P. and another Vs. Karam Chand Page-1183

Industrial Disputes Act, 1947- Section 36(4)- Reference was made to the Tribunal by the workmen- notice was issued to the employer who put in appearance through an advocate- no objection was raised against appearance of the Advocate- an application was filed by the employer to seek leave for representation by an advocate which was dismissed by the Tribunal- held, that employer was required to obtain the consent of the Authorized representative of the workmen and the leave of the tribunal for representation by advocate – no consent was taken from Representative nor leave was taken from the Tribunal- however, not raising any objection for representation amounted to implied permission from the workmen- Tribunal had wrongly dismissed the application- petition allowed. (Para-5 to 14) Title: M/S Him Cylinder Private Limited Vs. Janak Raj Page- 1037

Insurance Act, 1938- Section 64-VB- Cheque issued for the payment of premium was dishonoured- it was contended that insurer is not liable- held, that insurer has to intimate the owner about the cancellation of insurance policy, in absence of which, he is liable- there is no evidence that any notice was issued to the insured - hence, insurer was rightly held liable to pay the compensation. Title: National Insurance Company Limited Vs. Vineet Kumar & others Page-1496

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Land Acquisition Act, 1884- Section 18- Land of the claimant was acquired for the construction of Ranjit Sagar (Thein Dam) Project - Land Acquisition Collector awarded the compensation- aggrieved from the order of compensation, reference was sought to the District judge who enhanced the compensation, irrespective of the classification of the land- aggrieved from the award, appeals were preferred- held, that claimants have relied upon the sale deed for small areas and a big chunk of land had been acquired, deduction was permissible while assessing market value of the land- value of the structures was assessed on the basis of the estimates prepared by the Junior Engineer at the site- compensation for the trees was worked by the DFO Dalhousie- award was made on 27.1.1999 - reference petitions were filed on 20.2.1999- petition was received in the Reference Court on 2.12.1999- delay in sending the reference was on the part of the Land Acquisition Collector and the claimants cannot be held liable for the same- when the land owner is not present nor the copy of the award had been supplied to him, he can seek reference within 6 months from the date of the knowledge - in the present case, award was not made in the presence of the claimant nor copy was supplied to him- hence, award cannot be said to be barred by limitation. Title: Hari Singh Vs. General Manager, Ranjit Sagar (Thein Dam) and others Page-896

Land Acquisition Act, 1884- Section 18- Land of the petitioner was acquired for the construction of Housing Board Colony- compensation was awarded by Land Acquisition Collector- aggrieved from the compensation, a reference was sought- Reference Court enhanced the compensation to Rs. 883.31 paise per square meter, irrespective of the classification of the land- aggrieved from the award, appeals were preferred- held, that Housing Board Colony, Durga Colony and Krishna Colony are located adjacent to the acquired land- land is 600 meters away from Una Nangal road- roads and lanes have already been constructed in this colony- education institution was started near the acquired land- acquired land falls within the limit of M.C., Una- amount of compensation should be just and proper- 20% amount should have been deducted towards development charges- claimants were entitled to 20% increase over the amount assessed by the Collector- therefore, no interference was required with the award of the collector.Title: Land Acquisition Collector, H.P. Housing and Urban Development Authority Vs. Usha Devi & ors. Page-656

Land Acquisition Act, 1894 - Section 18- Land of the petitioners was acquired for the construction of Kol Dam Hydro Electric Project- Land Acquisition Collector divided the land into two categories i.e. Majrua (Barani/cultivated land) and 'Gair Majrua' (uncultivated land) and awarded compensation @ Rs. 4,68,496.11/- for 'Majrua' land and Rs. 1,04,117.44/- for 'Gair Majrua' land- Reference was made to the District Judge who refused to enhance the compensation- aggrieved from the award of the District Judge, appeals were preferred- held, that sale deed should have been taken into consideration at the time of determination of market value - certified copies of the sale deeds are admissible in evidence as exemplars in land acquisition proceedings, even if the vendor or vendee are not examined- further, testimonies of witnesses made it difficult to rely upon the sale deeds- possibility of these having been executed to seek hike in the prices of land in the area and to obtain the benefits without there being exchange of sale consideration, cannot be ruled-out- Reference Court had not made any illegality or irregularity in discarding the same- entire area was in the process of development- land was acquired for construction of Kol Dam- land should not have been classified into two categories- hence, market value is to be determined @ Rs. 4,68,497.00/- uniformly irrespective of classification. Title: Dadu Ram Vs. Land Acquisition Collector and others Page-636

Land Acquisition Act, 1884- Section 18- Land was acquired for construction of Colony by Housing Board- Land Acquisition Collector awarded the compensation- a reference was sought and reference Court awarded a sum of Rs. 3,000/- per marla with statutory benefits- aggrieved from the award, appeal was preferred- held, that land is situated in the fast developing and upcoming area of Rakkar where the facilities of road, marketing and telecommunication were already present- amount of compensation is just and adequate- another reference was answered and in appeal the compensation was reduced to Rs. 883.31/- per square meter- hence, compensation awarded in this case also at the rate of Rs. 883.31/- per square meter with all statutory benefits. Title: Land Acquisition Collector, H.P. Housing and Urban Development Authority and another Vs. Daulat Ram & ors. Page-653

Land Acquisition Act, 1884- Section 18- Land was acquired for the construction of Ranjit Sagar (Thein Dam) Project – aggrieved from the award, made by the Land Acquisition Collector, reference was sought to District judge who enhanced the compensation- appeals were preferred against the award of District judge on the ground that petitions were barred by limitation- claimant also sought enhancement of compensation- Land Acquisition Collector had assessed the value of "Bagicha Barani Faldar" at Rs. 5 lakhs per bigha or say Rs. 25,000/- per biswa- Learned District Judge had awarded Rs.3 lacs ber bigha after making deduction of 60%- held, that when sale deeds are of small areas and the land

acquired is a big chunk, the deductions are permissible while assessing the market value of the land- value of the structures was assessed on the basis of the estimates prepared by the Junior Engineer at the site- compensation for the trees was worked by the DFO Dalhousie- award was made on 27.1.1999 - reference petitions were filed on 20.2.1999- petition was received in the Reference Court on 2.12.1999- delay in sending the reference was on the part of the Land Acquisition Collector and the claimants cannot be held liable for the same- when the land owner is not present or the copy of the award is not supplied to him, he can seek reference within 6 months from the date of the knowledge - in the present case, award was not made in the presence of the claimant nor copy was supplied to him- hence, award cannot be said to be barred by limitation. Title: General Manager, Ranjit Sagar Dam Vs. Thakur Chand and others Page-884

Limitation Act, 1963- Section 5- Applicant has sought condonation of delay of three years, five months and twenty three days in filing the present Letters Patent Appeal- judgment was pronounced on 31.10.2011- civil review petition was filed which was dismissed on 23.7.2012- LPA was filed which was withdrawn on 23.6.2014 with liberty to file fresh appeal- appeal was filed on 21.8.2014- held, that applicant had made all efforts to get rid of the judgment but had failed to do so- he had sufficient cause for condonation of delay- delay condoned. Title: Himachal Pradesh Horticulture Produce Marketing and Processing Corporation Limited Vs. Kanta Devi and another (D.B.) Page-1440

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Motor Vehicles Act, 1988- Section 149- Claimants had pleaded that deceased was travelling in the vehicle as owner of goods- insurer admitted this fact in the reply- insurer had not led any evidence to prove that offending vehicle was being driven in violation of terms and conditions of the policy- burden was upon the insurer to prove this fact- insurer was saddled with liability in another case arising out of the same accident which has attained finality- Tribunal had wrongly absolved the insurer of the liability- insurer directed to deposit the amount along with interest. Title: Ashok Kumar Vs. Lajya Devi and others Page-695

Motor Vehicles Act, 1988- Section 149- Claimants had specifically pleaded that deceased was travelling in the goods' vehicle with goods- this fact was admitted in the reply- insurer had taken a plea that deceased was gratuitous passenger but had not led any evidence to prove this fact- driver was driving Pick-up Van gross weight of which is 2750 kilograms- it falls within the definition of LMV- driver possessed a licence to drive light motor vehicle and endorsement of PSV was not required- Tribunal had wrongly saddled the owner with liability- Insurer directed to satisfy the award. Title: Rattan Singh and another Vs. Surto Devi and another Page-1508

Motor Vehicles Act, 1988- Section 149- Driver was having a learner licence- the offending vehicle was light motor vehicle- held, that person having learners' licence is having a valid and effective driving licence and the Tribunal had rightly held the insurer to be liable. Title: Oriental Insurance Company Limited Vs. Ravi Kant & others Page-766

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence at the time of accident- driver was driving Mahindra pick up, the gross weight of which is 2820 kilograms and falls within the definition of light motor vehicle- driver had a driving licence to drive the light motor vehicle- held, that driver having licence to drive light

motor vehicle requires no PSV endorsement- appeal dismissed. Title: National Insurance Company Limited Vs. Jai Chand & others Page-763

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence at the time of accident- insurer examined Clerk, DTO Hoshiarpur who proved entries regarding the renewal of the driving licence- he has not deposed that owner/insured had committed any breach- it was for the insurer to plead and prove that there was breach of terms and conditions of the policy – licence was issued for LTV and was renewed for LMV- un-laden weight of the vehicle was 2590 kgs and as such vehicle falls within the definition of LMV- therefore, driver had a valid and effective driving licence at the time of accident.Title: Oriental Insurance Company Vs. Shinder Kaur and others Page-999

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid and effective driving licence at the time of accident- driver was driving maxi cab, the gross weight of which is 2710 kilograms - it falls within definition of 'Light Motor Vehicle' - endorsement of PSV was not required in this case- breach of the terms and conditions were not proved- insurer was rightly held liable to pay compensation. Title: National Insurance Company Limited Vs. Anupam Sharma & others Page-1494

Motor Vehicles Act, 1988- Section 149- It was contended by the Insurer that premium was paid through cheque which was dishonoured and insurer is not liable- held, that unless insurer cancels the policy and intimates the owner by way of a notice, the insurer continues to be liable to pay the compensation- appeal dismissed. Title: The New India Assurance Company Limited Vs. Chura Mani and others Page-1021

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not have a valid driving licence at the time of accident- however, no evidence was led to establish this fact- owner, on the other hand, deposed that he had engaged the driver after checking the driving licence and satisfying himself that driver was competent to drive the vehicle- hence, Tribunal had rightly held the insurer liable to indemnify the award- appeal dismissed. Title: Oriental Insurance Company Ltd. Vs. Pawan Kumar and others Page-769

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle was being driven in breach of the terms and conditions of the route permit- held, that it was for the insurer to prove that vehicle was being driven in breach of insurance policy- there was no satisfactory evidence to prove this fact- hence, insurer was rightly held liable to pay the compensation- deceased was aged 40 years- amount awarded cannot be said to be excessive- interest was awarded on the higher side and should have been @ 7.5% per annum- award modified. Title: Bajaj Allianz General Insurance Co. Ltd. Vs. Krishna Sharma and others Page-704

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a Maruti van which was insured only for private purposes- the person who had hired the vehicle specifically stated that vehicle was hired for Rs. 300/-- vehicle was not insured for carrying the passengers and could not have been hired- owner had committed willful breach and insurer cannot be held liable- appeal dismissed. Title: Sandeep Mahajan Vs. Surjeet Singh and another Page-1518

Motor Vehicles Act, 1988- Section 149- Owner and driver had filed a reply stating that deceased had hired the vehicle for selling the garlic and for bringing the other items from Solan- thus, vehicle was hired for transporting the goods- insurer had not led any evidence to prove the breach of terms and conditions on the part of the owner- thus, insurer is liable- Tribunal had awarded interest @ 9% per annum which is on the higher side- rate of interest

reduced to 7.5% per annum from the date of filing of the claim petition till realization. Title: Oriental Insurance Company Ltd. Vs. Mathara Devi & others Page-1500

Motor Vehicles Act, 1988- Section 149- Vehicle was transferred by the registered owner but the insurance policy was still in his name- insurer contended that after the expiry of the insurance policy, the new insurance policy was also renewed in favour of the registered owner- however, facts show that vehicle was not transferred at the time of renewal of the insurance policy- it was still registered in the name of the registered owner- transfer of vehicle cannot defeat the claim of the person- insurer was liable to satisfy the award- appeal dismissed. Title: Rajesh Kumar Dhiman Vs. Krishan Dutt Verma and others Page-1504

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 30 years- multiplier of 15 was to be applied- Tribunal had erred in applying the multiplier of '11'- claimants are entitled to Rs. 1500/- x 12 = Rs.18,000 x 15 = Rs.2,70,000/- under the head 'loss of dependency'- claimants are also entitled to Rs.10,000/- each, under the heads 'loss of estate' and 'funeral expenses- thus, claimants are entitled to total compensation of Rs .2,70,000/- + Rs.20,000= Rs. 2,90,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. Title: Nande Lal Yadav & others Vs. Manjeet Singh & others Page-1490

Motor Vehicles Act, 1988- Section 166- Appellant contended that the amount of compensation was excessive- Deceased was aged 59 years at the time of accident- he was a B-Class government contractor- his monthly income was not less than 50,000/- - Tribunal had taken the income of the deceased as Rs.15,000/-, which was on the lower side- multiplier of 9 was applied, which is correct – compensation cannot be said to be excessive- appeal dismissed. Title: Himachal Road Transport Corporation and Anr. Vs. Anup Kumar and others Page-1485

Motor Vehicles Act, 1988- Section 166- An FIR was registered against the driver of the offending bus- challan was also filed against the driver before the Court of competent jurisdiction- PW-1 stated that driver had suddenly applied the break which shows the rash and negligent driving of the driver- negligence has to be determined on the preponderance of probabilities and not beyond the reasonable doubt- in these circumstances, Tribunal had rightly held that accident had taken place due to rash and negligent driving of the driver of the offending bus. Title: Manoj Kumar and others Vs. Rajesh Kumar and others Page-746

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 80% permanent disability - he remained admitted in the hospital for a pretty long time – his income tax return shows that his income was Rs. 17,16,913 and Rs. 9,46,432/-- Tribunal had assessed the income of the claimant as Rs. 20,000/-, which is upheld- he had sustained 80% disability in his left leg which stands amputated above knee – it was duly proved that claimant will not be able to perform the job of the contractor as he was performing earlier- disability will affect the earning capacity by 50% or Rs. 10,000/- per month- the age of the claimant was 48 years- thus, multiplier of '14' is applicable- claimant is entitled to Rs.10,000 x 12 x 14 = Rs. 16,80,000/-, under the head 'loss of future earning'- claimant remained admitted in the hospital for a considerable period and by exercising guess work- it can be said that claimant was not able to earn anything for six months- thus, claimant is entitled to Rs. 20,000/- x 6 = Rs. 1,20,000/- under the head 'loss of income'- claimant is entitled to Rs. 50,000/- under the head pain and sufferings undergone' and Rs. 50,000/- under the head 'future pain and sufferings'- claimant is also entitled to Rs.1 lac under the head 'loss of amenities of life' and Rs. 50,000/- under the head 'medical expenses, transportation charges, attendant charges and special diet'- claimant is also entitled to Rs. 50,000/- under the head 'future medical

treatment'- thus, claimant is entitled to Rs. 21,00,000/- along with interest @ 7.5% per annum from the date of the judgment till deposit. Title: Om Parkash Vs. Dilawar Singh (deceased) and others Page-995

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that he remained in hospital for a period of two months and had to spend Rs.50,000/- for medical expenses, special diet, attendant charges and transportation charges- lump sum amount of Rs.50,000/- was awarded which is just- he had sustained 80% disability which has affected his earning capacity – his income is Rs.8,200/- per month as per income tax return- keeping in view the disability, loss of future earning capacity will not be less than 50% or Rs.4,100/- - the age of the claimant was 48 years- multiplier of 12 is applicable- claimant is entitled to Rs.4100 x 12 x 12 = Rs.5,90,400/-, under the head 'loss of future earning capacity'- claimant is also entitled to Rs.49,200/- (Rs.8,200/- x 6) under the head 'loss of income' – amount of Rs.50,000/- each awarded under the head 'pain and sufferings undergone' and 'future pain and sufferings' – Rs.1 lac awarded under the head 'loss of amenities of life'- Rs.50,000/- awarded under the head 'future medical treatment'- thus, total compensation of Rs.9,39,600/- awarded along with interest @ 7.5% per annum from the date of filing of the petition. Title: Sadh Ram Vs. Sanjay Rao and others Page-780

Motor Vehicles Act, 1988- Section 166- Claimant suffered 15% disability- he remained in the hospital for 26 days and had to engage an attendant- Tribunal awarded Rs. 9390/- towards medical and hospitalization expenses but has fallen in error in not awarding the compensation under the head 'Pain and suffering', 'Loss of amenities of life' and 'Loss of income'- claimant will not be in a position to earn anything after his retirement except pension- hence, amount of Rs.1 lac awarded under the head 'loss of income'- he will be suffering pain throughout his life, thus, amount of Rs.50,000/- awarded under the head 'pain and suffering' and Rs.50,000/- awarded under the head 'loss of amenities of life'- thus, claimant is entitled to Rs.2 lacs (1 lac+ 50,000/- + 50,000)- in addition to the amount awarded by the tribunal along with interest @ 7.5% per annum from the date of the award till realization. Title: Laxman Vs. HRTC and another Page-744

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that deceased was earning Rs. 10,000/- per month from saw mill and Rs. 3,000/- per month from growing the vegetables but they failed to prove the income relating to the vegetables- hence, income of the deceased has to be taken as Rs. 10,000/- per month, after deducting 1/3rd amount towards personal expenses, claimants have lost 2/3rd amount towards loss of dependency- age of the deceased was 40 years- multiplier of 14 was applicable- Tribunal had wrongly awarded Rs. 50,000/- under the head 'loss of consortium', Rs. 50,000/- under the head 'love and affection' and Rs. 10,000/- under the head 'last rites'- Tribunal had also wrongly awarded interest @ 9% per annum, whereas, interest was to be awarded @ 7.5% per annum- thus, claimants are entitled to Rs. 6666/- x 12 x 14 = Rs. 11,19,888/- under the head 'loss of income' – Rs. 10,000/- each under the heads 'loss of consortium', 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, claimants are entitled to Rs. 11,19,888/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- = Rs. 11,59,888/-, or say Rs. 11,60,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization. Title: Oriental Insurance Company Vs. Shinder Kaur and others Page-999

Motor Vehicles Act, 1988- Section 166- Deceased was 50 years at the time of accident- Tribunal had applied multiplier of '8', whereas multiplier of '9' is applicable- claimants are entitled to Rs. 3,56,400/- (3300/- x 12 x 9) under the head 'loss of dependency'- they are also entitled to Rs.10,000/- each under the heads of 'Loss of love and affection', 'Loss of

consortium', 'Loss of estate' and 'Funeral expenses' along with interest @ 7.5% per annum. Title: Vinod & others Vs. Champa Thakur & others Page-792

Motor Vehicles Act, 1988- Section 166- Deceased was a house wife and was working in a factory – her income cannot be less than Rs. 3,000/- per month- after deducting 1/3rd amount from the income of the deceased towards her personal expenses, loss of dependency is Rs. 2,000/- P.M.- the age of the deceased was 32 years at the time of accident- multiplier of '14' is applicable- hence, claimants are entitled to Rs.3,36,000/- (Rs.2000 x 12 x 14) towards the loss of dependency- they are also entitled to Rs.10,000/- each under the heads 'Loss of love and affection', 'Loss of estate', 'Loss of consortium' and 'Funeral expenses'- thus, claimants are also entitled to Rs.3,76,000/- (Rs.3,36,000/- + Rs.40,000/-) along with interest @ 7.5% per annum from the date of filing of the claim petition. Title: Manoj Kumar and others Vs. Rajesh Kumar and others Page-746

Motor Vehicles Act, 1988- Section 166- Deceased was a student, aged 14 years- by guess work, it can be said that he would have been earning at least Rs. 4500/- per month- multiplier of '14' is applicable- one half of the amount is to be deducted towards personal expenses- claimants have lost source of dependency to the extent of Rs.2250/- per month- claimants are entitled to Rs.2250x12x14= Rs.3,78,000/- from the date of the claim petition till its realization. Title: Meera Devi Vs. J.D. Verma and another Page-1489

Motor Vehicles Act, 1988- Section 166- Deceased was aged 22 years at the time of accident- he was earning Rs. 3,000/- per month and Rs. 30/- pay day as daily allowance- income of the deceased can be taken as approximately Rs. 4,000/- per month- half of the amount is to be deducted towards personal expenses of the deceased- claimants have lost dependency to the extent of Rs. 2,000/- per month- multiplier of '15' is applicable in the present case and the claimants are entitled to Rs. 2,000/- x 12 = Rs. 24,000 x 15= Rs. 3,60,000/- with interest @ 9% per annum from the date of filing of the claim petition till realization. Title: Kashmiro Devi & another Vs. Rang Lal & others Page-1487

Motor Vehicles Act, 1988- Section 166- Deceased was aged 24 years at the time of Accident- it was pleaded that deceased was working as labourer and was also performing job of a petty contractor- however, no evidence was led to show that the deceased was a petty contractor- Tribunal assessed the income of the deceased as Rs. 3,000/- per month which is on the lower side- even a labourer does not earn less than Rs. 150/- per day or say Rs. 4,500/- per month – deceased was a bachelor- half amount is to be deducted towards personal expenses- multiplier of '15' is applicable- thus, claimants are entitled to Rs. 2,250 x 12 x 15= Rs. 4,05,000/-_towards loss of dependency- Rs. 10,000/- each awarded under the heads 'loss of love and affection', loss of estate' and 'funeral expenses'- thus, claimants are entitled to Rs. 4,35,000/- along with interest @ 7.5% per annum from the date of the filing of the petition till deposit. Title: Mohan Lal Vs. Lalit Mohan & others Page-992

Motor Vehicles Act, 1988- Section 166- Deceased was aged 36 years at the time of accident- it was pleaded that he was earning Rs. 10,000/- per month- Tribunal had taken monthly income of the deceased as Rs. 3,000/- - even if deceased was a daily wager, he would not have been earning less than ₹ 150/- per day and his monthly income would not have been less than ₹ 4,500/- per month- 1/3rd amount is to be deducted towards the personal expenses of the deceased - claimants are entitled to Rs. 3,000/- per month towards loss of dependency- Tribunal had rightly applied multiplier of '16'- hence, claimants are entitled to Rs. 3,000/- x 12 x 16 = Rs. 5,76,000/-- they are also entitled to Rs. 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and

'funeral expenses'- thus, they are entitled to Rs. 5,76,000/-+ 10,000/- + 10,000/- + 10,000/-= Rs. 6,16,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization. Title: Narkali Soni and others Vs. Mohd. Raffi and others Page-1492

Motor Vehicles Act, 1988- Section 166- Deceased was aged 46 years at the time of accident- multiplier of 13 was applied by the Tribunal- held, that multiplier of 11 is applicable- monthly income of the deceased was Rs.8,000/-- 1/3rd amount is to be deducted towards the personal expenses- thus, claimants are entitled to Rs. 64,000/- x 11 = Rs. 7,04,000/- under the head 'loss of dependency'- claimants are also entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of estate', 'loss of consortium' and 'funeral expenses'- thus, claimants are entitled to total compensation of Rs.7,44,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. Title: M/s Oriental Insurance Company Vs. Hira Devi & others Page-988

Motor Vehicles Act, 1988- Section 166- Deceased was aged 83 years at the time of accident and was drawing pension of Rs.15,878/-- claimants are sons, daughters and widow of deceased- they are entitled to compensation as they have lost their father and husband- claimants have lost source of dependency of Rs.10,000/-- multiplier of '5' is applicable- claimants are entitled to Rs.6,00,000/- (Rs.10,000x12x5), under the head "Loss of income"- claimants are also entitled to Rs.10,000/- each under the heads of 'Loss of love and affection', 'Loss of estate', 'Funeral expenses' and 'Loss of consortium'- thus, total amount of Rs. 6,00,000/- + 40,000/- = Rs.6,40,000/- awarded in favour of the claimants along with interest @ 7.5% per annum from the date of the award on the enhanced amount. Title: Anand Rani and others Vs. Anil Kumar and others Page-693

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 14,028/- per month- claimants were four in number- 1/4th amount is to be deducted towards personal expenses- thus, claimants have lost dependency of Rs. 10,500/- per month - age of the deceased was recorded as 41 years in the post mortem report- multiplier of '12' is applicable- thus, claimants are entitled to Rs. 10,500 x 12 x 12 = Rs. 15,12,000/- - claimants are entitled to compensation of ₹ 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses- however, in view of statement of the Counsel for the respondent, claimants held entitled to compensation of Rs. 14,50,000/- along with interest @ 7.5% per annum from the date of the award. Title: Indara Devi and others Vs. Rakesh Kaushal and another Page-984

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 10,240/- per month- 1/4th amount was to be deducted towards the personal expenses of the deceased and the loss of the dependency will be Rs. 7680/- per month- age of the deceased was 50 years- multiplier of 10 is applicable, thus, claimants are entitled to Rs.7,680 x 10 x 12= Rs. 9,21,600/- towards the loss of income- they are also entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of estate', 'loss of consortium' and 'funeral expenses' – thus, they are entitled to Rs. 9,61,600/- along with interest @ 7.5% per annum from the date of the filing of the claim petition. Title: Himachal Road Transport Corporation & Anr. Vs. Kamlesh Kumari and others Page-982

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 22,547/-, or say Rs. 22,600/-- 1/4th amount was to be deducted towards personal expenses as number of dependants are four- thus, claimants have lost Rs. 16,950/-, or say Rs. 17,000/- per month- they are entitled to Rs.17,000 x 12 x 13 = Rs. 26,52,000/- under the head 'loss of dependency'- claimants are also entitled to Rs. 10,000/- each under the head 'loss of love

and affection', 'loss of estate', 'loss of consortium' and 'funeral expenses'- thus, claimants are entitled to total compensation of Rs. 26,92,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. Title: Prabha & others Vs. Parveen Kumar & others Page-1008

Motor Vehicles Act, 1988- Section 166- Deceased was working as teacher and was drawing Rs. 23,765/- as salary- after deducting 1/3rd amount, claimants have lost source of dependency of Rs. 15,800/- per month- deceased was aged 47 years at the time of accident- multiplier of '13' is applicable- Tribunal had awarded interest @ 12% per annum- however, rate of interest should be awarded as per the prevailing rates. Title: The New India Assurance Company Limited Vs. Kumari Sujata and others Page-1024

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 14,600/- per month- after making deductions of 1/3rd ,claimants have lost source of dependency of Rs. 9,733/- per month- deceased was aged 37 years- multiplier of '15' is applicable- claimants are entitled to Rs. 17,51,940/- (Rs. 9733x12x15) – Tribunal had fallen in an error in awarding Rs. 1,00,000/- under the head "love and affection" and Rs. 50,000/- under the head "loss of consortium"- claimants are entitled to Rs. 10,000/- each under the heads of 'Loss of love and affection', 'loss of estate', 'funeral expenses' and 'loss of consortium'- thus, total amount of Rs. 17,51,940+Rs. 40,000/-=Rs. 17,91,940/- awarded in favour of claimants along with interest @ 7.5% per annum. Title: Union of India and others Vs. Radha Verma & others Page-790

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs.3800/- and his age was 26 years at the time of the accident- Tribunal has applied multiplier of '15', which is just and appropriate- claimants cannot claim that insurer should have been made liable to pay compensation – appeal dismissed. Title: Kanta Devi and another Vs. Rita Devi and others Page-1486

Motor Vehicles Act, 1988- Section 166- It was asserted in the claim petition that accident had taken place due to rashness and negligence of the claimant- it was pleaded that claimant had hit the scooter against the rear portion of the bus showing that bus was ahead of the scooter- it was not pleaded that rear portion had hit the scooter while overtaking or in the process of reversing the bus- an FIR was lodged – matter was compromised which shows that there was no negligence on the part of the driver- otherwise there was no necessity of compromise- in these circumstances, MACT had rightly held that negligence of the driver was not proved- appeal dismissed. Title: Rajan Sharma Vs. Ravinder Singh and others Page-1010

Motor Vehicles Act, 1988- Section 166- It was contended that deceased was travelling on the roof of the vehicle, therefore, he himself was negligent- held, that allowing a person to travel on the roof of the vehicle by itself amounts to negligence on the part of driver and conductor of the bus – therefore, Tribunal had rightly held that driver was negligent and his negligence had caused accident. Title: Himachal Road Transport Corporation & Anr. Vs. Kamlesh Kumari and others Page-982

Motor Vehicles Act, 1988- Section 166- It was contended that no accident had taken place- evidence was led before the Tribunal to prove this fact- it was also held by the District Consumer Disputes Redressal Forum, Shimla that respondent No. 2 was driving the vehicle and had caused the accident- the findings were assailed before the State Consumer Disputes Redressal Commission and the Commission upheld those findings- hence, findings

recorded by the Tribunal are correct- appeal dismissed. Title: Satish Kumar and another Vs. Tarun Jain and another Page-784

Motor Vehicles Act, 1988- Section 166- Tractor was registered as transport vehicle- gross weight of the vehicle was 5225 kilogram which falls within the definition of light motor vehicle- claimant had specifically averred in the claim petition that claimant had loaded cow-dung in the vehicle – sitting capacity of the vehicle was 1+1- findings recorded by Tribunal that insured had committed breach of the terms and conditions of the insurance policy are set aside- insurer is held liable to pay compensation. Title: Baldev Singh Vs. Jagdish Chand & another Page-977

Motor Vehicles Act, 1988- Section 169- Driver had died during the pendency of the petition- held, that there is no necessity to bring on record legal representatives of the driver at this stage- provision of order 22 have not been made applicable to the proceedings under Motor Vehicles Act by the Government- name of respondent No. 1 is deleted from the array of the respondent. Title: Om Parkash Vs. Dilawar Singh (deceased) and others Page-995

Motor Vehicles Act, 1988- Section 169- High Court had remanded the case to the Tribunal with a direction to dispose of the same on the point as to whether driver had valid driving licence at the time of accident or not- it was specifically directed that other points which were settled by the learned Tribunal in its award were not to be disturbed- Tribunal not only decided the issue regarding the validity of the driving licence but also proceeded to consider other issues including the issue of quantum of compensation- Tribunal enhanced the compensation from Rs.3.00 lakh to Rs.5,65,000/- and rate of interest from 7.5 % per annum to 8% per annum- held, that Subordinates Courts are bound by the specific direction of the High Court – Tribunal had specifically held that driver had a valid driving licence at the time of accident- therefore, Insurance Company is required to abide by the original award passed by the Tribunal- however, it is directed that Insurance Company will not be liable to pay the amount over and above the award earlier passed by the Tribunal. Title: National Insurance Co. Ltd. Vs. Nisha Verma & ors. Page-1095

'N'

N.D.P.S. Act, 1985- Section 8, 18, 29 and 60- Vehicle was stopped and searched during which 10 Kg. of opium was recovered- accused were tried and acquitted by the trial Court- held, in appeal that incident had taken place near the toll barrier Baddi- no independent witness was associated – confessional statement was not proved satisfactorily- it was necessary to produce the Malkhana Register to prove that the case property was deposited and was taken out at the time of production before the Court – prosecution case was not proved beyond reasonable doubt – trial Court had rightly acquitted the accused- appeal dismissed. Title: Narcotics Control Bureau Vs. Ajmer Kumar and another (D.B.) Page- 1090

N.D.P.S. Act, 1985- Section 18- Accused became perplexed on seeing the police party- his search was conducted during which 3.200 kgms of charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that prosecution witnesses had admitted that there were residential houses near the place of incident- there was Indane Gas plant at a distance of 100 meters- however, no independent witness was associated- it was mentioned in the news item published in news paper that recovery was effected from the house of the accused, therefore, there is discrepancy regarding the place of recovery as well - prosecution case was not proved- in these circumstances, accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Santokh Singh alias Sukha (D.B.) Page-1252

N.D.P.S. Act, 1985- Section 20- Accused got perplexed on seeing the police and tried to run away- he was apprehended- his search was conducted during which 6 kg 250 grams of charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that prosecution version was not supported by independent witnesses- local witnesses were also not associated- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these circumstances prosecution case was not proved beyond reasonable doubt- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Arjun Singh (D.B.) Page-964

N.D.P.S. Act, 1985- Section 20- Accused tried to flee away on seeing the police- he was apprehended on suspicion- his search was conducted during which 1.6 kg. of charas was recovered- accused was tried and convicted by the trial Court- held, in appeal that testimony of police official cannot be discarded only on the ground that he is a police official and interested in the success of the case- police officials consistently stated that no independent witness was available at the spot- their testimonies corroborated each other regarding the recovery - they have withstood the test of cross-examination- contradictions regarding association of the Pradhan and Members of the Gram Panchayat are not material to make the prosecution case doubtful- police had no reason to falsely implicate the accused- mere non-association of the witness is not fatal – link evidence is complete and there is no discrepancy regarding the weight of the contraband substance, number of seals, NCB form and that the Charas was recovered- prosecution had succeeded in proving its case beyond reasonable doubt- accused was rightly convicted by the trial Court- appeal dismissed. Title: Hem Raj Vs. State of Himachal Pradesh (D.B.) Page-794

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police party- search of the accused was conducted during which 1.45 kg. of charas was recovered- accused was tried and acquitted by the trial Court- PW-7 had given a different version regarding the place of visit and the place where accused was apprehended- there was discrepancy in the number of seals put on the parcel at the spot and the number of seals actually found on the parcel in the Court- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these circumstances prosecution case was not proved beyond reasonable doubt- trial Court had rightly acquitted the accused. Title: State of Himachal Pradesh Vs. Chaman Lal (D.B.) Page-1125

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police party- he was apprehended- his search was conducted during which 1.7 kg. of charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that entry in the police diary shows that ASI had left the police station with HC Chaman Lal and not with ASI Yashwant Singh- it was further stated that everything was found in order- there was no mention of recovery of charas in the entry- no option to be searched was given to the

accused as required under Section 50 of N.D.P.S. Act- there was contradiction regarding the presence of Chaman Lal at the spot- Column No. 7 of NCB form was filled after handing the case property which is contrary to the version that all the columns were filled at the spot- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, accused was rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Vikas (D.B.) Page-1176

N.D.P.S. Act, 1985- Section 20- Accused turned and tried to run away on seeing the police vehicle- he was apprehended and searched- 400 grams of charas was found from the right pocket of his jacket during search - he was acquitted by the trial Court- held in appeal, accused was not apprised of his legal right to be searched before a gazetted officer or a Magistrate, which was mandatory- there are discrepancies in the testimonies of the witnesses regarding the place where accused was apprehended and manner of carrying investigation- held, that in these circumstances prosecution case was not proved- trial Court had rightly acquitted the accused-appeal dismissed. Title: State of Himachal Pradesh Vs. Amar Chand (D.B.) Page-957

N.D.P.S. Act, 1985- Section 20- Accused was found carrying a bag on his back- he was stopped and searched -9 kilogram of charas was found in the bag - he was tried and convicted by the trial Court- aggrieved from the judgment, appeal was preferred- held, in appeal that police had not associated owner/driver of the vehicle as independent witnesses- PW-1 had not supported the prosecution version- there were material contradictions in the testimonies of the prosecution witnesses- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- accused had given consent for the search of his bag but had not consented to his personal search- however, police had carried out personal search, which was violation of Section 50 of the N.D.P.S. Act- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt- accused acquitted. Page- Nanak Chand Vs. State of Himachal Pradesh (D.B.) Page-933

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.6 kg of charas- he was tried and acquitted by the trial Court- I.O. had kept the case property with him- he had not deposited the same with police post – no entry was also made regarding keeping the case property with I.O.- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- prosecution had not produced Malkhana Register - held, that in these circumstances prosecution case was not proved- accused acquitted. Title: State of Himachal Pradesh Vs. Satish Kumar (D.B.) Page-1255

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2 kg. of charas- he was tried and convicted by the trial Court- held, in appeal that police had not joined any independent witnes- PW-2 had specifically admitted that vehicles frequently ply on the road towards Kihar and Salooni – houses were situated at a distance of 10-15 minutes from the spot- there was difference of 12 hours in the case of the prosecution and entries in the NCB form, which was not explained- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these circumstances prosecution case was not proved- accused acquitted- appeal accepted. Title: Nand Lal Vs. State of Himachal Pradesh (D.B.) Page-1277

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 500 grams of charas- he was tried and acquitted by the trial Court- held, in appeal that police had not joined any person from locality as a witness- it was stated by PW-1 that jamabandi was also put in parcel along with charas – however, no jamabandi was found in the parcel- register No. 19 containing record of the case property was not produced - instead register No. 9 was produced- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, prosecution case was not proved- accused acquitted. Title: State of Himachal Pradesh Vs. Rajinder Singh (D.B.) Page-1158

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.650 kg. of charas- accused was tried and acquitted by the trial Court- held, in appeal that prosecution had failed to link the bag which was lying in the rack with the accused- only one occupant of the bus was cited as witness, even driver and conductor were not associated- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, prosecution case was not proved- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Poshu Ram (D.B.) Page-1284

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.550 Kgs. of charas- he was tried and acquitted by the trial Court- held, in appeal that independent witnesses have not supported the prosecution version- two views have appeared on the record- one is favourable to the accused and the other is favourable to the prosecution- in these circumstances, benefit has to be given to the accused- it was not proved that prosecution had complied with the requirement of Section 50 of N.D.P.S. Act- official witnesses had improved upon their versions- prosecution had not complied with the Section 42 of N.D.P.S Act- in these circumstances, prosecution case was not proved – trial Court had rightly

appreciated the evidence- appeal dismissed. Title: State of H.P. Vs. Des Raj (D.B.) Page-1070

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.2 kg. of charas- he was tried and acquitted by the trial Court- held, in appeal that independent witnesses were not associated nor efforts were made for associating them- accused was told that he had right to be searched before Police Officials, Magistrate or Gazetted Officer, which is not permissible –prosecution case was not proved beyond reasonable doubt- appeal dismissed. Title: State of Himachal Pradesh Vs. Bishan Dutt (D.B.) Page-1520

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of 1.5 kg. of charas- they were tried and acquitted by the trial Court- held, in appeal that accused were apprehended at busy place- no independent witness was associated – personal search of the accused was conducted but no option to be searched before Gazetted Officer or Magistrate was given- case of the prosecution was not proved- in these circumstances, accused were rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Desh Raj and another (D.B.) Page-1352

N.D.P.S. Act, 1985- Section 20 and 29- Accused tried to run away on seeing the police- they were apprehended – their search was conducted during which 3.2 kg. of charas was recovered from their possession- accused were tried and acquitted by the trial court- held, in appeal that I.O. had taken joint consent of the accused which is not permissible as individual consent had to be obtained- the place of apprehension of the accused was a busy place but no independent witness was associated- these circumstances make the prosecution case doubtful- accused were rightly acquitted by the trial Court- appeal dismissed. Title: State of Himachal Pradesh Vs. Som Nath @ Babi and another (D.B.) Page-1372

N.D.P.S. Act, 1985- Section 20- Vehicle of the accused was intercepted which was checked- 3 kg. of charas was recovered during search which was concealed inside the inner of accused 'R' - 2 kg. 490 grams of charas was found inside the inner of accused L and 1 kg. 985 grams of charas was recovered from the bag having the words PICCACHOSE, 2 kg of charas was recovered from the other bag having the words "PICCACHOSE" written over it and 4 kg 855 grams of charas was recovered from the third bag having words "PICCACHOSE" written over it- accused were tried and acquitted by the trial Court- held, in appeal that DW-1 deposed that he was driver of the vehicle bearing registration no. HP-37-0020- he specifically stated that he had not taken the vehicle bearing registration no. HP-34A-0049 which was stated to be used by police to arrive at the spot – hence, prosecution version becomes highly doubtful- according to log book, vehicle started at 2:30 A.M and returned at 6:30 P.M. - the purpose of the visit was recovery of 17 kg charas by CIA staff - this entry makes the prosecution case doubtful- prosecution witnesses stated that search of the accused was also conducted at the spot – there was discrepancy regarding the person who carried out the investigation - call details have also not been proved in accordance with law- all these circumstances, make the prosecution case doubtful- trial Court had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Dharam Pal Singh & ors. (D.B.) Page-1246

N.D.P.S. Act, 1985- Section 20- Vehicle was intercepted by the police- 10kg. of charas was recovered from the vehicle- accused were tried and acquitted by the trial Court- held, in appeal that independent witnesses had not supported the prosecution versions- testimonies of official witnesses were contradictory- police official stated that vehicle, accused and contraband were photographed on the spot but photographs produced on record are not the

spot photographs- it was nowhere shown that investigation was conducted with the help of search light- no efforts were made to associate independent witnesses- there was no entry regarding the dispatch of NCB forms- testimonies of official witnesses were not reliable- conviction could not have been based on the same- learned Trial Court had rightly appreciated the evidence and had rightly acquitted the accused- appeal dismissed. Title: State of Himachal Pradesh Vs. Jasmer Singh and another (D.B.) Page-1525

N.D.P.S. Act, 1985- Section 21 and 22- An election commission party conducted the search of the car during which 13248 Spasmo Proxyvon capsules and 1165 Rexcof Syrup vials were recovered without any permit- accused was tried and convicted by the trial Court- held, that there were three occupants in the car- police had prosecuted only two persons- defence that contraband belonged to third person becomes probable in view of non-explanation for not prosecuting the third person- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these circumstances prosecution case was not proved- accused acquitted. Title: Firoz Ansari Vs. State of Himachal Pradesh (D.B.) Page-677

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque, which was dishonoured due to insufficient fund- he was tried and convicted by the trial Court- appeal was dismissed- held, in revision, that it was duly proved that cheque was issued by the accused which was dishonoured due to insufficient funds- plea that blank cheque was obtained as security was not established- accused had admitted liability by signing cheque - there is a presumption regarding consideration of the cheque which was not rebutted- in these circumstances, accused was rightly convicted by the trial Court – revision dismissed. Title: Banshi Ram son of Shri Dittu Ram Vs. Ram Chand son of Sh. Puran Chand Page-1085

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque of Rs. 1,08,000/- for repayment of loan but the cheque was dishonoured with the endorsement 'insufficient funds'- accused was tried and convicted by the trial Court- he filed an appeal which was dismissed- held, in revision that there was no recital in the cheque that it was issued as security cheque- otherwise also cheque issued as security would fall within the purview of Section 138 of N.I. Act- there is a presumption regarding the cheque having been issued for consideration- accused had not rebutted the presumption- trial Court had rightly convicted the accused- appeal was rightly dismissed- revision dismissed. Title: Hamid Mohammad S/o Sh. Sarif Mohammad Vs. Jaimal, S/o Sh. Hari Dass & another Page-1325

'S'

Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989- Section 3(1)(x)- **Indian Penal Code, 1860-** Section 506- Accused came to the house of the complainant, a member of scheduled caste- accused abused his old parents and other lady members of the family- complainant requested the accused not to do so on which accused said 'Chamara teri yeh auquat ki tu mera sath zabaan larae'- complainant requested him not to repeat the expression "chamar" repeatedly but the accused threatened to kill him- brother of the complainant came at the spot who was also threatened- PW-1 also arrived at the spot and requested the accused not to abuse complainant and family members on which accused said 'Tusan Rajputan chamar sar par charah rakhey hain"- matter was reported to the

police on which FIR was registered- accused was tried and convicted by the trial Court- there was discrepancy regarding the person who had lodged the original complaint- name of 'S' was not mentioned in the complaint- no witness from neighbourhood was examined by the prosecution- parents or sister-in-law of the complainant were not cited as witnesses- in these circumstances, prosecution case was not proved- appeal accepted- accused acquitted. Title: Inderjit Singh Vs. State of Himachal Pradesh Page-715

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- Section 13(4)- Authorized Officer of bank had taken possession of suit property relating to the loan amount and had issued possession cum sale notice under SARFAESI Act- SARFAESI Act 2002 is a special Act and jurisdiction of Civil Court is barred- however, relief of declaration to the effect that reconstituted partnership deeds are wrong illegal and result of fraud can be granted only by the Civil Court- hence, jurisdiction of the civil Court to entertain entire civil suit is not barred. Title: Manu Goel W/o Sh. Ashok Goel & others Vs. Tarsem Chand Jain & others Page-1445

Specific Relief Act, 1963- Section 5- Accommodation was allotted to K, the husband of the defendant as licencee- he died and the licence was revoked- wife of K was unauthorized possession- notice was served for handing over the possession but the possession was not handed over- hence, suit was filed for possession and the *mesne* profits at the rate of Rs.300/- per month- claim was denied by the defendant- suit was decreed by the trial Court- appeal was dismissed- held, in second appeal, husband of the defendant was working as driver and the accommodation was allotted to him as licencee- he died during the course of employment- defendant approached the plaintiff for providing employment on compassionate grounds- defendant had received notice but had not vacated the premises- her claim was rejected- even by the Appellate Court and the Courts below had correctly appreciated the matter- appeal dismissed.Title: Sudesh Kumar Vs. M/s Shivalik Hatcheries Pvt. Ltd. Page-1377

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession pleading that defendant had dispossessed him without any right to do so- defendant denied the claim of the plaintiff- trial Court dismissed the suit but in appeal Appellate Court allowed the same- held in Second Appeal that plaintiff relied upon the demarcation report and tatima to prove the encroachment- demarcation report was not accepted by the trial Court as the Demarcating Official had not recorded the statements of the parties regarding the permanent points from which demarcation was conducted- Appellate Court had wrongly relied upon the report of demarcation- requirement of recording statements is not an empty formality failure to record the statements vitiate the entire demarcation- Appellate Court had wrongly allowed the appeal- Appeal accepted- judgment of Appellate Court set aside. Title: Besro Devi and others Vs. Ranjit Singh Page- 1385

Specific Relief Act, 1963- Section 34- **Indian Succession Act, 1925-** Section 63- Plaintiff challenged the Will executed by 'P' in favour of the defendant and claimed ownership on the basis of subsequent will executed in his favour by 'P'- trial Court held that Will propounded by defendant was cancelled by subsequent will executed in favour of the plaintiff- defendant was found to be in possession, hence, suit was dismissed on the ground that suit for declaration and injunction is not maintainable- appeal was preferred which was allowed and the judgment of trial Court was reversed – it was held by the Appellate Court that plaintiff is co-owner of the land in question and Will was validly executed in favour of the plaintiff- held, that plaintiff is a co-sharer and defendant had nowhere pleaded that he was in possession of the share of the plaintiff- land was never partitioned- possession of any co-owner is the possession of all and plaintiff will be deemed to be in possession- relief of

possession is not required to be sought by the plaintiff- appeal dismissed. Title: Gian Chand Vs. Om Parkash Page-827

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that he is grand-son of T- the property was mutated in the name of the defendants No. 1, 3 and 4- deceased T had executed a Will in favour of the plaintiff- plaintiff had no knowledge of the Will as the will was kept by Vice-president of Gram Panchayat- he came to know subsequently about the Will- plaintiff claimed that mutation of inheritance was wrong- defendants denied the case of the plaintiff- suit was partly decreed- appeal was preferred which was allowed- aggrieved from the order of the Appellate Court, RSA was filed before the High Court- held, in appeal that there was no occasion for T to leave the Will with S- S had deposed that he had apprised the plaintiff about the Will- S stated that names of the witnesses and their addresses were typed, whereas, they were hand written in the Will- Appellate Court had wrongly held that Will was legally executed- defendant No. 2 had sold the land, inherited by her and M is bona-fide purchaser for consideration. Title: Hem Raj Vs. Meera Devi and others Page-1218

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration to the effect that the sale deed executed by the original plaintiff in favour of defendant was illegal, null and void as she was deaf and dumb - she could not understand her good and bad, and she was born mentally ill- suit was filed through next friend- defendant denied the claim of the plaintiff- suit was dismissed by the trial Court- appeal was also dismissed- held, in second appeal that deaf and dumb person would not necessarily be an idiot- no material was placed on record to show that vendor was an idiot- defendants examined 5 witnesses to prove that deceased was more intelligent than stated by the plaintiff- trial Court and Appellate Court had rightly dismissed the suit- appeal dismissed. Title: Savitri Vs. Mahanti and others Page-1449

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit pleading that suit land was previously owned by S who had mortgaged the suit land in favour of C, father of plaintiff- defendants failed to redeem the mortgage and plaintiff has become owner by efflux of time – defendants pleaded that suit land was inherited by K, after the death of S- K had sold the land in favour of the defendants- defendants are bona-fide purchaser for consideration- suit was dismissed by the trial court- appeal was preferred which was allowed- held, in second appeal that C was shown as mortgagee in the revenue record- thus plea of the defendants that they were not aware of the status of C cannot be accepted- mortgage was oral but was duly recorded in the revenue record- area falls in Kullu, where provisions of Section 59 of Transfer of Property Act were not applicable- mortgagor had failed to redeem the mortgage- thus, plaintiff has become owner by efflux of time- appeal dismissed. Title: Alam Chand and another Vs. Yaad Singh and others Page-819

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit pleading that suit land was owned and possessed by their father, defendants in collusion with the settlement staff got themselves recorded as owner in possession of the suit land- suit was dismissed by the trial Court- judgment was set aside in the appeal- trial court had held that in absence of mutation being challenged, same had attained finality- held, that mutation does not confer any title nor it does extinguish the same- owner of the land is not supposed to approach the Court unless his rights are actually infringed – judgment of trial Court was rightly set aside by the Appellate Court- appeal dismissed. Title: Mansa Devi & ors. Vs. Saina Devi & ors. Page-1261

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit pleading that N was owner of the suit land- he left village in the year 1972 and plaintiffs occupied the land in the year 1973- plaintiffs are cultivating suit land and they have become owners by adverse possession- M general power of attorney of N had received an amount of Rs. 3,800/- but had not executed the sale deed- defendant denied the claim of the plaintiffs- they pleaded that possession of the plaintiffs was as licensee- when defendant requested to deliver the possession of suit land, plaintiffs became dishonest and filed the civil suit- counter-claim was also filed by the defendant seeking possession on the basis of the title- suit was dismissed and counter-claim was decreed by the trial Court- appeal was preferred, which was dismissed- held, in second appeal that plaintiffs had admitted their permissive possession in agreement to sell and, they cannot claim adverse possession- plea of part performance is available only by way of defence and is not available to plaintiffs- suit for specific performance was barred by limitation and specific performance cannot be granted to the plaintiffs- defendant being owner is entitled to claim the possession- Appellate Court had rightly dismissed the appeal- second appeal dismissed. Title: Mobina wife of Mohd Ikram and others Vs. Kala wife of Balla Ram Page-1388

Specific Relief Act, 1963- Section 38- **Code of Civil Procedure, 1908-** Section 100- Defendant had applied for the allotment of house on the basis of Hire Purchase Agreement- he had agreed to abide by the terms and conditions of the allotment as well as Hire Purchase Agreement- defendant had submitted a plan to carry out further constructions, which was approved with some modifications by the plaintiff- official of the plaintiff found that defendant was raising unauthorized construction- notice was issued to the defendant but he continued to carry out unauthorized construction- hence, suit for mandatory injunction was filed- defendant denied the claim of the plaintiff and stated that construction was raised in accordance with the approved site plan- trial court held that plaintiff had failed to prove that any unauthorized construction had been carried out by the defendant- appeal was also dismissed- held, in second appeal that substantial question of law means a question having substance, essential, real, of sound worth, important or considerable- proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or directly and substantially affects the rights of the parties- Court had come to the conclusion that plaintiff had failed to prove that unauthorized construction had been carried out by the defendant- it was obligatory for the plaintiff to prove that construction was in violation of the approved site plan - in absence of any such material, court had rightly concluded that plaintiff had failed to prove the unauthorized construction- appeal dismissed. Title: H.P. Housing and Urban Development Authority Vs. Tarsem Lal Page-1434

'W'

Workmen Compensation Act, 1923- Section 5- workman was employed as labourer in MGNREGA- heavy stone and debris fell upon her- she sustained injuries in her left leg and other parts of the body- she spent Rs. 70,000/- for her treatment- state denied the claim pleading that she was already paid a sum of Rs. 35,444/- for medicine and MGNREGA scheme only provides for 100 days guaranteed wages employment- workman was not entitled to any compensation- Workmen Commissioner awarded compensation of Rs. 4,02,613.2 along with interest @ 12% per annum- held, that workman had sustained 40% disability- she was an employee as she was engaged in the construction/maintenance/ repair of the road- provisions of MGNREGA did not debar the workman from filing the claim petition before the Workmen Compensation Commissioner- the income of the respondent was rightly assessed and correct factor was applied while awarding compensation – petition

dismissed. Title: Secretary, Rural Development Department and others Vs. Jethi Devi Page-801

Workmen Compensation Act, 1923- Section 22- Employee died as a result of motor vehicle accident- his mother and wife were dependent upon him- mother filed an application for compensation, which was allowed- wife re-married subsequent to the accident- when mother filed an application for release of the amount, wife also sought the release of the amount which was declined- held, that a widow falls within the definition of dependent and employer is under an obligation to deposit the amount with the Commissioner Workmen Compensation- wife was dependent upon the deceased being his widow- dependency has to be determined on the date of the accident- merely because she had not filed the claim petition within two years is not sufficient to deny the compensation to her- hence, the order of the Commissioner set aside and the amount ordered to be apportioned in the ratio of 30:70. (Para-3 to 18) Title: Bano Devi Vs. Rashilu Devi & others Page-875

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Union of India & others versus Paras Ram, I L R 2015 (III) HP 1397 D.B.

Union of India and another versus Bashirbhai R. Khiliji, (2007)6 SCC 16

Union of India and others versus P.Gunasekaran AIR 2015 SC 545

Union of India and others vs. Tarsem Singh (2008) 8 SCC 648

Union of India Versus Ibrahim Uddin and another, (2012) 8 SCC 148

Union of India vrs. Raj Kumar Baghal Singh & ors., (2014) 10 SCC 422

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United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174

United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others, Latest HLJ 2014 (HP) 1140

'V'

V.Y.Jose and another vs. State of Gujarat and another, (2009)3 SCC 78

Venkata Narasinha Naidu V. Bhasyakarlu Naidu, (1902) 6 Cal WN 641= 29 Ind App 76 (PC)

Vijayan vs. State of Kerala, AIR 1999 Apex Court 1086 t

Viluben Jhalejar Contractor (Dead) by LRs versus State of Gujarat, (2005) 4 SCC 789

Vinod Kumar vs. Varinder Kumar Sood, I L R 2015 (III) HP 404

Vir Prakash Sharma vs. Anil Kumar Agarwal and another, (2007)7 SCC 373

'W'

Walter Louis Franklin(Dead) through LRs Vs. George Singh(Dead) through LRs, (1997) 3 SCC 503

Wave Industries Private Ltd. vrs. Atar Singh and others, (2011) 14 SCC 745,

Wellington Associates Ltd. Vs. Mr. Kirit Mehta, 2000 (4) SCC 272

'Y'

Yeshwant Rao v. State of Madhya Pradesh AIR 1992 SC 1683

Yeshwant Singh Vs. Jagdish Singh, AIR 1968 SC 620

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

Shri Hussan Lal. .....Petitioner-Tenant.

Versus

Data Ram. .....Respondent-Landlord.

Civil Revision No. 22 of 2007.
Date of decision: March 17, 2016.

H.P. Urban Rent Control Act, 1987- Section 13- Petitioner filed an application for seeking permission to carry out necessary repairs on the ground that landlord has failed to repair the same for the last 22 years- respondent denied the claim of the petitioner and pleaded that petitioner is a habitual defaulter- application was allowed by the Rent Controller – order was reversed in appeal – held, that it was duly proved that shutter of the premises was damaged in the year 1999- the fact that petitioner is habitual defaulter and estimate has not been prepared unnecessarily weighed with Appellate Authority- landlord directed to repair the shutter of the premises within a month, failing which the tenant granted liberty to repair/replace the same and to adjust the cost of repair/ replacement towards the future rent. (Para-5 to 6)

For the petitioner-Tenant : Mr. Naresh K. Thakur, Senior Advocate with Mr. Surinder Sharma, Advocate.

For the respondent-Landlord: Mr. Sanjeev Kumar Suri, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Mr. Sanjeev Kumar Suri, learned Counsel, on instructions submits that the respondent-landlord is prepared to repair the damaged shutter of the demised premises himself and agreed even for the repair thereof by the petitioner-tenant also on adjustment of the expenditure incurred upon out of the rent due and payable.

2. In order to adjudicate the point in issue, it is desirable to take note of the facts in a nut shell. The petitioner herein is the tenant. He has been inducted as tenant by the respondent-landlord in a shop situated near HRTC workshop at Una on the monthly rent of Rs.192.50/-. The petitioner-tenant has filed an application under Section 13 of the HP Urban Rent Control Act (hereinafter referred to as 'Act' in short) for seeking permission to carry out necessary repairs in the shop premises on the ground that the respondent-landlord has failed to repair the same for the last 22 years and even on receipt of the legal notice Ext.PW1/A dated 22.11.1999 also. The repair in the shop premises being sought is in the nature of repair of shutter thereof or its replacement. The cost of such repair/replacement at the time of filing of the rent petition i.e. April 2000 was Rs.1000/-.

3. The respondent-landlord has however, contested the application on the ground such as estimate qua the expenditure to be incurred upon not prepared and that the petitioner-tenant is habitual defaulter being not paying the rent well in time.

4. In view of the pleadings of the parties, learned Rent Controller has framed the issues and after taking on record the evidence and on appreciation of the same has allowed the petition thereby allowing the petitioner-tenant to repair the damaged shutter of the shop premises on making an expenditure of Rs.1000/-. He was held entitled to the

adjustment of the amount to be so spent out of the rent payable. Learned Appellate Authority however, in appeal has reversed the order passed by learned Rent Controller and dismissed the petition. The judgment passed by the Appellate Authority is under challenge before this Court on the grounds, inter-alia, that neither the provisions under the HP Urban Rent Control Act nor the evidence available on record is appreciated in its right perspective and as a result thereof wrong findings came to be recorded.

5. If not shocking, it is painful to point out that a very petty matter is hanging fire for the last 16 years. The factum of the shutter of the shop premises got damaged some where in the year 1999 is satisfactorily established from the evidence available on record. The trial Court even has allowed the petitioner-tenant to repair/replace the same by spending a sum of Rs.1000/-, however, learned Appellate Authority has reversed the well reasoned and detailed order in a slipshod manner and without application of mind. The factors such as the petitioner-tenant is habitual defaulter in the matter of payment of rent and that estimate has not been prepared unnecessarily weighed with Appellate Authority while reversing the order passed by the Rent Controller for the reasons that cost of repair/replacement of shutter was not such a high so as to warrant preparation of estimate thereof. It was a meagre amount that is Rs.1000/- and at the most it is the petitioner-tenant who could have been ordered to bear the same without passing an order qua its adjustment out of the rent due and payable.

6. Anyhow, now the respondent-landlord is ready both way to repair/replace the shutter of the shop premises i.e. either himself or even by the petitioner-tenant also on adjustment of the rent due and payable. In view of the increase in the prices with the passage of time, this Court deem it appropriate that the respondent-landlord to repair/replace the shutter of the shop premises on his own expenses because in the event of the petitioner-tenant is permitted to do so, the possibility of dispute qua the cost of the repair/replacement is likely to arise. Therefore, the judgment passed by Learned Appellate Authority is hereby quashed and set aside. Consequently, on modification of the order passed by the Rent Controller, there shall be a direction to the respondent-landlord to repair/replace the shutter of the shop premises within a month from today, failing which the petitioner-tenant shall be at liberty to repair/replace the same at his own costs and to make the adjustment of the costs of such repair/replacement towards the future rent payable to the respondent-landlord. In the event of the shutter is not repaired/replaced by the respondent-landlord within the time granted, he shall pay costs to the petitioner-tenant to the tune of Rs.3000/-.

7. With the aforesaid findings, the revision petition stands disposed of, so also the pending application(s), if any.

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

Sh. Ashok Kumar(deceased) through his LRs and others. .....Petitioners.

Versus

Mrs. Neena Mittal and another. .....Respondents.

CMPMO No. 509 of 2015

Date of decision: 19th March, 2016

Code of Civil Procedure, 1908- Order 6 Rule 17- Tenant filed an application seeking amendment, which was partly dismissed by the trial court - held, that amendment sought in reply on the ground that in view of amendment in Section 14 of H.P. Urban Rent Control, Act, reply is to be amended cannot be allowed as the provisions of the Act need not to be pleaded in the reply but can be pointed out during the course of final hearing in the rent petition - further, amendment sought that the landlord cannot seek eviction of the tenant for rebuilding premises without sanctioned map is not necessary as the preparation and sanction of the plan are not conditions precedent to seek the eviction of the tenant- prayers were rightly rejected by the trial Court- revision dismissed. (Para-6 to 8)

Cases referred:
Deepak Boot House and another vs. Dr. Piyare Lal Sood, 2014 (1) Shim. L.C. 47
Janmejai Sood vs. Ram Gopal Sood, I L R 2014 (VI) HP 28
Vinod Kumar vs. Varinder Kumar Sood, I L R 2015 (III) HP 404

For the petitioners: Mr. Anirudh Sharma, Advocate.
For the respondents: Mr. Basant Thakur, Advocate vice Mrs. Devyani Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)**.**

Complaint is that learned Rent Controller-II, Solan has committed illegality and irregularity while allowing amendment in reply to the rent petition filed by the petitioner-tenant, particularly vide order dated 7.10.2015, under challenge in these proceedings.

2. The petitioner is a tenant. The respondent-landlord has sought his eviction from the shop situate in ground floor of the building known as Shop No. 47-49, Shri Radhe Lal building, Circular road, Solan on the ground of subletting, he being in arrears of rent and that the building very old and in dilapidated condition needs to be re-constructed. The petitioner-tenant has filed reply to the rent petition. Subsequently, he filed an application under Order 6 rule 17 read with Section 151 of the Code of Civil Procedure, seeking the following amendment in the reply:

> "18 (a) (1) That the contents of para no. 18(a) (!) of the petition are wrong and denied. It is denied that the tenant has failed to pay rent to the petitioner w.e.f. 1.1.1994 till filing of the petition @ 1000/- month rest of the contents of this para are wrong and denied. In fact premises in question were let out @250/- month which is being paid regularly with statutory increase at the rate of 10% after five years to the petitioners till today. The rent is paid in presence of Harmohinder Sood and Mr. Gopal Verma to the petitioner and some time to her husband and her son Sachin, who also used to collect the rent on behalf petitioner. It is also worth submitting that premises were in occupation of Sh. Kachru prior to 1994 and he was running audio and video cassette shop in the same premises. As such the present petition is filed in collusion with respondent No. 1 who was projected by petitioner just to get undue advantage."

3. Substitution of word 'tenant' and deletion of word 'plaintiff' in para 18(a)(i) of the reply filed originally has also been sought. Pleading qua right of re-entry in the following manner in view of the amendment under Section 14 of the Act, which extends a right in favour of the tenant of re-entry in the building after its re-construction have also been sought to be incorporated:-

> "Provided that the tenant evicted under this clause shall have right to re-entry on new terms of tenancy, on the basis of mutual agreement between the land lord and tenant, to the premises in re-built building equivalent in area to the original premises for which he was tenant."

4. The petitioner-tenant also intends to insert following by way of preliminary objection No. 3:-

> "3. That the petition is premature, as the petitioner has no right, title or interest to seek eviction of the respondent from the tenanted premises unless and until he get building plan prepared and sanctioned in such a manner which provides for construction of new building in such a manner that similar and equivalent area can be given on tenancy to the tenant/respondent. Moreover, in the petition there is no description for plea taken by the petitioner that the building which is proposed to be constructed is being constructed in such a manner that similar and equivalent space will be given to the respondent No. 2 and as such the petition is not maintainable and is liable to be dismissed on this sole ground."

5. He further intends to insert following by way of preliminary objection No. 4:-

> "4. That the petitioner has no right to raise construction of new building as no building plan has been got approved from MC Solan and the earlier sanction plan has lapsed approximately 4-5 years ago and the petitioner has not renewed the same plan and as such the petitioner is barred under Municipal Law to raise construction of building or re-erect the building in question or to make any type of addition/alternation in the same."

6. It is seen that amendment i.e. substitution of word 'plaintiff' with word 'tenant' has already been granted by learned Rent Controller. As regards, amendment in the reply allegedly necessitated in view of the amendment in Section 14 of the H.P. Urban Rent Control Act, in the considered opinion of this Court, learned Rent Controller has rightly rejected the prayer so made for the reason that provisions of the Act need not to be pleaded in the reply, rather the petitioner-landlord is at liberty to point out the same during the course of final hearing in the rent petition.

7. Now, if coming to the amendment that without getting the plan in respect of re-building of the demised premises prepared and sanctioned, the respondent-landlord cannot seek eviction of the petitioner-tenant, the same is also uncalled for because the Apex Court has authoritatively held that the preparation of the plan and its sanction cannot be a condition precedent to seek the eviction of the tenant on the ground of demised premises bonafidely required for the purpose of re-building and re-construction. This Court draw

support in this case from the judgment of the apex Court in Hari Dass Sharma v. Vikas Sood and others (2013) 5 SCC 243 which read as follows:

> *"13. In Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. (supra), this Court had the occasion to consider the provisions of Section 14(3)(c) of the Act and R.C. Lahoti J. writing the judgment for the Court held that Section 14(3)(c) does not require that the building plans should have been duly sanctioned by the local authorities as a condition precedent to the entitlement of the landlord for eviction of the tenant. To quote from the judgment of this Court in Jagat Pal Dhawan v. Kahan Singh (dead) by L.Rs. & Ors. (supra): (SCC p. 194, para 6)*
>
> > *"6.……The provision also does not lay down that the availability of requisite funds and availability of building plans duly sanctioned by the local authority must be proved by the landlord as an ingredient of the provision or as a condition precedent to his entitlement to eviction of the tenant. However still, suffice it to observe, depending on the facts and circumstances of a given case, the court may look into such facts as relevant, though not specifically mentioned as ingredient of the ground for eviction, for the purpose of determining the bona fides of the landlord. If a building, as proposed, cannot be constructed or if the landlord does not have means for carrying out the construction or reconstruction obviously his requirement would remain a mere wish and would not be bona fide."*
>
> *It will be clear from the aforesaid passage that this Court has held that availability of building plans duly sanctioned by the local authorities is not an ingredient of Section 14(3)(c) of the Act and, therefore, could not be a condition precedent to the entitlement of the landlord for eviction of the tenant, but depending on the facts and circumstances of each case, the Court may look into the availability of building plans duly sanctioned by the local authorities for the purpose of determining the bonafides of the landlord.*
>
> *17. In fact, the only question that we have to decide in this appeal filed by the appellant is whether the High Court could have directed that only on the valid revised/renewed building plan being sanctioned by the competent authority, the order of eviction shall be available for execution. The High Court has relied on the decision of this Court in Harrington House School v. S.M. Ispahani & Anr.(2002) 5 SCC 229 and we find in that case that the landlords were builders by profession and they needed the suit premises for the immediate purpose of demolition so as to construct a multi-storey complex and the tenants were running a school in the tenanted building in which about 200 students were studying and 15 members of the teaching staff and 8 members of the non-teaching staff were employed and the school was catering to the needs of children of non-resident Indians. This Court*

found that although the plans of the proposed construction were ready and had been tendered in evidence, the plans had not been submitted to the local authorities for approval and on these facts, R.C. Lahoti, J, writing the judgment for the Court, while refusing to interfere with the judgment of the High Court and affirming the eviction order passed by the Controller, directed that the landlords shall submit the plans of reconstruction for approval of the local authorities and only on the plans being sanctioned by the local authorities, a decree for eviction shall be available for execution and further that such sanctioned plan or approved building plan shall be produced before the executing court whereupon the executing court shall allow a reasonable time to the tenant for vacating the property and delivering the possession to the landlord and till then the tenants shall remain liable to pay charges for use and occupation of the said premises at the same rate at which they are being paid.

18. In the present case, on the other hand, as we have noted, the Rent Controller while determining the bonafides of the appellant-landlord has recorded the finding that the landlord had admittedly obtained the sanction from the Municipal Corporation, Shimla, and has accordingly passed the order of eviction and this order of eviction has not been disturbed either by the Appellate Authority or by the High Court as the Revision Authority. In our considered opinion, once the High Court maintained the order of eviction passed by the Controller under Section 14(4) of the Act, the tenants were obliged to give vacant possession of the building to the landlord and could only ask for reasonable time to deliver vacant possession of the building to the landlord and hence the direction of the High Court that the order of eviction could only be executed on the revised plan of the building being approved was clearly contrary to the provisions of Section 14(4) of the Act and the proviso thereto."

8. This judgment even has also been followed by this Court in ***Karam Chand and others*** vs. ***Jasbir Kaur and others,*** C.R. No. 125 of 2012**,** decided on 16.8.2013, ***Roshan Lal Bhardwaj*** vs**.** ***Ashok Sud and another,*** C.R. No. 4034 of 2013 decided on 4.10.2013**,** ***R.R.Sharma vs. Gopla and others,*** C.R. No. 4053 of 2013 decided on 24.10.2013**,** ***Deepak Boot House and another*** vs. ***Dr. Piyare Lal Sood, 2014 (1) Shim. L.C. 47, Janmejai Sood*** vs**.** ***Ram Gopal Sood,*** C.R. 62 of 2013 decided on 4.11.2014, ***Vinod Kumar*** vs. ***Varinder Kumar Sood,*** C.R. No. 60 of 2013 decided on 13.5.3015.

9. In view of what has been said hereinabove, this Court feels that there is no illegality and infirmity in the order under challenge in this petition. The same is hereby affirmed. Consequently, the petition is dismissed. Pending application(s), if any, shall also stand disposed of.

An authenticated copy of this judgment to learned Rent Controller below for being taken on record and compliance.

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

H.P. State Electricity Board & another ..Petitioners.

Versus

Mitter Dev Sharma & another ..Respondents.

CWP No. 267 of 2003.
Reserved on: 3rd March, 2016.
Date of Decision: 22.3.2016

Constitution of India, 1950- Article 226- Respondent No. 1 suffered a fall from a electric pole and sustained injuries - he was found to have suffered traumatic paraplegia- Administrative Tribunal directed the writ petitioner to consider the grant of pension by relaxing the mandatory condition of 10 years of service and to pay all the benefits and arrears as if respondent No. 1 has put in 10 years of service- aggrieved from the order, writ petition was filed- held, that Rule 88 of the Pension Rules confers the power to relax the qualifying service of 10 years- when respondent No. 1 had suffered 100% disability in the course of his employment, direction was properly issued to invoke Rule 88 for relaxing the mandatory condition of 10 years of service- writ petition dismissed. (Para-4 to 10)

Case referred:
Union of India and another versus Bashirbhai R. Khiliji, (2007)6 SCC 16

For the Petitioners:	Mr. Bimal Gupta, Senior Advocate with M/s Satish Sharma and Vineet Vashist, Advocates.
For Respondent No.1:	Ms. Ranjana Parmar, Senior Advocate with Ms. Komal Kumari, Advocate.
For Respondent No.2:	Mr. Shrawan Dogra, Advocate General with Mr. Anup Rattan, Addl. Advocate General and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

Respondent No.1 herein stood engaged by the petitioners herein as T-Mate. He performed work in the aforesaid capacity from 11.05.1978 to 30.03.1980. On 30.3.1980, during the course of his employment under the petitioners, he suffered a fall from a electric pole, in consequence whereof grave injuries stood entailed upon his person. He stood admitted in the emergency ward at PGI, Chandigarh on 31.03.1980 and on examination, he was found to have suffered complete traumatic paraplegia, D-6 vertebral level. Annexure R-1, appended to T.A. No. 172 of 87, is a certificate of 21.1.1981 issued by the Senior Associate, Department of Urology, PGI, Chandigarh disclosing the factum of respondent No.1 standing entailed with paraplegia caused by the accident or in sequel to the accident. A recommendation was made therein for grant of 100% compensation to him. The Himachal Pradesh Administrative Tribunal (hereinafter referred to as the 'learned Tribunal') held in affirmation to the apposite averments constituted by respondent No.1 in his petition of his during the course of his employment under the petitioners suffering a fall from an electric pole whereupon he suffered a grave injury sequelling entailment upon him of 100% disability or his standing encumbered with 100% disability. It was also held by the learned

Tribunal that the disability as stood entailed upon respondent No.1 carried a direct nexus with his employment under the petitioners. Precisely, it was held by the learned Tribunal in the order impugned before this Court of the 100% disablement as stood entailed upon respondent No.1 being attributable to his employment under the petitioners.

2. The petitioners have concerted to, by instituting the instant writ petition before this Court reverse the order of the learned Tribunal, comprised in Annexure P-6, whereby the learned Tribunal on considering the apposite material placed before it, directed the petitioners herein to favourably consider the grant of invalid pension to respondent No.1 by relaxing the mandatory condition of 10 years of service as prescribed for its availment in Rule 49 of the Central Civil Services Pension Rules (hereinafter referred to as the "Pension Rules") by exercising powers vested in it under Rule 88 of the Pension Rules, besides a direction was also rendered to the employers/petitioners to pay to the aggrieved/respondent No.1 all the benefits and arrears as if he has put in 10 years of service for the purpose of pensionary benefits. Necessarily, the petitioners stand aggrieved and are constrained to institute the instant writ petition before this Court for quashing of the orders of the learned Tribunal comprised in Annexure P-6.

3. We have heard the learned counsel appearing for the parties at length and have also perused the entire record carefully.

4. It is apt to record herein that a Co-ordinate Bench of this Court vide order dated 21.06.2013 considered the issue whether the employer has authority to retire his employee with retrospective effect and held that the employer cannot retire his employee with retrospective effect. But in the second part of the order, the matter was referred to the Full Bench for determination of the mandate of Rule 38 and Rule 49 of the Pension Rules. This issue was considered by the Full Bench and it was held in para 3 of the order dated 2nd August, 2013 that Rule 38 does not specify the minimum qualifying service but has to be traced while examining Rule 49 of the Pension Rules. The said finding was based on the decision of the Hon'ble Apex Court reported in ***Union of India and another versus Bashirbhai R. Khiliji, (2007)6 SCC 16.*** It is apt to reproduce para 9 of the aforesaid judgment hereunder:-

> "9. We are presently concerned with two provisions of the Rules i.e. Rule 38 and Rule 49. Rule 38, as reproduced above, contemplates the invalid pension. The procedure has been mentioned therein i.e. in case an incumbent retires from service on account of bodily or mental infirmity which permanently incapacitated him for the service, then a medical certificate of incapacity shall be given by the authorities concerned and in particular Form 23 the same may be applied before the competent authority. It is true that the qualifying service is not mentioned in Rule 38 but Rule 49 which deals with the amount of pension stipulates that a government servant retiring in accordance with the provisions of these Rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service. Therefore, the minimum qualifying service of ten years is mentioned in Rule 49. The word "qualifying service" has been defined in Rule 3(1)(q) of the Rules which reads as under:
>
> > "3(1)(q) 'qualifying service' means service rendered while on duty or otherwise which shall be taken into account for the purpose of pensions and gratuities admissible under these Rules;"

(...p 20)

5. While going through the impugned order made by the learned Tribunal, it appears that the learned Tribunal has discussed Rule 88 of the Pension Rules qua power to relax which was neither discussed by the Coordinate Bench of this Court nor by the Full Bench and no findings were returned thereon.

6. In order to determine the question as to whether the learned Tribunal has rightly made the impugned order, it is necessary to examine the provisions of law read with the facts of the case in hand.

7. The learned Tribunal even while noticing the provisions of Rule 38 of the Pension Rules which stands extracted hereinafter mandating therein the grant of invalid pension to a government servant who stand superannuated from service, superannuation whereof arises on account of any bodily or mental infirmity permanently incapacitating him to perform his duties under his employer, yet with the provisions of Rule 49 of the Pension Rules which too stand extracted hereinafter enjoining in clause 2(c) qua exclusion of sub clause (a) and sub clause (b) of clause (2) of Rule 49 of the Pension Rules in the wake of the provisions/conditions contemplated therein getting enlivened. However, apparently the conditions contemplated in sub clauses (a) and (b) of Clause (2) to Rule 49 of the Pension Rules cannot stand availed of by respondent No.1 in either computing or quantifying the invalid pension payable to him. For reiteration, his not falling within the parameters of the preconditions envisaged in sub clauses (a) & (b) of Clause (2) to Rule 49 of the Pension Rules for warranting its computation thereunder qua him besides its concomitant availment by him would not exclude him from its availment by him if he satiates the conditions embodied in clause (1) to Rule 49 of the Pension Rules. The reason for so holding stands aroused by the factum of the provisions of the non obstante sub clause (c) of Clause (2) constituted in Rule 49 of the Pension Rules while bespeaking therein qua exclusion with specificity the operation or the applicability of sub clauses (a) and (b) qua respondent No.1 while the department concerned assesses thereunder invalid pension payable to him provisions whereof, for reasons aforestated embedded in respondent No.1 not satiating the conditions spelt out therein for its availment by him hence forestalling its operation qua him, yet when the non obstante sub clause (c) omits to exclude with specificity the applicability or the operation of Clause 1 of Rule 49 of the Pension Rules qua respondent No.1, besides with its carrying a prescription of a government employee standing entitled to pension inconsonance with the Pension Rules only on his completing the mandatorily stipulated period of qualifying service of 10 years. As a sequitur, when the minimum of 10 years of qualifying service mandatorily enjoined to be completed by the employee/respondent No.1 stood not rendered by him under his employer he was aptly disentitled to the benefit of Rule 38 of the Pension Rules. However, the conclusion aforesaid would render the aggrieved/respondent No.1 to despite his standing permanently incapacitated from rendering further service under his employer avail the benefit of invalid pension, especially when for mitigating his hardship, the provisions of Rule 38 and Rule 49 of the Pension Rules are to be imperatively harmoniously read as aptly read by the learned Tribunal. Rule 38 and Rule 49 of the Pension Rules read as under:

> **"38. Invalid Pension:**
>
> (1) In valid pension may be granted if a Government servant retires from the service on account of any bodily or mental infirmity which permanently incapacitates him for the service.
>
> (2).....
>
> (3).....

(4).....

49. Amount of Pension:

(1) In the case of a Government servant retiring in accordance with the provisions of these rules before completing qualifying service of ten years, the amount of service gratuity shall be calculated at the rate of half month's emoluments for every completed six monthly period of qualifying service.

(2) (a) In the case of a Government servant retiring in accordance with the provisions of these rules after completing qualifying service of not less than thirty-three years, the amount of pension shall be calculated at fifty percent of average emoluments, subject to a maximum of four thousand and five hundred rupees per mensum;

(b) In the case of a Government service retiring in accordance with the provisions of these rules before completing qualifying service of thirty three years, but after completing qualifying service of 10 years, the amount of pension shall be proportionate to the amount of pension admissible under Clause (a) and in no case the amount of pensions hall be less than Rupees three hundred and seventy five per mensum;

(c) Notwithstanding anything contained in Clause (a) and Clause (b), the amount of invalid pension shall not be less than the amount of family pension admissible under sub-rule (2) of Rule 54."

8. On an harmonious reading of both the provisions of the Pension Rules, the learned Tribunal proceeded to invoke the provisions encapsulated in Rule 88 of the Pension Rules which stand extracted hereinafter:-

"**88. Power of relax**.

Whereby any Ministry or Department of the Government is satisfied that the operation of any of these rules, causes undue hardship in any particular case, the Ministry or Department, as the case may be, may, by order for reasons to be recorded in writing, dispense with or relax the requirements of that rule to such extent and subject to such exceptions and conditions as it may consider necessary for dealing with the case in a just and equitable manner:

Provided that no such order shall be made except with the concurrence of the Department of Personnel and Administrative Reforms."

The provisions of Rule 88 of the Pension Rules bestow in the competent authority of the department concerned to for reasons recorded in writing dispense with or relax the requirement of any rule. The power vested in the department concerned of the Government to relax the rigour of any rule is a plenary power exercisable at its instance for diluting the rigours of any rule embodied in the Pension Rules especially when the operation of any Rule with its fullest might in working out or computing the quantum of invalid pension to any employee, who during the course of his employment, as is respondent No.1, stood entailed with a 100% disability, rendering him perennially incapacitated to perform his duties under the petitioners whereupon he stood retired from services by them, would encumber an invalid employee with inexorable hardship. Even though, the availment of invalid pension by respondent No.1 stands embodied in Rule 38 of the Pension Rules, yet despite his suffering 100% disability entailed upon him during the course of his employment under the petitioners, disability whereof rendered him unfit to perform his further duties under his employers whereupon he stood retired from services appears to, given the factual matrix extantly available, stand circumscribed by Clause (1) of Rule 49 of the Pension Rules with a prescription therein of availment of invalid pension by respondent No.1 being subject to his

completing the mandatorily enjoined minimum qualifying 10 years of service which condition, however, remained unsatiated by him. In other words, satiation of the aforesaid preconditions by an invalid employee stand statutorily embodied to be a sine qua non, for him to avail the benefit of Rule 38 of the Pension Rules. For reiteration, the statutory conditions encompassed in sub caluse (a) for reasons aforesaid remain unaccomplished by respondent No.1. Consequently, even if a perennial disability stands entailed upon respondent No.1 and stands spurred from his performing duties during the course of his employment under the petitioners herein sequelling his retirement from service, he would remain unrecompensed in monetary terms by ousting the operation of Rule 38 of the Pension Rules by besetting it with the rigour of clause (1) to Rule 49 of the Pension Rules whereupon obvious manifest financial hardship would accrue to him. In sequel, the rigours of clause (1) of Rule 49 of the Pension Rules as invoked besides made applicable qua him by the petitioners are to suffer dilution, dilution whereof would stand begotten by resorting to the provisions of Rule 88 of the Pension Rules as aptly done by the learned Tribunal. Preeminently resort thereto would beget justice to respondent No.1.

9. In aftermath, the learned Tribunal did not commit any error in directing the petitioners to consider qua respondent No.1 by theirs invoking besides applying Rule 88 of the Pension Rules qua him with an empowerment therein to them to relax the rigour of Clause (1) of Rule 49 of the Pension Rules and thereupon proceed to exercise the power of relaxation vested therein in them especially given the inexorable financial hardship accruing to respondent No.1 by his standing entailed with a 100% disability which disability stood enjoined upon him during the course of his employment under the petitioners rendering him unfit to perform his duties under his employer sequelling his retirement with a concomitant effect of his standing disabled to earn for his livelihood. In sequel, a tenable direction stood rendered by the learned Tribunal to the petitioners to proceed to invoke the provisions of Rule 88 of the Pension Rules qua respondent No.1 for mitigating the hardship aforesaid encumbered upon him.

10. The learned Tribunal has not committed any jurisdictional error in granting the relief aforesaid to respondent No.1. A plain reading of the averments made in the application upsurges the prime factum of 100% disability standing entailed upon respondent No.1 while performing his duties under the petitioners, hence, if the relief as stood afforded and as stand encapsulated in paragraph 24 of the order of the learned Tribunal impugned before this Court, even if it remained not asked for by respondent No.1, the learned Tribunal was jurisdictionally competent to grant the relief aforesaid to him by moulding it in consonance with the apposite averments constituted qua it in the petition.

11. In view of the above, there is no merit in this petition which is accordingly dismissed. In sequel, the impugned order is affirmed and maintained. All pending applications also stand disposed of.

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

RFA No. 246 of 2008 along with RFA Nos. 247 to 251 of 2008
Decided on: 29th March, 2016

RFA No. 246 of 2008

Dadu Ram .....Appellant.

Versus

Land Acquisition Collector and others .....Respondents

RFA No. 247 of 2008
Dila Ram and another .....Appellants.
Versus
Land Acquisition Collector and others .....Respondents.
RFA No. 248 of 2008
Sunka Ram and others .....Appellants.
Versus
Land Acquisition Collector and others .....Respondents.
RFA No. 249 of 2008
Dropti and another .....Appellants.
Versus
Land Acquisition Collector and others .....Respondents.
RFA No. 250 of 2008
Lekh Ram .....Appellant.
Versus
Land Acquisition Collector and others ...Respondents.
RFA No. 251 of 2008
Babu Ram and others .....Appellants.
Versus
Land Acquisition Collector and others ...Respondents.

Land Acquisition Act, 1894 - Section 18- Land of the petitioners was acquired for the construction of Kol Dam Hydro Electric Project- Land Acquisition Collector divided the land into two categories i.e. Majrua (Barani/cultivated land) and 'Gair Majrua' (uncultivated land) and awarded compensation @ Rs. 4,68,496.11/- for 'Majrua' land and Rs. 1,04,117.44/- for 'Gair Majrua' land- Reference was made to the District Judge who refused to enhance the compensation- aggrieved from the award of the District Judge, appeals were preferred- held, that sale deed should have been taken into consideration at the time of determination of market value - certified copies of the sale deeds are admissible in evidence as exemplars in land acquisition proceedings, even if the vendor or vendee are not examined- further, testimonies of witnesses made it difficult to rely upon the sale deeds- possibility of these having been executed to seek hike in the prices of land in the area and to obtain the benefits without there being exchange of sale consideration, cannot be ruled-out- Reference Court had not made any illegality or irregularity in discarding the same- entire area was in the process of development- land was acquired for construction of Kol Dam- land should not have been classified into two categories- hence, market value is to be determined @ Rs. 4,68,497.00/- uniformly irrespective of classification.

Cases referred:
Himmat Singh and others v. State of M.P. and others, 2014(1) Civil Court Cases, 301 (SC).
Deputy Collector, Land Acquisition, Gujarat and another v. Madhubai Gobarbhai and another (2009) 15 SCC 125
Cement Corporation of India Ltd. v. Purya and others (2004) 8 SCC 270
Executive Engineer and another v. Dila Ram, Latest HLJ 2008 (HP) 1007

For the appellants: Mr. Tara Singh Chauhan, Advocate (in all the appeals)
For the respondents: Mr. Shrawan Dogra, Advocate General with Mr. D.S. Nainta, Additional Advocate General and Mr. Pushpinder Jaswal,

Deputy Advocate General for respondents No. 1 and 2 (in all the appeals).
Mr. Chandranaryana Singh, Advocate for respondent No. 3-NTPC (in all the appeals).

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, Judge (Oral)**.**

This judgment shall dispose of present appeal and its connected matters as aforesaid having arisen from the common award dated 31.5.2008 whereby learned District Judge, Bilaspur has dismissed the references under Section 18 of the Land Acquisition Act preferred by the appellants herein.

2. The appellants (hereinafter referred to as the petitioners-claimants) are resident of two different villages namely Devla Chamb and Nehar. Their land was acquired for the public purpose namely construction of Kol Dam Hydro Electric Project. The Notification under Section 4 of the Act to acquire the land of the petitioners-claimants measuring 422-05 bighas situate in both the villages was issued on 16.10.2000. The same was published in the issue of Hindi daily 'Divya Himachal' and English daily 'Indian Express' on 20.10.2000, whereas in the gazette on 18.10.2000. The Land Acquisition Collector (Kol Dam), the 1st respondent on observation of the entire procedure prescribed under the Act has announced award No. 3/2002 pertaining to this acquisition. The Collector taking into consideration that in both villages no instance of sale of land had taken place preceding one year from the issuance of the Notification under Section 4 of the Act has made the rates of land approved by the District Collector, Bilaspur vide letter No. BLS-KDR-4(9)/94-III-18777 dated 10.5.2002 basis to assess the market value of the acquired land and on categorization of the same on the request of the petitioners-claimants into two different categories i.e. Majrua (Barani/cultivated land) and 'Gair Majrua' (uncultivated land) determined the market value of the 'Majrua' as Rs.4,68,496.11/- and that of 'Gair Majrua' Rs.1,04,117.44/- and awarded the compensation payable to the petitioners-claimants accordingly. They, however, being aggrieved and dissatisfied with the determination of the market value by the 1st respondent have preferred the references under Section 18 of the Act. The same were forwarded to learned District Judge, Bilaspur.

3. The references eight in number came to be registered. The grouse as brought to the Court by the petitioners-claimants was that the market value of the acquired land determined by learned Collector is highly inadequate, as according to them taking into consideration the proximity of the acquired land from the national highway, ACC Barmana and Dehar Power House, its market value should have not been less then Rs.10,000,00/- (ten lac) per bigha. The compensation, therefore, was sought to be enhanced taking into consideration the following factors:

(i) That this land is immediately adjoining Mandi District and Slapper Colony and Hydle Project known as Dehar Power House which is also very near to it.

(ii) That near to it A.C.C. Factory, Barmana is also situated, which is a very important business concern. Due to this the value has also multiplied many fold.

(iii) That N.H. 21 passes near to this land and the same is very useful for any business.

(iv) That all modern facilities like hospitals, schools, college, roads etc. are available nearby which has added high in its value.

(v) That due to Dehar Power House and A.C.C. Barmana, it has become tourist place due to its geographical situation, which has multiplied its value.

(vi) That due to hilly terrain a land is scares and demand is very hgith even for one bishwa one has to pay lacs of rupees and due to high value no body can dare to purchase land in Bighas.

(vii) That this land is known for sugarcane due to its higher fertility and this land is also known for turmeric and ginger which multiply its value.

(viii) That there is plenty of limestone, which is very important for industries which also multiply its value.

(ix) That the acquired land is very important for cultivation of Khair trees, which is very valuable and costly for its herbal importance i.e. Katha. Its cultivation gives immediate property to the land owners and this cultivation is repeated after 10 years which gives income to the tune of Rs. five lacs. On this account compensation for 10 decades may be given.

4. The respondents on entering appearance have resisted and contested the claim of the petitioners on the grounds inter-alia that the market value of the acquired land determined by the 1st respondent is absolutely just and reasonable. The said respondent has taken into consideration all relevant and legal parameters. In the adjoining village Harnoda, the market value of the acquired land was claimed to be Rs.50,000/- per bigha. It is also denied that the acquired land was cultivable and orchard were also raised thereon.

5. Rejoinder was filed. On the pleadings of the parties, learned trial Court has framed the following issues:

1. Whether the petitioners are entitled to enhancement of compensation as alleged, if so, its effect. ....OPP.

2. Relief.

6. The parties were put to trial. The petitioners-claimants in order to substantiate their claims in the references they made have examined evidence comprising oral as well as documentary. The petitioner-claimant Gurditta in reference petition No. 29/03 has appeared himself as PW-1. The petitioners-claimants have also examined Sh. Shyam Lal, PW-2, Kirpal Singh, PW-3, Sh. Kala, PW-4. Sh. Dandu Ram, PW-5, Sh. Yashwant Singh Dhiman, PW-6 and Sh. Ram Singh, PW-7. Learned counsel representing them in his statement recorded separately had produced in evidence copies of sale deeds Ext. P-1 to Ext. P-14.

7. On the other hand, no evidence on behalf of respondent No. 3-NTPC Barmana, the beneficiary except for tendering in evidence copies of sale deeds Ext. R-1 to Ext. R-8 and copy of agreement Ext. R-9, was intended to be produced.

8. Similarly, on behalf of respondents No. 1 and 2 also, no evidence except for tendering sale deed Ext.R-A by learned District Attorney in his statement recorded separately was produced.

9. Learned reference Court on appreciation of the evidence comprising oral as well as documentary has arrived at a conclusion that no case for re-determination of the market value of the acquired land is made out. Consequently, the market value thereof as assessed by the 1st respondent was affirmed and all the references were dismissed vide common award, which is under challenge in these appeals.

10. The legality and validity of the impugned award has been questioned on the grounds inter-alia that the same is passed on surmises and conjectures. Overwhelming oral as well as documentary evidence produced by the petitioners-claimants is stated to be erroneously ignored. The Court below has erred in not considering the sale instances Ext. P-2, P-4, P-6, P-8, P-10, P-12 and P-14 produced in evidence by them. The market value of the land in the area is more than Rs.50,000,00/- (fifty lacs) per bigha. The market value determined by the Collector is stated to be highly inadequate. The Land Acquisition Collector also erred in determining different rates for 'Majrua' and Gair Majrua' land, which according to learned counsel for the petitioner is against the settled legal principles.

11. Mr. Tara Singh Chauhan, learned counsel representing the petitioners-claimants has strenuously contended that the sale instances Ext. P-1 and Ext. P-14 of course pertains to adjoining villages including village Harnoda should have been taken into consideration to determine the market value of the acquired land, particularly, when the Collector has himself concluded that no instance of sale has taken place in village Nehra, Devla Chang. Mr. Chauhan has also drawn the attention of this Court to the fact that the compensation should have been awarded at flat rates, irrespective of the nature and category of the acquired land, in view of the same acquired for common public purpose, i.e. the construction of Kol Dam Hydro Electric Project.

12. On the other hand, Mr. D.S. Nainta, learned Additional Advocate General has pointed out from the record that the learned Reference Court below has appreciated the evidence available on record in its right perspective and has not committed any illegality or irregularity while dismissing the references filed by the petitioners-claimants.

13. Mr. C.N. Singh, learned counsel representing respondent No. 3, the beneficiary, has pointed out that the market value of the acquired land as assessed by the Land Acquisition Collector is just and reasonable. According to Mr. Singh, as per evidence produced by the petitioners-claimants themselves, the sale deeds came to be executed in that area near and around the issuance of Notification under Section 4 of the Act and the date of laying foundation stone of the project.

14. On analyzing the rival submissions and the evidence available on record, following points arise for determination in these appeals:

1. Whether the reference Court has committed illegality or irregularity by not placing reliance on the sale instances Ext. P-1 to Ext. P-14, tendered in evidence on behalf of the petitioners-claimants, and on that count the judgment is perverse hence not legally sustainable?
2. Whether the reference Court below was right while determining the market value of the acquired land on categorization of the same as 'Majrua' and 'Gair Majrua'?

15. Now, if coming to point No. 1 supra, Mr. Chauhan learned counsel has urged that the sale instances Ext. P-1 to Ext. P-14 should have been relied upon even without vendor and vendee not examined. Also that, there is no legal requirement of the examination of vendor and vendee and the sale instances, if produced in evidence and not

objected to by the opposite party, can be relied upon. Be it stated that as per legal principles settled at this stage the sale deeds produced in evidence being registered documents should be taken into consideration at the time of determination of the market value of the acquired land, because the same being the registered documents, the authenticity and genuineness thereof cannot be questioned. It is held so by the Apex Court in ***Himmat Singh and others*** v. ***State of M.P. and others, 2014(1) Civil Court Cases, 301 (SC)***. The Apex Court in ***Deputy Collector, Land Acquisition, Gujarat and another*** v. ***Madhubai Gobarbhai and another (2009) 15 SCC 125***, has also held that certified copies of the sale deeds are admissible in evidence as exemplars in land acquisition matters, even if the vendor or vendee have not been examined. Similar is the ratio of the judgment of the Apex Court in ***Cement Corporation of India Ltd.*** v. ***Purya and others (2004) 8 SCC 270***. In view of the law laid down by the Apex Court, Mr. Chahuan is absolutely justified in arguing that the sale deeds produced in evidence can be relied upon for determination of the market value of the acquired land, even if the vendor or vendee were not examined.

16. In the case in hand, the sale deeds Ext. P-1 to Ext. P-14 have been produced in evidence by learned counsel representing the petitioners-claimants in his own statement recorded separately without there being any objection thereto raised on behalf of the opposite party. However, the question arises that in view of the evidence as has come on record by way of statements of witnesses examined by the petitioners themselves, would it be safe to place reliance on these documents. The answer to this poser in all fairness and in the ends of justice would be in negative for the reason that Gurditta, petitioner in lead reference petition No. 29/03, while in the witness box as PW-1 has expressed his ignorance so far as the contents of the affidavit he produced in evidence are concerned. Not only this but as per his version the affidavit is false being not prepared at his instance. As per his further version in the cross-examination, the petitioners were in the knowledge of setting up of Kol Dam Hydro Electric Project there in February, 2000. It is in June, 2000, the Hon'ble Prime Minister of India has laid the foundation stone of this project. He also tells us that after February, 2000, the local residents started selling small portion of their lands, whereas, no sale transactions had taken place in their village for the last 10 years. According to him, in their village no Senior Secondary School, bank, dispensary and college etc., are in existence. PW-2 Shyam Lal is petitioner No. 2 in reference petition No. 31/03. If coming to his version in the cross-examination, he tells us that in February, 2000, the villagers acquired knowledge that Kol Dam Hydro Electric Project is being set up in that area. The foundation stone of the project was laid down on 5.6.2000. No land was sold in their village for the last 10-15 years. He also admits that in their village college, dispensary, bank etc. were not in existence. PW-3 Kirpal Singh, PW-4 Kala and PW-5 Dandu Ram have stated in one voice in their examination-in-chief that when they acquired knowledge about the construction of Kol Dam project in their area, they purchased land by way of registered sale deeds in the names of their cousins Bhagat Ram and Lekh Ram so that they could get employment in the project and get the plot also under the rehabilitation scheme. As per their further version, the sale consideration as mentioned in the sale deeds were neither paid by the vendee nor received by the vendors and that these transactions had taken place without there being any exchange of sale consideration. Similar is their version in cross-examination. Similar is the version of PW-7 Ram Singh, as according to him his father had purchased the land in the name of his grand children Suman Kumar and Sunil, so that they could get the relief under the rehabilitation scheme and the sale consideration was not passed on and the sale deeds were executed for enrichment of the near and dear.

17. Thus in view of the own evidence produced by the petitioners themselves and discussed hereinabove, it is not safe to place reliance on the sale deeds Ext. P-1 to Ext. P-14, because the possibility of the same also being executed merely to seek hike in the prices of

land in the area and to obtain the benefits such as seeking allotment of plots under the rehabilitation scheme without there being exchange of sale consideration, cannot be ruled-out. Above all, the perusal of these documents reveal that the same have been executed near and around the date of laying the foundation stone of the project by the Hon'ble Prime Minister of India on 5.6.2000 and after February, 2000, when as per version of the petitioners' witnesses, the local residents had come to know about setting up of the Kol Dam Project in their area. Therefore, the testimonies of PW-1 to PW-5 and PW-7 belie the authenticity and genuineness of the sale deeds Ext. P-1 to Ext. P-14 and as such, it is not safe to place reliance on the same. Learned reference Court, therefore, has not committed any illegality or irregularity in discarding the same. Therefore, no case is made out warranting interference qua this aspect of the award. Point No. 1 is answered accordingly.

18. Now, if coming to the 2nd point, it is seen that learned reference Court has categorized the land in two categories i.e. 'Majrua' and 'Gair Majrua', of course on the request of the petitioners, as is apparent from the perusal of award announced by the Land Acquisition Collector. In view of the evidence available on record, prior to inception of Kol Dam Project, no developmental activities had taken place there by that time. Meaning thereby that the entire area was in the process of being developed. The land was acquired for the construction of project. Therefore, taking into consideration, the purpose for which the land was acquired, the same should not have been classified 'Majrua' or 'Gair Majrua' for the reason that the land was acquired for the construction of project and as such, the classification of the acquired land completely looses significance. I am drawing support in this regard from the judgment of this Court in ***Executive Engineer and another*** v. ***Dila Ram, Latest HLJ 2008 (HP) 1007***, the relevant portion of the judgment reads as follows:

> "12. The Collector has awarded compensation of the acquired land as per classification of the land. The learned District Judge has enhanced the compensation of the acquired land as per classification. One of the questions in the above appeals is whether awarding of compensation as per classification of the land is proper or not. The purpose of the acquisition in the present case is for construction of road and for that purpose classification completely looses significance. The acquired land is to be used/developed as a single unit for the construction of road. In ***H.P. Housing Board vs. Ram Lal and others, 2003 (3)Shim.L.C 64*** the acquisition was made for construction of housing board colony and compensation was assessed as per classification by the Collector. In the High Court the persons interested limited their claim for enhancement of compensation to Rs. 400/- per square meter irrespective of classification. On those facts, a learned single Judge of this court has held that when the land is being developed for constructing housing colony, the classification completely looses significance and awarded compensation on the flat rate of Rs. 200/- per square meter for the entire land irrespective of classification or nearness to the road. In ***Union of India vs. Harinder Pal Singh and others 2005 (12) SCC 564***, the Hon'ble Supreme Court has approved the view of the High Court assessing the market value of the lands under acquisition in the five villages at uniform rate of Rs. 40,000/- per acre, irrespective of their nature or quality and whether the same was situated nearer

to the road or at some distance therefrom. In the present case also, the acquired land is to be used/developed for the construction of the road as a single unit and, therefore, classification of the land looses significance. In these circumstances, the persons interested are entitled to compensation at the rate of Rs. 6,000/- per biswa of Rs. 1,20,000/- per bigha of the acquired land irrespective of classification, which is more than the market value assessed by learned District Judge."

19. The point in issue, therefore, is squarely covered by the judgment supra. Learned reference Court, therefore, should have determined the market value of the acquired land at flat rates, irrespective of its categorization. It is seen that the Court below has assessed the market value of the land categorized as 'Majrua' @Rs.4,68,497.00/- and 'Gair Majrua' @ Rs.1,04,117.44/-. In view of the above, this Court determine the market value of the acquired land at flat rates, irrespective of its nature as Rs.4,68,497.00/-

20. In view of what has been said hereinabove, the market value of the acquired land is assessed as Rs.4,68,497.00/-. The impugned award is ordered to be modified accordingly. The amount of compensation be now calculated along with all statutory benefits payable thereon accordingly and deposited in the Registry of this Court within three months from today. All the appeals are disposed of accordingly. Pending application(s), if any, shall also stand disposed of. No orders so as to costs.

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

Mohan Lal and others .....Petitioners

Versus

State of H.P. and others ....Respondents

CWP No.44 of 2010.
Decided on: 29th March, 2016

Constitution of India, 1950- Article 226- Land of the petitioners was utilized for construction of Johron-Pipliwala-Kiratpur-Majra road without acquisition and payment of due and admissible compensation, whereas, such compensation was paid to the other land holders- respondents pleaded that road was constructed in the year 1994-97 and no objection was raised by the petitioners nor any compensation was demanded- petitioners are not entitled to invoke the jurisdiction of the Court after 25 years- held, that question regarding the consent of the petitioners cannot be determined in the writ petition- hence, petition disposed of with liberty to the petitioner to institute a suit in accordance with law- further, direction issued to exclude the period spent by the petitioners in pursuing the writ while computing period of limitation. (Para-5 to 9)

Case referred:
Shankar Dass Vs. State of H.P. and others and its connected matters, 2013(2) Him. LR (FB) 698

For the petitioner: Mr. Ms. Jyotsna Rewal Dua, Senior Advocate with Ms. Charu Bhatnagar, Advocate.

For the respondents: Mr. D.S. Nainta, Additional Advocate General with Mr. Pushpender Jaswal, Deputy Advocate General.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary. *(Oral)*

This writ petition has been filed with the following prayers:

> i). For issuing a writ of mandamus to the respondents to initiate the proceedings under Land Acquisition Act to acquire the land ofpetitioners used for the construction of Johron-Pipliwala-Kiratpur-Majra road in Tehsil Paonta Sahib District Sirmour and to complete the process in a time bound manner.
>
> ii). For issuing a writ of mandamus or any other appropriate writ, order or direction to the respondents to compensate on account of the possession of their lands taken for construction of Johron-Pipliwala-Kiratpur-Majra road in Tehsil Paonta Sahib District Sirmour, without acquiring the same.

2. The complaint is that the respondent-State has utilized the land measuring 0-7 Bighas, bearing Khasra No.1224/64/1 of petitioner No.1; measuring 1-18 Bighas, bearing Khasra No.3/2 of petitioner No.2, situate in Mauza Pipliwala, Tehsil Paonta Sahib, District Sirmour; measuring 0-11 Bighas, bearing Khasra No.68/1, situate in Mouza Kiratpur-Bhagwanpur, Tehsil Paonta Sahib, District Sirmour of petitioner No.3; measuring 4-1 Bighas, bearing Khasra Nos.401/45/2; measuring 1-2 Bighas, bearing Khasra No.403/49/2 and measuring 0-1 Bighas, bearing Khasra No.371/108/1 of petitioners No. 4 to 8, situate in Mouza Kiratpur, Tehsil Paonta Sahib, District Sirmour, 15 years back for construction of Johron-Pipliwala-Kiratpur-Majra Road, without acquisition and payment of due and admissible compensation.

3. Further grievance of the petitioners is that due and admissible compensation has been paid to the right holders of Mouza Bhagwanpur, with regard to their land acquired for the construction of the same road. The petitioners, therefore, are stated to be discriminated, in the matter of acquisition of their land and payment of due and admissible compensation, against the similarly situated persons, hence, this writ petition.

4. Though the respondent-State has not denied the construction of Johron-Pipliwala-Kiratpur-Majra road, however, its stand is that the said road was constructed during the year 1994-97. Also that ***Kutcha*** road was in existence since the year 1984 and that it was constructed as a deposit work on allocation of funds by the Deputy Commissioner to the tune of Rs.91,600/- on 31.12.1984. The petitioner never objected to the construction of the road nor demanded compensation for the land utilized for alignment of the same. Therefore, according to the respondent-State, after an inordinate delay of more than 25 years, the petitioners are stated to be not entitled to invoke the extraordinary jurisdiction of this Court and to claim the compensation for the road in question. The writ petition, therefore, has been sought to be dismissed on merits and also on the ground of delay and latches. Further, according to the respondent-State, the remedy, if any available to the petitioners, lies in the Civil Court and not in this Court.

5. Ms. Jyotsna Rewal Dua, learned Senior Advocate assisted by Ms. Charu Bhaatnagar, Advocate, has canvassed that the petitioners are entitled to the payment of just and reasonable compensation qua their land utilized by the respondent-State for construction of the road in question. She has emphasized that he petitioners cannot be discriminated against the similarly situated persons i.e. the right holders of Mouza Bhagwanpur, to whom the due and admissible compensation has been paid after acquiring their land used for the same public purpose i.e. construction of Johron Pipliwala-Kiraatpur Majra Road.

6. Learned Additional Advocate has, however, vehemently argued that the point in issue in this petition is covered against the petitioners by the judgment of a larger Bench of this Court in ***Shankar Dass*** *Vs.* ***State of H.P. and others and its connected matters***, ***2013(2) Him. LR (FB) 698***. The same, therefore, has been sought to be disposed of in view of the ratio of the judgment (supra).

7. A larger Bench of this Court in ***Shankar Dass's*** case supra, has considered the question as to what should be the parameters to be taken into consideration by the writ Court in a situation when the land utilized by the State for a public purpose without acquiring the same and payment of due and admissible compensation. By majority, the Bench has held as under:

> "In cases where the State has not taken steps under the Land Acquisition Act for the purpose of construction of roads on the ground that the required land had been willingly surrendered either orally or otherwise or with implied or express consent by the owners at the relevant time, they can invoke the jurisdiction refuting such express or implied consent or the stand of the State on voluntary surrender, only within the time within which such a relief can be claimed in a Civil Suit. Once such a question is thus raised in a Writ Petition, the same can be considered in the Writ Petition itself."

8. In ***CWP No.1996 of 2010***, decided by a Division Bench of this Court on 12.9.2013, the land was acquired for construction of the road in the year 1994-95 and the stand of the respondent-State was that the petitioner did not raise any objection when the work commenced and completed and rather voluntarily consented for the construction of the road through his land. After placing reliance on the judgment of a larger Bench of this Court in ***Shankar Dass's*** case supra, the Division Bench has held as under:

> *"2. From the pleadings, we find that according to the case set out by the petitioner, the land belonging to him was utilized by the respondents for the construction of Kharapathar-Patsari road in the year 1994-95. The stand of the respondent-State, on the other hand, is that before starting the construction work of Kharapathar-Patsari road the petitioner raised no objection but rather verbally consented/did not object to the construction so made, which was completed in the year 1995 in all respects.*
>
> *3. From the pleadings, we find that serious disputed questions of law and facts arise for determination of the starting point of limitation, which, it is not possible to adjudicate in writ proceedings. The appropriate remedy for the petitioner would be to institute a civil suit in accordance with Shankar Dass's case supra, to establish the claim as pleaded. In these circumstances, this writ petition is disposed of with liberty to the petitioner to institute a civil suit in accordance with law and the ratio in Shankar Dass's case supra.*

4. We do not pronounce on the merits of the case of either party. We also direct that if such suit is filed the period spent by the petitioner in pursuing the writ remedy before this Court shall obviously be excluded for calculation of period of limitation, if disputed. Petition stands disposed of."

9. It is seen that the petitioners herein are similarly situate to the petitioner in ***CWP No. 1966/2010***. Therefore, applying the ratio of the judgment in ***CWP No.1966/2010*** (supra), this petition is disposed of with liberty to the petitioners to institute a civil suit in accordance with law and also the ratio of the judgment of a larger bench of this Court in ***Shankar Dass's case, supra***. If the suit is filed by the petitioners, the period spent by them in pursuing the writ remedy before this Court shall be excluded while computing the period of limitation prescribed for filing the same.

10. The petition stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

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

Roshan Lal .....Petitioner
Versus
State of H.P. and others ....Respondents

CWP No.1337 of 2008.
Decided on: 29th March, 2016

Constitution of India, 1950- Article 226- Petitioner pleaded that his land was utilized for construction of road without acquiring the same- therefore, direction be issued to pay compensation or to acquire land- state pleaded that no objection was raised at the time of construction of the road and petition was filed after 15 years, therefore, same be dismissed- held, that the plea of the state that petitioner had not raised any objection for construction of the road is to be adjudicated in the civil suit- hence, petition disposed of with liberty to the petitioner to institute a civil suit. (Para-7 to 9)

Case Referred:
Shankar Dass Vs. State of H.P. and others and its connected matters, 2013(2) Him. LR (FB) 698

For the petitioner: Mr. B.S. Chauhan, Senior Advocate with Mr. Vaibhav Tanwar, Advocate.
For the respondents: Mr. D.S. Nainta, Additional Advocate General with Mr. Pushpender Jaswal, Deputy Advocate General for respondents No.1 to 4.
None for respondent No.5.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary.

This writ petition has been filed with the following prayer:

It is, therefore, prayed that the writ of mandamus may kindly be issued to the respondents for initiating acquisition proceedings or to pay compensation in respect of

land measuring about 1.5 Bighas used for the construction of road in the year 2002-03 out of Khasra No.73, 77 and 78 kita 3, measuring 00-21-59 hectares, situate at Mohal Dhar Tarpunoo, Tehsil Theog, District Shimla, H.P.

2. The complaint is that the respondent-State has utilized approximately 1.5. Bighas of land belonging to the petitioner out of Khasra Nos. 73, 77 and 78, measuring 00-21-59 hectares, situate at Mohal Dhar Tarpunoo, Tehsil Theog, District Shimla, for construction of Meha-Dhandi Road in the year 2002, without acquiring the same and payment of due and admissible compensation in respect of the land and apple trees, uprooted during the construction of the road in question.

3. Though the respondent-State has not denied the construction of Meha-Dhandi road through the land of the petitioner, however, its stand is that the said road was constructed during the year 2000 with his consent. He never objected to the construction of the road nor ever demanded compensation qua his land over which the road has been constructed. Therefore, according to the respondent-State, after an inordinate delay of more than 15 years, the petitioner is stated to be not entitled to invoke the extraordinary jurisdiction of this Court and to claim the compensation for the road in question. The writ petition, therefore, has been sought to be dismissed on merits and also on the ground of delay and latches.

4. Mr. B.M. Chauhan, learned Senior Advocate assisted by Mr.Vaibhav Tanwar, Advocate, has canvassed that the petitioner is entitled to the payment of just and reasonable compensation qua his land utilized by the respondent-State for construction of the road in question and also the apple trees uprooted during such construction.

5. Learned Additional Advocate General has, however, vehemently argued that the point in issue in this petition is covered against the petitioner by the judgment of a larger Bench of this Court in ***Shankar Dass*** *Vs.* ***State of H.P. and others and its connected matters***, ***2013(2) Him. LR (FB) 698***. The same, therefore, has been sought to be disposed of in view of the ratio of the judgment (supra).

6. A larger Bench of this Court in ***Shankar Dass's*** case supra, has considered the question as to what should be the parameters to be taken into consideration by the writ by the writ Court in a situation when the land utilized by the State for a public purpose without acquiring the same and payment of due and admissible compensation. By majority, the Bench has held as under:

> "In cases where the State has not taken steps under the Land Acquisition Act for the purpose of construction of roads on the ground that the required land had been willingly surrendered either orally or otherwise or with implied or express consent by the owners at the relevant time, they can invoke the jurisdiction refuting such express or implied consent or the stand of the State on voluntary surrender, only within the time within which such a relief can be claimed in a Civil Suit. Once such a question is thus raised in a Writ Petition, the same can be considered in the Writ Petition itself."

7. In ***CWP No.1996 of 2010***, decided by a Division Bench of this Court on 12.9.2013, the land was acquired for construction of the road in the year 1994-95 and the stand of the respondent-State was that the petitioner did not raise any objection when the work commenced and completed and rather voluntarily consented for the construction of the road through his land. After placing reliance on the judgment of a larger Bench of this Court in ***Shankar Dass's*** case supra, the Division Bench has held as under:

"2. From the pleadings, we find that according to the case set out by the petitioner, the land belonging to him was utilized by the respondents for the construction of Kharapathar-Patsari road in the year 1994-95. The stand of the respondent-State, on the other hand, is that before starting the construction work of Kharapathar-Patsari road the petitioner raised no objection but rather verbally consented/did not object to the construction so made, which was completed in the year 1995 in all respects.

3. From the pleadings, we find that serious disputed questions of law and facts arise for determination of the starting point of limitation, which, it is not possible to adjudicate in writ proceedings. The appropriate remedy for the petitioner would be to institute a civil suit in accordance with Shankar Dass's case supra, to establish the claim as pleaded. In these circumstances, this writ petition is disposed of with liberty to the petitioner to institute a civil suit in accordance with law and the ratio in Shankar Dass's case supra.

4. We do not pronounce on the merits of the case of either party. We also direct that if such suit is filed the period spent by the petitioner in pursuing the writ remedy before this Court shall obviously be excluded for calculation of period of limitation, if disputed. Petition stands disposed of."

9. It is seen that the petitioner herein is similarly situate to the petitioner in ***CWP No. 1966/2010***. Therefore, applying the ratio of the judgment in ***CWP No.1966/2010*** (supra), this petition is disposed of with liberty to the petitioner to institute a civil suit in accordance with law and also the ratio of the judgment of a larger bench of this Court in ***Shankar Dass's case, supra***. If the suit is filed by the petitioner, the period spent by him in pursuing the writ remedy before this Court shall be excluded while computing the period of limitation prescribed for filing the same.

10. The petition stands disposed of accordingly. Pending application(s), if any, shall also stand disposed of.

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

Lal Singh @ Lala .....Appellant.
Versus
State of H.P .....Respondent.

Cr. Appeal No. 634 of 2015
Reserved on: 16.3.2016
Decided on : 30.3.2016

Indian Penal Code, 1860- Section 342- **Protection of Children from Sexual Offences Act, 2012-** Section 4- Prosecutrix was found sleeping- when her mother returned prosecutrix was wearing her clothes inside out- on inquiry, she disclosed that accused had taken her to a room and had forcible sexual intercourse with her- matter was reported to police- FIR was registered- accused was tried and acquitted by the trial Court- prosecutrix was proved to be minor by the birth certificate and abstract of parivar register- testimony of PW-1

corroborated by PW-3- however, testimony of PW-1 was contradicted by the statement of PW-3- PW-3 had also not deposed that prosecutrix was wearing clothes in unnatural and odd fashion – version of PW-1 in cross-examination that she had noticed the blood stains on the clothes of the prosecutrix is an improvement as she had not deposed this fact in examination-in-chief – PW-3 had also not deposed any such fact- medical evidence also does not corroborate the prosecution version- prosecution case was not proved beyond reasonable doubt- accused acquitted. (Para-9 to 15)

For the Appellant: Mr. H.S Rangra, Advocate.
For the Respondent: Mr. M.A Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal is directed against the impugned judgment rendered on 21.11.2015, by the learned Special Judge, Mandi, District Mandi, Himachal Pradesh in Sessions trial No. 48 of 2014, whereby the learned trial Court convicted and sentenced the appellant (hereinafter referred to as "accused")as follows:-

> **Section 342 IPC:** to undergo simple imprisonment for a period of one month and to pay a fine of Rs.500/- and in default of payment of fine he shall undergo further simple imprisonment for one week.
>
> **Section 4 of the Prevention of Children from Sexual offences Act:-**
>
> to undergo rigorous imprisonment for ten (10) years and to pay a fine of Rs.10,000/- and in default of payment of fine he shall further undergo simple imprisonment for six months.

2. Brief facts of the case are that PW-1 is having two children, the victim and a son. The prosecutrix was born on 18.10.1996. She was not studying owing to mental disability. She even cannot speak properly. On 30.5.2014 the mother of the prosecutrix (PW-1) alongwith her son went to the school and returned back to home at about 3.30 p.m. The victim was sleeping at that time and was wearing her clothes inside out. On inquiry, the victim disclosed to PW-1 that accused took her to a room and bolted the door and thereafter committed forcible sexual intercourse with her. She cried for help, but the accused did not spare her. PW-3 the grandmother of the prosecutrix called from outside and also knocked at the door, but the accused did not open the door, however the door was opened by him after some time. On inquiry made by the grandmother of the prosecutrix, the accused did not give any satisfactory answer for not opening the door. PW-1 thereafter disclosed the incident to PW-2 her sister-in-law. PW-1 also disclosed about the incident to her aunt (PW-6) on telephone. The matter was reported to the police and FIR Ex. PW-1/B was registered. The prosecutrix was medically examined on application Ex.PW-18/A and MLC Ex.PW-18/B was obtained. On conclusion of the investigation, into the offence, allegedly committed by the accused, final report under Section 173 of the Code of Criminal Procedure was prepared and filed in the Court.

3. The accused was charged by the learned trial Court for his committing offences punishable under Sections 342, 376 IPC and Section 4 of POCSO Act to which he pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution examined 19 witnesses. On closure of prosecution evidence, the statement of the accused, under Section 313 of the Code of Criminal Procedure, was recorded in which he pleaded innocence and claimed false implication. He chose to lead evidence in defence and examined DW-1 Nand Lal in defence.

5. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction against the accused for his committing offences punishable under Sections 342 IPC and Section 4 of POCSO Act.

6. The learned counsel appearing for the appellant/accused has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of acquittal.

7. The learned Additional Advocate General has with considerable force and vigour contended qua the findings of conviction, recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating interference, rather meriting vindication.

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

9. The prosecutrix, as unfolded by Exs.PW-7/B and 7/C which constitute respectively the birth certificate and the relevant abstract of the Pariwar Registrar of the prosecutrix, was a minor at the time contemporaneous to the occurrence. The reflections therein acquire conclusivity arousable from the factum of the learned defence counsel omitting to cross examine PW-7 qua the veracity of the apposite portrayals occurring therein. Given the conclusivity imputable to PW-7/B and PW-7/C, the apt conclusion which ensues therefrom is of the prosecutrix being a minor at the stage contemporaneous to the occurrence hence standing disabled to accord consent to the sexual misdemeanors, if any, perpetrated upon her person by the accused. However, even if the prosecutrix was a minor at the stage contemporaneous to the occurrence as such constituting her legally handicapped to mete consent to the accused for his alleged act of perpetrating sexual intercourse upon her on the ill-fated day. Nonetheless the mere factum of hers standing legally interdicted to mete consent to the sexual overtures of the accused would not ipso facto clinch any conclusion qua the inculpation of the accused rather it stands enjoined upon this Court to on an incisive appraisal of her testimony unveil therefrom the preeminent factum of her deposition besides the corroborative depositions thereto of her relatives standing imbued with credibility besides inspiring. Moreover, the depositions of the prosecution witnesses are to imperatively secure corroboration from the medical evidence on record. In the event of this Court discerning on an incisive reading of her testimony besides of the testimonies of her relatives in purported corroboration thereto of theirs being credible besides trustworthy would constrain this court to return with aplomb the findings of conviction against the accused. In an endeavor to gauge whether the testimonies of the prosecution witnesses stand ingrained with candor and forthrightness for hence credibility being imputable to them, a prompt advertence to the testimony of PW-1 is imperative.

10. PW-1 (Satya Devi) is the mother of the prosecutrix. She in her examination-in-chief has unveiled therein the factum of her daughter being mentally retarded besides suffering from an impairment of speech. On 30.5.2014 she has underscored in her deposition of hers alongwith her son returning home from school at about 3.30 p.m. whereat

she noticed her daughter sleeping and hers also proceeding to sleep with her daughter. She proceeds to depose of hers noticing her daughter to be wearing her clothes inside out whereupon she made an inquiry from her for hers wearing clothes in an odd and unnatural fashion. On her inquiring from the prosecutrix she deposes of the latter disclosing to her that in her absence the accused had come home and had proceeded to take her to a room and bolted its door. She has also disclosed therein of a disclosure being made by the prosecutrix of the accused committing forcible sexual intercourse upon her and of hers crying for help yet hers standing not spared by the accused. She further disclosed of Gulabi Devi (mother in law of PW-1) beckoning the accused from outside and also knocking at the door but the accused not opening the door yet after sometime his opening the door. PW-1 further deposes of her mother in law making an inquiry from the accused for his not opening the door, yet the accused not giving any satisfactory answer. She proceeded to disclose the incident to her sister-in-law Lachmi Devi who had also noticed the prosecutrix wearing clothes in an unnatural and odd fashion. She has testified the factum of the FIR qua the occurrence comprised in Ex. PW-1/B standing lodged at her instance in the police station concerned. She in her cross-examination deposed of hers noticing the blood stains on the clothes of her daughter.

11. The deposition of PW-1stands corroborated by PW-3 (Gulabi Devi).

12. PW-4 is the deposition on oath of the prosecutrix whose intelligibility on standing adjudged by the learned trial Court on hers meteing apt answers to the queries put to her by the learned trial Court hence coaxing it to declare her to be a competent witness. She in her examination-in-chief deposes of the accused gagging her mouth and hers raising cries for help whereupon her grandmother knocked at the door. A close reading of the testimony of PW-1 underscores the factum of the prosecutrix raising outcries which invited the attention of PW-3 leading the latter to proceed to the room whereat the accused purportedly subjected the prosecutrix to forcible sexual intercourse. However the factum as deposed by PW-1 and by the prosecutrix of PW-3 proceeding to the room whereat the accused purportedly subjected the victim to forcible sexual intercourse on the prosecutrix raising an outburst besides shrieking for help to forbid the accused from perpetrating forcible sexual intercourse upon her is not lent any succor by the deposition of PW-3. In sequel, the testimonies on oath of PW-1 and of the prosecutrix qua the factum aforesaid stands belied with a concomitant effect of the veracity of theirs testimonies suffering impairment. Moreover what constrains this Court to conclude of PW-3 being a concocted witness stands aroused from the factum of a disclosure qua the incident standing rendered by the prosecutrix only to PW-1 at a stage when she had on returning home made an inquiry from the prosecutrix on hers noticing the latter wearing her clothes in an unnatural besides in an odd fashion. Further more, even the factum as deposed by PW-1 of hers noticing the prosecutrix to be wearing her clothes in an unnatural and odd fashion stands bereft of any trace or element of truth rather is rendered prevaricated especially in the face of PW-3 omitting to disclose in her deposition on oath of hers, on hers entering the room whereat the ill-fated occurrence took place not noticing the prosecutrix to be wearing her clothes in an unnatural and odd fashion. The effect of the aforesaid contradiction intra-se the testimonies of PW-1 and PW-3 spells an aura of doubt qua the veracity of the version spelt out qua the occurrence by both PW-1 and PW-3. It also belies the factum of the accused ever entering the room of the prosecutrix. Further more it also belies the deposition of the prosecutrix of hers inviting the attention of PW-3 by her raising cries and shrieks.

13. PW-1 has deposed in her cross-examination of hers noticing the blood stained clothes of the prosecutrix. However in her examination-in-chief she has omitted to testify qua the factum aforesaid. An articulation by PW-1 in her cross-examination of hers

noticing the clothes of the prosecutrix to be stained with blood whereas hers omitting to depose the factum aforesaid in her examination-in-chief renders the effect of her deposition qua the factum aforesaid constituted in her cross-examination to stand subsequently invented by her. Also in face of PW-3 omitting to disclose in her deposition of hers on entering the room whereat the ill-fated occurrence took place noticing the clothes of the prosecutrix to be stained with blood falsifies the deposition of PW-1. It appears that PW-1 has for falsely implicating the accused indulged in a bout of falsehood which falsehood qua the aforesaid factum is lent accentuated evidentiary corroboration by the report of the FSL comprised in Ex. PX spurring from the factum of its omitting to with conclusivity unveil therein qua the stains on the clothes of the prosecutrix belonging to her.

14. In aftermath the aforesaid prevarication occurring in the depositions of PW-1 and PW-3 renders their testimonies qua the occurrence to be both uninspiring and incredible. Apart therefrom PW-1 has also articulated falsehood qua the prosecutrix suffering from mental disability besides impairment of speech especially when the trial Court on gauging her intelligibility from hers meteing intelligible answers to its queries for adjudging her competence to depose as a witness thereupon proceeded to declare her a competent witness. As a corollary, the falsehoods embarked upon by PW-1 palpably portray the factum of hers contriving a false story against the accused.

15. The medical evidence omits to corroborate the testimonies of the prosecutrix and of PW-1 which otherwise too for reasons afore-stated are embroiled in falsehood. However, PW-18 who prepared MLC Ex. PW-18/B has therein recorded a tentative opinion of perpetration of sexual intercourse upon the prosecutrix being not overrule-able. She had reserved her final opinion on the FSL concerned ventilating in its report on an examination of the apposite material sent to it for forming an opinion therefrom, the clinching fact of the prosecutrix standing subjected to forcible sexual intercourse at the instance of the accused. The report of the FSL comprised in Ex. PX omits to render a conclusive opinion qua Ex. P-1constituing the underwear of the accused whereat human semen stood detected being of the accused. The lack of co-relatebility of human semen on Ex.P-1 with the semen of the accused clinches an invincible conclusion of the prosecutrix unveiling a false story qua the accused subjecting her to forcible sexual intercourse. Moreover, given the report of the FSL concerned the final opinion rendered by PW-18 qua the possibility of sexual assault upon the prosecutrix being not overruleable also cannot stand on any secure, firm and sacrosanct pedestal. In aftermath the final opinion recorded by PW-18 unveiling therein the factum of possibility of sexual assault upon the prosecutrix being not overrule-able stands benumbed of its efficacy especially when it for reasons aforestated strikes a discordant note with the report of FSL comprised in Ex.PX.

16. The summum bonum of the above discussion is that the prosecution has not been able to adduce cogent and emphatic evidence in proving the guilt of the accused. The appreciation of 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.

17. In view of the above discussion, the appeal is allowed and the impugned judgment of 21.11.2015 rendered by the learned Special Judge, Mandi is set aside. The appellant/accused is acquitted of the offences 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.

18. The registry is directed to prepare the release warrant of the accused and send it to the Superintendent of the jail concerned, in conformity with this judgment forthwith. Records be sent down forthwith.

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

Land Acquisition Collector, H.P. Housing
and Urban Development Authority and another .....Appellants.

Versus

Daulat Ram & ors. ....Respondents.

RFA No. 154/2010 with
CO No. 317/2010
Reserved on: 21.03.2016.
Decided on: 30.03.2016.

Land Acquisition Act, 1884- Section 18- Land was acquired for construction of Colony by Housing Board- Land Acquisition Collector awarded the compensation- a reference was sought and reference Court awarded a sum of Rs. 3,000/- per marla with statutory benefits- aggrieved from the award, appeal was preferred- held, that land is situated in the fast developing and upcoming area of Rakkar where the facilities of road, marketing and telecommunication were already present- amount of compensation is just and adequate- another reference was answered and in appeal the compensation was reduced to Rs. 883.31/- per square meter- hence, compensation awarded in this case also at the rate of Rs. 883.31/- per square meter with all statutory benefits. (Para-13 and 14)

For the appellants: Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate for HIMUDA.

For the respondents: Mr. H.K. Bhardwaj,Advocate, for private respondents.
Mr. Parmod Thakur, Addl. Advocate General, for the respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The present appeal has been instituted against the Award dated 21.4.2010 rendered by the learned District Judge, Una, H.P. in land reference No. 35/2005. The Cross objections bearing No. 317/2010 have also been preferred for enhancement of the compensation of amount.

2. "Key facts" necessary for the adjudication of the present appeal are that notification under Section 4 of the Land Acquisition Act, 1894 (herein after referred to as 'Act') was issued on 21.6.2002. It was published in the newspapers "Ajeet Samachar" and "Dainik Veer Partap" on 7.8.2002. It was also published in H.P. Rajpatra on 15.7.2002. Notification under Sections 6 and 7 of the Act was issued on 1.7.2003. Notice under Section 9 of the Act was also issued.

3. The learned Land Acquisition Collector awarded compensation for the acquired land as follows:

Sr. No.	Land under acquisition		Rate per sqm/Centar	Total compensation
	Classification	Area (in hect.)		
1.	Barani-Awwal	1-37-53	883.31	1,21,48,162.00
2.	Bajan Kadeem/Karateer/Banjer Jadeed	10-80-84	76.94	83,15,983.00
3.	Gair Mumkin	0-19-21	6.16	11,833.00
	Total Land	12-37-58	Total Value	2,04,75,978.00

4. The claimants, feeling aggrieved, by the award No. 1 of 2004, dated 1.12.2004, filed Reference Petition No. 35 of 2005 for enhancement of the compensation before the learned District Judge, Una. The learned District Judge, Una awarded a sum of Rs. 3,000/- per marla with statutory benefits. The HPHUDA has challenged the award dated 21.4.2010. Hence this appeal and cross-objections.

5. Mr. Bhupender Gupta, learned Sr. Advocate with Mr. Neeraj Gupta, Advocate, appearing for the appellants has vehemently argued that there was no tangible evidence available on record justifying the enhancement of the compensation. According to him, undue reliance has been placed on award No. 1 of 2004 rendered by the Land Acquisition Collector. He lastly contended that deductions should have been made towards development charges. On the other hand, Mr. H.K. Bhardwaj, Advocate, has argued that the claimants were entitled to compensation at the rate of Rs. 50,000/- per marla. The learned Reference Court has failed to take into consideration the sale deeds and other relevant evidence.

6. I have heard learned Advocates for the parties and gone through the award and records of the case carefully.

7. PW-1 Ganesh Chand has proved map Ext. PW-1/A.

8. PW-2 Hans Raj led his evidence by filing affidavit. It is averred in the affidavit that the land has been acquired by the Housing Board for the construction of housing colony. The land is Barani awwal and they used to cultivate the same. This land touches housing board colony which is in existence for the last 35 years. Many private colonies, including Mount Carmel School, Office of HPSEB and commercial complexes are in close proximity of the acquired building. This area also abuts local road. The State Highway Una-Nangal is also in close proximity. This area is also near the railway line. The market value of the land was not less than 50,000/- per marla. There were lot of trees on the acquired land.

9. RW-1 R.C.Bhatia has led his evidence by filing affidavit. According to him, the acquired land was uneven. The acquired land was Kharetar and Banjar Kadeem and no cultivation was being done prior to the acquisition. The acquired land is away from the existing colony and government offices. Huge sum is required for development of the land. 50% of the land would go waste for providing roads, paths, sewerages, green spaces etc. Moreover 11% of the acquired land is waste land and cannot be put to any use. In his cross-examination, he has admitted that the land has been acquired for the extension of the housing colony. He has also admitted that Mohal Khurd and Rakkar are adjoining. He also

admitted that the State Highway is near the acquired land. He also admitted that in the Housing Board, all facilities are available. Volunteered that they have provided the facilities.

10. RW-2 Ravi Kumar has proved certified sale deed dated 5.1.1990 vide Ext. RW-2/A. He also proved sale deeds Ext. RW-2/B dated 13.10.2004, RW-2/C dated 13.10.2004 and RW-2/D dated 24.11.2003. In his cross-examination, he admitted that he did not know about the classification, location and valuation of the land.

11. According to the claimants, the land is situated near the Power Sub-station and official residential colony of HPSEB. The Mount Carmel School, Office of HPSEB and commercial complexes are in close proximity of the acquired building. This area also abuts local road. The State Highway Una-Nangal is also in close proximity. This area is also near the railway line.

12. According to the sale deed Ext. RW-2/A dated 5.1.1990, executed by Sh. Jeewan Kumar in favour of Shesh Mani Tripathi, land measuring 0-08-43 hectares of Up-Mohal Rakkar was sold for Rs. 12,500/-. As per sale deed Ext. RW-2/B dated 13.10.2004, Chhajju Ram had sold land measuring 0-05-80 hectares of revenue estate Tabba in favour of Prem Chand for Rs.28,000/-. As per Ext. RW-2/C sale deed dated 13.10.2004, Shamsher Singh sold land measuring 0-05-61 hectares of land in revenue estate Tabba in favour of Prem Chand for Rs. 27,000/-. Ext. RW-1/D is the copy of sale deed dated 24.11.2003 whereby Ujjagar Singh had sold land measuring 0-42-27 hectares of revenue estate Tabba in favour of Rajinder Bali for Rs. 1,55,000/-.

13. The land is situated in the fast developing and upcoming area of Rakkar where the facilities of road, marketing and telecommunication were already present. The amount of compensation should be just and adequate. The notification under Section 4 of the Act was issued on 21.6.2002. The Land Acquisition Collector has awarded Rs.883.31 per square metre for *Barani Awwal*, Rs. 76.94 per square meter for *Banjar Kadeem/Kharetar/Banjar Jadeed* and Rs. 6.16 per square meter for *Gair Mumkin* land in RFA Nos. 67/2011 alongwith analogous matters. The learned Reference Court has awarded Rs.883.31/- per square meter for *Barani Awwal*, as compensation to the claimants. This compensation ought to have been reduced taking into consideration 20% development charges since roads, drains etc. were to be constructed but the Court relying upon the sale deeds proved on record holds that the claimants are entitled to 20% increase in the market value. The learned Reference Court ought to have awarded a sum of Rs. 883.31 per square meter to the claimants also since land acquired was under the same notification, irrespective of the nature of the land, since the land acquired was for the purpose of construction of housing colony. All these matters were required to be clubbed to maintain clarity of facts. It has come in the statement of PW-1 Jugal Kishore that the land acquired was Barani Awwal and they used to cultivate the same.

14. Accordingly, this appeal is disposed of in view of the judgment rendered by this Court in RFA No. 67/2011 and analogous matters with declaration that claimants would be entitled to compensation at par with the claimants in RFA No. 67/2011 and analogous matters i.e. at the rate of Rs.883.31 per square metre instead of Rs.3,000/- per marla, with all statutory benefits, in order to maintain equities as well as uniformity when the land acquired is from the same Mohal Bharolia Khurd and notification under Section 4 of the Act was issued on 21.6.2002. Cross-objections are disposed of without modifying the Award of the learned Reference Court dated 21.4.2010. The Award is upheld for the reasons stated herein above.

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

RFA Nos. 67, 68, 69, 70, 72, 73, 74, 75 and 81 of 2011 and CO Nos. 538/2012, 991/2012, 699/2011, 700/2011, 992/2012, 461/2011, 468/2012, 701/2011, 445/2012 and 848/2012
Reserved on: 21.03.2016.
Decided on: 30.03.2016.

1. RFA No. 67 of 2011 (with CO No. 538/2012)
Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.
Versus
Usha Devi & ors. .....Respondents.

2. RFA No. 68 of 2011 (with CO No. 991/2012)
Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.
Versus
Shashi Kala and others .....Respondents.

3. RFA No. 69 of 2011 (with CO No. 699/2011)
Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.
Versus
Kiran Bala & ors. .....Respondents.

4. RFA No. 70 of 2011 (with CO No. 700/2011)
Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.
Versus
Balraj Singh & ors. .....Respondents.

5. RFA No. 72 of 2011 (with CO No. 992/2012)
Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.
Versus
Usha Devi & ors. .....Respondents.

6. RFA No. 73 of 2011 (with CO No. 461/2011)
Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.
Versus
Santosh Kumari & ors. .....Respondents.

7. RFA No. 74 of 2011 (with CO No. 468/2012)
Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.
Versus
Saroj Bala & ors. .....Respondents.

8. RFA No. 75 of 2011 (with CO No. 701/2011)
Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.
Versus
Jatinder Pal & ors. .....Respondents.

9. RFA No. 81 of 2011 (with CO No. 445/2012 and 848/2012)

Land Acquisition Collector, H.P.
Housing and Urban Development Authority. .....Appellant.

Versus

Shashi Kala & ors. .....Respondents.

Land Acquisition Act, 1884- Section 18- Land of the petitioner was acquired for the construction of Housing Board Colony- compensation was awarded by Land Acquisition Collector- aggrieved from the compensation, a reference was sought- Reference Court enhanced the compensation to Rs. 883.31 paise per square meter, irrespective of the classification of the land- aggrieved from the award, appeals were preferred- held, that Housing Board Colony, Durga Colony and Krishna Colony are located adjacent to the acquired land- land is 600 meters away from Una Nangal road- roads and lanes have already been constructed in this colony- education institution was started near the acquired land- acquired land falls within the limit of M.C., Una- amount of compensation should be just and proper- 20% amount should have been deducted towards development charges- claimants were entitled to 20% increase over the amount assessed by the Collector- therefore, no interference was required with the award of the collector,. (Para- 18 to 23)

Cases referred:

Shaji Kuriakose and another versus Indian Oil Corporation Limited and others, (2001) 7 SCC 650

Viluben Jhalejar Contractor (Dead) by LRs versus State of Gujarat, (2005) 4 SCC 789

Atma Singh (Dead) through LRs and others vs. State of Haryana and another, (2008) 2 SCC 568

Satish and others vrs. State of Uttar Pradesh and ors., (2009) 14 SCC 758

Trishala Jain and another vrs. State of Uttaranchal and another, (2011) 6 SCC 47

Wave Industries Private Ltd. vrs. Atar Singh and others, (2011) 14 SCC 745,

Indraj Singh (dead) through LRs and others vs. State of Haryana and another, reported in (2013) 14 SCC 491

Union of India vrs. Raj Kumar Baghal Singh & ors., (2014) 10 SCC 422

Bhupal Singh and Others vs. State of Haryana, (2015) 5 SCC 801

For the appellant(s): Mr. Bhupender Gupta, Sr. Advocate with Mr. Neeraj Gupta, Advocate for HIMUDA in all the appeals.

For the respondents: Mr. K.D. Sood, Sr. Advocate with Mr. Sanjeev Sood, Advocate, Mr. G.D. Verma, Sr. Advocate with Mr. B.C. Verma, Advocate, Mr. Shyam Chauhan, Advocate, for the respective respondents.

Mr. Parmod Thakur, Addl. Advocate General, for the respondent-State.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

Since these appeals arise from the common award dated 31.12.2010, all these were taken up together and are being disposed of by a common judgment.

2. "Key facts" necessary for the adjudication of these regular first appeals are that the Land Acquisition Collector, H.P. Housing & Urban Development Authority has filed these appeals against the award dated 31.12.2010 rendered by the learned Addl. District Judge, (FTC), Una, Distt. Una, H.P. in LAC Petition Nos. 3/05 RBT 14/05/05, 4/05 RBT 13/05/05 5/05 RBT 12/05/05, 7/05 RBT 11/05/05, 2/05 RBT 8/05/05, 6/05 RBT 6/05/05, 8/05 RBT 9/05/05, 10/05, RBT 7/05/05, 9/05 RBT 10/05/05. The claimants have also filed the Cross-objection Nos. 538/2012, 991/2012, 699/2011, 700/2011, 992/2012, 461/2011, 468/2012, 701/2011, 445/2012 and 848/2012 for enhancement of the compensation. Notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the Act) was issued by the Government of Himachal Pradesh on 21.6.2002 with intention to acquire the land measuring 12-37-58 hectares in village Bharolia Khurd, Tehsil and Distt. Una, H.P. for the construction of Housing Colony. The notification was published in two vernacular local newspapers, namely, the "Ajeet Samachar" and the "Dainik Vir Partap" on 7.8.2002. The same was also published in the Rajpatra dated 15.7.2002. Public notice was also caused to be circulated through the Tehsildar, Una on 19.8.2002 in the vicinity. The Government of Himachal Pradesh after considering report under Section 5A of the Act, issued a notification under Sections 6 & 7 dated 1.7.2003. The land was got marked on the spot by the relevant revenue field agency of Una in the presence of the land owners. Notice under Section 9 of the Act was served upon the land owners to file their claim, if any, with regard to compensation and interest in the land being acquired. Few of the land owners filed objections through their learned Advocates against the acquisition of their land and demanded Rs. 20 lacs per kanal.

3. The Land Acquisition Collector awarded the following rates of the land:

Sr. No.	Land under acquisition		Rate per sqm/Centar	Total compensation
	Classification	Area (in hect.)		
1.	Barani-Awwal	1-37-53	883.31	1,21,48,162.00
2.	Bajan Kadeem/Karateer/Banjer Jadeed	10-80-84	76.94	83,15,983.00
3.	Gair Mumkin	0-19-21	6.16	11,833.00
	Total Land	12-37-58	Total Value	2,04,75,978.00

4. The claimants, feeling aggrieved, by the award No. 1 of 2004, dated 1.12.2004, filed Reference Petitions for enhancement of the compensation. The matters were consolidated and the evidence was recorded separately in LAC Petition No. 2/05 RBT 8/05/05 titled as Rajpal Singh vrs. LAC, HPHUDA and in LAC petition No. 10/05 RBT 7/05/05 titled Vikram Singh & ors. vrs. State of H.P. through Collector Una, though it was advisable to record the evidence in one case only when the matters already stood consolidated. The learned Addl. District Judge, (FTC), Una, Distt. Una, H.P. enhanced the compensation to Rs. 883.31 paise per square meter, irrespective of the classification of the land taking into consideration that the land in question was acquired by the HPHUDA for the same purpose i.e. for construction of the Housing Colony alongwith statutory benefits. The HPHUDA has challenged the award dated 31.12.2010. Hence these appeals and cross-objections.

5. Mr. Bhupender Gupta, learned Sr. Advocate with Mr. Neeraj Gupta, Advocate, appearing for the appellants has vehemently argued that there was no tangible evidence available on record justifying the enhancement of the compensation. According to him, undue reliance has been placed on award No. 1 of 2004 rendered by the Land Acquisition Collector. He lastly contended that deductions have not been made towards the development charges. On the other hand, M/S. G.D. Verma and R.K.Gautam, Sr. Advocates, for the respective respondents have argued that the compensation for sum of Rs. 883.35 paise, irrespective of the market value of the land is on the lower side. The learned Reference Court has failed to take into consideration the sale deeds and other relevant evidence.

6. I have heard learned Senior Advocates for the parties and gone through the award and records of the case carefully. I have taken into consideration the evidence recorded in LAC Petition No. 2/05 RBT 8/05/05 titled as Rajpal Singh vrs. LAC, HPHUDA and in LAC petition No. 10/05 RBT 7/05/05 titled Vikram Singh & ors. vrs. State of H.P. through Collector Una & anr.

7. PW-1 Jugal Kishore, Registration Clerk, Tehsil Office, Una has brought the requisitioned record pertaining to sale deed Vasika No. 2082 dated 31.10.2002. He also placed on record certified copy of sale deed Ext. PW-1/A. He also placed on record certified copy of sale deed Vasika No. 386 dated 11.3.2003 Ext. PW-1/B. He also placed on record certified copy of sale deed Vasika No. 1159 dated 21.6.2005 Ext. PW-1/C, sale deed Vasika No. 1758 dated 12.9.2002 Ext. PW-1/D.

8. PW-2 Yashpal has proved expert report Ext. PW-2/A.

9. PW-3 B.S.Thakur, deposed that the Revenue Committee headed by him was formed by the Deputy Commissioner, Una for verifying the nature and market value of the land in question. The Committee submitted its report Ext. PW-2/A. In his cross-examination, he admitted that the value suggested by them was on the basis of Krishna Colony. There were about 200-250 plots in this Colony. There was provision for roads and drains.

10. PW-4 Pyare lal Bains has proved site plan Ext. PW-4/A. In his cross-examination, he admitted that the acquired land was in the vicinity of Housing Board Colony, Rakkar. Durga Colony was also at a distance of half kilometer.

11. PW-5 Ravi Kishore, Jr. Draftsman, Town and country Planning, Una deposed that he has brought the requisitioned record. Krishna Colony is situated in village Bharolian Khurd. Krishna Colony is also known as Mehta Colony. He deposed that the old housing colony is adjacent to the proposed housing colony of HIMUDA. He also deposed that the nearby land is covered by residential colony. 2 or 3% area is kept as commercial area near those colonies. The development plan of the area is approved by the Director, Town and Country Planning.

12. PW-6 Jaswinder Singh has led his evidence by filing affidavit. According to the averments made in the affidavit, the acquired land was situated adjacent to the HP Housing Board Colony Rakkar and also in the vicinity of Mount Carmel School, Office of Town and Country Planning, Office of Executive Engineer, I & PH, HPSEB offices. Housing Colony was also in the vicinity of the acquired land.

13. The learned Addl. District Judge (FTC) Una has not taken into consideration the evidence led by Raj Pal Singh. He has also led his evidence by filing affidavit. According to him, the acquired land is situated adjacent to Rakkar Colony and also in the vicinity of

Mount Carmel School, Office of Town and Country Planning, Office of Executive Engineer, I & PH, HPSEB offices. Housing Colony was also in the vicinity of the acquired land. As such the acquired land was fit for construction of house buildings, commercial complex etc. In his cross-examination, he has admitted that acquired land does not touch the Una Nangal road. He also admitted that near the north side of the acquired land there is Durga Colony. The land was also sold by co-villagers.

14. Sh. R.C.Bhatia has appeared as RW-1. He has led his evidence by filing affidavit. According to him, the acquired land was uneven. The respondents have provided provision of establishment of health centre, educational institutions, commercial establishment and community centre for the benefit of residents of the colony. The estimated amount of Rs. 2 crores was likely to be incurred for the construction of over head water storage tank, installation of tube well, pumping machinery, construction of pump house, construction of retaining walls, sewerage treatment plants and development of green spaces etc. In his cross-examination, he categorically admitted that this land was to be sold after carving plots and houses were to be constructed on them. He also admitted that the department has given compensation as per the revenue record. He also admitted that the acquired land was banjar, barani, chahi and land was acquired for the same purpose. He also admitted that on eastern side of the acquired land there is Housing Board Colony and on the northern side, there is Durga Colony and Krishna Colony. According to him, the acquired land was at a distance of 600 meters from Una Nangal road. He also admitted specifically that in the close vicinity of acquired land, there is educational institution, Electricity Superintending Engineer Office and Transmission Division of HPSEB.

15. RW-2 Diwan Chand has also led his evidence by filing affidavit. According to him, 20% of the area was to be used for the construction of roads and lanes for the colony. The respondents have also made provisions for establishment of educational institutions in the colony for the benefit of the residents of the colony and around 3% out of the acquired land has been reserved for the purpose. Besides other facilities, playgrounds, parks and green spaces had been provided for the benefit of the residents of the colony. In his cross-examination, he admitted that the department has carved out 215 plots in the acquired land and all of them have been sold out.

16. In addition to evidence in LAC Petition No. 2/05 RBT 8/05/05 titled as Rajpal Singh vrs. LAC, HPHUDA evidence rendered in LAC petition No. 10/05 RBT 7/05/05 titled Vikram Singh & ors. vrs. State of H.P. through Collector Una was also considered. The claimant Vikram Singh in this petition has appeared as PW-5. He has led his evidence by filing affidavit. It is specifically averred in the affidavit that the acquired land abuts the Municipal Committee as well as National Highway Una-Nangal road. The Housing Board Colony was in existence. There is old office of forest department. There are other colonies adjacent to his acquired land.

17. RW-1 R.C.Bhatia in his affidavit has deposed that respondents have spent approx. 3.20 crores of amount for leveling, construction of roads, external water scheme and external sewerage system over the acquired land and to make it feasible for the construction of residential colony. The estimated amount of Rs. 2 crores was likely to be incurred for the construction of over head water storage tank, installation of tube well, pumping machinery, construction of pump house, construction of retaining walls, sewerage treatment plants and development of green spaces etc. In his cross-examination, he could not narrate as to how much area was plain and how much was uneven. He also admitted in his cross-examination that the acquired land was banjar, barani, chahi and land was acquired for the same purpose i.e construction of the housing colony. RW-2 Diwan Chand has deposed that considerable amount was require to mitigate the acquired land smooth and feasible for

construction of housing colony. He deposed that 20% of the area was to be used for the construction of roads and lanes for the colony and 39% of the acquired land could be utilized for the construction of houses of different categories as detailed in the lay out plan. 29% of the land was remaining unutilized.

18. The appellant-HPHUDA have not placed on record any tangible evidence that an amount of Rs. 3.20 crores was spent for leveling the acquired land. It has also come on record that adjoining acquired land there is housing colony, Krishna Colony and Durga Colony. The land is about 600 meters away from the Una Nangal road. It has come in the evidence that the drains and roads were already constructed in these colonies. There are also no estimates placed on record by the appellants that Rs. 2 crores were likely to be spent for water storage tank and construction of pump house etc. There are educational institutions also nearby the acquired land. The office of the Electricity Boards is also in close proximity of the acquired land. The acquired land falls with the Municipal limits of M.C. Una. The learned Reference Court has not taken into consideration the sale deeds proved on record by PW-1 Jugal Kishore. He has only taken into consideration the award No. 1 of 2004 made by the Land Acquisition Collector.

19. The amount of compensation should be just and adequate. The notification under Section 4 of the Act was issued on 21.6.2002. The sale deeds proved by PW-1 Jugal Kishore are dated 31.10.2002, 11.3.2003, 12.9.2002 and 21.6.2005. PW-1 Jugal Kishore was, however, not cross-examined. Vide Sale deed Ext. PW-1/A dated 31.10.2002 Devender Kumar sold land measuring 0-00-59 hect. to Surinder Pal for Rs. 75,000/-. Vide sale deed Ext. PW-1/B dated 11.3.2003 Tilak Raj sold land measuring 0-4-16 hect, 0-68-93 hect. to Surjeet Singh and Sushma Singh for Rs. 3,00,000/-. Vide sale deed Ext. PW-1/C dated 21.6.2005, Viram Dass sold land measuring 0-27-07 hect to Asha Devi for Rs.16,00,000/-. Vide sale deed Ext. PW-1/A dated 12.9.2002 Devender Kumar sold land measuring 0-02-00 hect. and 1-10-26 hect. to Ram Pal for an amount of Rs. 3,50 lacs.

20. Their Lordships of the Hon'ble Supreme Court in ***Shaji Kuriakose and another*** versus ***Indian Oil Corporation Limited and others***, (2001) 7 SCC 650 have laid down the following factors for determination of market value of acquired land inter alia:

1) The sale must be a genuine transaction;
2) that the sale deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act,
3) that the land covered by the sale must be in the vicinity of the acquired land,
4) that the land covered by the sales must be similar to the acquired land and
5) that the size of plot of the land covered by the sales be comparable to the land acquired.

Their Lordships have held as under:

> "[3] It is no doubt true that Courts adopt Comparable Sales Method of valuation of land while fixing the market value of the acquired land. While fixing the market value of the acquired land, Comparable Sales Method of valuation is preferred than other methods of valution of land such as Capitalisation of Net Income Method or Expert Opinion Method. Comparable Sales Method of valuation is preferred because it furnishes the evidence for determination of the market value of the acquired land at which a willing purchaser would pay for

> the acquired land if it has been sold in open market at the time of issue of notification under Section 4 of the Act. However, Comparable Sales Method of valuation of land for fixing the market value of the acquired land is not always conclusive. There are certain factors which are required to be fulfilled and on fulfillment of those factors the compensation can be awarded, according to the value of the land reflected in the sales. The factors laid down inter alia are : (1) the sale must be a genuine transaction, that (2) the sale-deed must have been executed at the time proximate to the date of issue of notification under Section 4 of the Act, that (3) the land covered by the sale must be in the vicinity of the acquired land, that (4) the land covered by the sales must be similar to the acquired land and that (5) the size of plot of the land covered by the sales be comparable to the land acquired. If all these factors are satisfied, then there is no reason why the sale vlaue of the land covered by the sales be not given for the acquired land. However, if there is a dissimilarity in regard to locality, shape, site or nature of land between land covered by sales and land acquired, it is open to Court to proportionately reduce the compensation for acquired land than what is reflected in the sales depending upon the disadvantages attached with the acquired land. In the present case, what we find is that the first two factors are satisfied. The sale transaction covered by the sale Ex. A-4 is genuine, inasmuch as sale was executed in proximity to the date of notification under Section 4 of the Act. However, there is a difference in the similarity in the land acquired and the land covered by Ex.A-4. The land covered by Ex. A-4 is situated at Kottayam and Ernakulam, PWD Road, whereas the acquired land is situated at a distance of 3 furlong from the main road. There is no access to the acquired land and there exists only an internal mud road which belonged to one of the claimants, whose land has also been acquired. Further, the land coverd by Ex.A-4 is a dry land and whereas the acquired land is a wet land. After acquisition, the acquired land has to be re-claimed and a lot of amount would be spent for filling the land. Moreover, the land covered by Ex.A-4 relates to a small piece of land which do not reflect the true market value of the acquired land. If it is often seen that a sale for a smaller plot of land fetches more consideration than larger or bigger piece of land. For all these reasons, the High Court was fully justified in lowering the rate of compensation than what was the market value of the land covered by Ex.A-4.We, therefore, do not find any infirmity in the judgment of the High Court."

21. Their Lordships of the Hon'ble Supreme Court in ***Viluben Jhalejar Contractor (Dead) by LRs*** versus ***State of Gujarat***, (2005) 4 SCC 789 have culled out the following principles to determine the market value of the acquired land:

> [18] One of the principles for determination of the amount of compensation for acquisition of land would be the willingness of an informed buyer to offer the price therefore. It is beyond any cavil that the price of the land which a willing and informed buyer would offer would be different in the cases where the owner is in possession and enjoyment of the property and in the cases where he is not.

> [21] Whereas a smaller plot may be within the reach of many, a large block of land will have to be developed preparing a layout plan, carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers and the hazards of an entrepreneur. Such development charges may range between 20% and 50% of the total price."

22. Their Lordships of the Hon'ble Supreme Court in ***Atma Singh (Dead) through LRs and others*** vs. ***State of Haryana and another,*** (2008) 2 SCC 568 have succinctly explained the general principles for determination of market value of the acquired land. Their Lordships have held as under:

> [4] In order to determine the compensation which the tenure- holders are entitled to get for their land which has been acquired, the main question to be considered is what is the market value of the land. Section 23(1) of the Act lays down what the Court has to take into consideration while Section 24 lays down what the Court shall not take into consideration and have to be neglected. The main object of the enquiry before the Court is to determine the market value of the land acquired. The expression 'market value' has been subject-matter of consideration by this Court in several cases. The market value is the price that a willing purchaser would pay to a willing seller for the property having due regard to its existing condition with all its existing advantages and its potential possibilities when led out in most advantageous manner excluding any advantage due to carrying out of the scheme for which the property is compulsorily acquired. In considering market value disinclination of the vendor to part with his land and the urgent necessity of the purchaser to buy should be disregarded. The guiding star would be the conduct of hypothetical willing vendor who would offer the land and a purchaser in normal human conduct would be willing to buy as a prudent man in normal market conditions but not an anxious dealing at arms length nor facade of sale nor fictitious sale brought about in quick succession or otherwise to inflate the market value. The determination of market value is the prediction of an economic event viz., a price outcome of hypothetical sale expressed in terms of probabilities. See Thakur Kanta Prasad v. State of Bihar, AIR 1976 SC 2219; Prithvi Raj Taneja v. State of M. P., AIR 1977 SC 1560; Administrator General of West Bengal v. Collector, Varanasi, AIR 1988 SC 943 and Periyar v. State of Kerala, AIR 1990 SC 2192.
>
> [5] For ascertaining the market value of the land, the potentiality of the acquired land should also be taken into consideration. Potentiality means capacity or possibility for changing or developing into state of actuality. It is well settled that market value of a property has to be determined having due regard to its existing condition with all its existing advantages and its potential possibility when led out in its most advantageous manner. The question whether a land has potential value or not, is primarily one of fact depending upon its condition, situation, user to which it is put or is reasonably capable of being put and proximity to residential, commercial or industrial areas or institutions. The existing amenities like, water, electricity, possibility of their further extension, whether near about Town is developing or has prospect of development have to be taken into consideration. See Collector Raigarh v. Hari Singh Thakur, AIR 1979 SC 472, Raghubans Narain v. State of U.P., AIR 1969 SC 465 and Administrator General, W. B. v. Collector Varanasi, AIR 1988 SC 943. It has been held in Kaushalya Devi v.

L.A.O. Aurangabad, AIR 1984 SC 892 and Suresh Kumar v. T.I. Trust, AIR 1980 SC 1222 that failing to consider potential value of the acquired land is an error of principle.

23. Their lordships of the Hon'ble Supreme Court in the case of ***Satish and others vrs. State of Uttar Pradesh and ors.,*** reported in ***(2009) 14 SCC 758,*** have held that for a certified copy of a registered deed of sale, vendor and vendee thereof need not be examined. All deeds of sale which have been brought on record should have been taken into consideration. It has been held as follows:

"20. At the outset, it must be noticed that the learned Reference Judge as also the High Court refused to take into consideration a large number of deeds of sale relying on or on the basis of a decision of this Court in P. Venkaiah (supra). Section 51A of the Land Acquisition Act construction of which fell for consideration before this Court therein reads as under :

"51A. Acceptance of certified copy as evidence.

--In any proceeding under this Act, a certified copy of a document registered under the Registration Act, 1908 (16 of 1908), including a copy given under section 57 of that Act, may be accepted as evidence of the transaction recorded in such document."

23. A Constitution Bench of this Court in Cement Corporation of India v. Purya & Ors. [(2004) 8 SCC 270] opined that by reason of the insertion of Section 51A, the Parliament merely enabled a party to get over the problem, namely calling for the original from the vendor or the vendee and proving the same and, thus, the decision of this Court in Special Deputy Collector & Anr. v. Kurra Sambasiva Rao & Ors. [(1997) 6 SCC 41] was held to be not laying down the correct proposition of law, holding :

"18. From the above, it is seen that till the judgment of the three Judge Bench in Narasaiah's case (supra), the consensus of judicial opinion was that Section 51A was enacted for the limited purpose of enabling a party to produce certified copy of a registered sale transaction in evidence only and for proving the contents of the said document the parties had to lead oral evidence as contemplated in the Evidence Act.

19. A careful perusal of the judgment in Kurra Sambasiva Rao's case and other cases which fall in line with the said view discloses that they proceeded on the basis that prior to the insertion ofSection 51A in the LA Act, the Evidence Act did not permit the production of a certified copy of the registered sale transaction in evidence. Therefore, by the insertion of Section 51A the legislature merely enabled a party to get over that problem.

Thereafter, according to the said judgments, the party concerned had to prove the contents of the document by adducing oral evidence separately to prove the contents of the document.

20. The above view of the Court in Kurra Sambasiva Rao's case, in our opinion, is not the correct position in law. Even prior to the insertion of Section 51A of the Act the provisions of the Evidence Act and the Registration Act did permit the production of a certified copy in evidence. This has been clearly noticed in the judgment in Narsaiah's case wherein the court relying on Sections 64 and65(f) of

> the Evidence Act read with Section 57(5) of the Registration Act held that production of a certified copy of a registered sale document in evidence was permissible in law even prior to insertion of Section 51A in the LA Act.
>
> We are in agreement with the said view expressed by this Court in Narasaiah's case."
>
> The Constitution Bench, thus, laid down the law that for praying a certified copy of a registered deed of sale, the vendor and vendee thereof need not be examined.
>
> 26. This legal position, thus, being neither in doubt nor dispute, all the deeds of sale which have been brought on record subject to the applicability thereof, therefore, in our opinion should have been taken into consideration."

24. Their lordships of the Hon'ble Supreme Court in the case of ***Trishala Jain and another vrs. State of Uttaranchal and another,*** reported in ***(2011) 6 SCC 47,*** have held that deduction on account of expenses of development of the sites could vary from 10% to 86.33% depending on the nature of the land, its situation, the purpose and stage of development. Their lordships further held that the cases where the acquired land itself is fully developed and has all essential amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of `no deduction'. Furthermore, where the evidence led by the parties is of such instances where the compensation paid is comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of `no deduction' may be applied. These may be the cases where least or no deduction could be made. It has been further held that normally deduction is to be applied on account of carrying out development activities like providing roads or civic amenities such as electricity, water, etc. when the land has been acquired for construction of residential, commercial or institutional projects. The sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilization, amenities and infrastructure with hardly any distinction. Their lordships have allowed a deduction of 10% from the market value on account of development charges and other possible expenditures. It has been held as follows:

> "41. The cases where the acquired land itself is fully developed and has all essential amenities, before acquisition, for the purpose for which it is acquired requiring no additional expenditure for its development, falls under the purview of cases of `no deduction'. Furthermore, where the evidence led by the parties is of such instances where the compensation paid is comparable, i.e. exemplar lands have all the features comparable to the proposed acquired land, including that of size, is another category of cases where principle of `no deduction' may be applied. These may be the cases where least or no deduction could be made. Such cases are exceptional and/or rare as normally the lands which are proposed to be acquired for development purposes would be agricultural lands and/or semi or haphazardly developed lands at the time of issuance of notification under Section 4(1) of the Act, which is the relevant time to be taken into consideration for all purposes and intents for determining the market value of the land in question.
>
> 44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed

> surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits.
>
> 45. This Court, depending on the facts and circumstances of each given case, has taken the view that deduction on account of expenses of development of the sites could vary from 10% to 86.33% depending on the nature of the land, its situation, the purpose and stage of development. Reference can be made to the cases of K.S. Shivadevamma v. Assistant Commissioner and Land Acqusition Officer [(1996) 2 SCC 62], Ram Piari v. Land Acquisition Collector, Solan [(1996) 8 SCC 338],Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona [(1988) 3 SCC 751], Hasanali Walimchand (Dead) by L` v. State of Maharashtra [(1998) 2 SCC 388]."

25. In view of the facts and circumstances of the case, in the instant case also, the acquired land is adjacent to the fully developed colonies. It has come on record that the land is plain and thus least expenditure was required for developmental charges. However, the fact of the matter is that the learned Reference Court, once the specific ground was taken for deduction of development charges, should have addressed the issue.

26. Their lordships of the Hon'ble Supreme Court in the case of ***Wave Industries Private Ltd. vrs. Atar Singh and others,*** reported in ***(2011) 14 SCC 745,*** relying upon the ratio in Atma Singh's case, (2008) 2 SCC 568 have allowed the deduction of 10% by way of development charges. It has been held as follows:

> "[9] We shall first consider the question whether the Reference Court or for that reason the High Court should have made appropriate deduction towards the development cost. In cases involving the acquisition of land which is proposed to be utilized for the purpose of development, the Courts have generally approved deduction of l/3rd of market value towards development cost.
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> 10. In Kasturi v. State of Haryana, 2003 1 SCC 354, the Court held:
>
> > 7. ...It is well settled that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation has to be deducted out of the amount of compensation payable on the acquired land subject, to certain variations depending on its nature, location, extent of expenditure involved for development and the area required for roads and other civic amenities to develop the land so as to make the plots for residential or commercial purposes. A land may be plain or uneven, the soil of the land may be soft or hard bearing on the foundation for the purpose of making construction; may be the land is situated in the midstf a developed area all around but that land may have a hillock or may be low-lying or may be having deep ditches. So the amount of expenses that may be incurred in developing the

area also varies. A claimant who claims that his land is fully developed and nothing more is required to be done for developmental purposes, must show on the basis of evidence that it is such a land and it is so located. In the absence of such evidence, merely saying that the area adjoining his land is a developed area, is not enough particularly when the extent of the acquired land is large and even if a small portion of the land is abutting the main road in the developed area, does not give the land the character of a developed area. In 84 acres of land acquired even if one portion on one side abuts the main road, the remaining large area where planned development is required, needs laying of internal roads, drainage, sewer, water, electricity lines, providing civic amenities, etc. However, in cases of some land where there are certain advantages by virtue of the developed area around, it may help in reducing the percentage of cut to be applied, as the developmental charges required may-be less on that account. There may be various factual factors which may have to be taken into consideration while applying the cut in payment of compensation towards developmental charges, may be in some cases it is more than l/3rd and in some cases less than 1/ 3rd. It must be remembered that there is difference between a developed area and an area having potential value, which is yet to be developed. The fact that an area is developed or adjacent to a developed area will not ipso facto make every land situated in the area also developed to be valued as a building site or plot, particularly when vast tracts are acquired, as in this case, for development purpose.

11. The rule of 1/3rd deduction was reiterated in Tejumal Bhojwani v. State of U.P., 2003 10 SCC 525, V. Hanumantha Reddy v. Land Acquisition Officer & Mandal Revenue Officer, 2003 12 SCC 642, H.P. Housing Board v. Bharat S. Negi, 2004 2 SCC 184 and Kiran Tandon v. Allahabad Development Authority, 2004 10 SCC 745.

12. In Lai Chand v. Union of India, 2009 15 SCC 769, the Court indicated that percentage of deduction for development to be made for arriving at market value of large tracts of undeveloped agricultural land with potential for development can vary between 20 and 75 per cent of the price of developed plots and observed:

> “14. The 'deduction for development' consists of two components. The first is with reference to the area required to be utilised for developmental works and the second is the cost of the development works....
>
> 20. Therefore the deduction for the 'development factor' to be made with reference to the price of a small plot in a developed layout, to arrive at the cost of undeveloped land, will be for more than the deduction with reference to the price of a small plot in an unauthorised private layout or an industrial layout. It is also well known that the development

cost incurred by statutory agencies is much higher than the cost incurred by private developers, having regard to higher overheads and expenditure."

13. In Subh Ram v. State of Haryana, 2010 1 SCC 444, this Court held as under:

"24. Deduction of "development cost" is the concept used to derive the "wholesale price" of a large undeveloped land with reference to the "retail price" of a small developed plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the "development cost". Two factors have a bearing on the quantum (or percentage) of deduction in the "retail price" as development cost. Firstly, the percentage of deduction is decided with reference to the extent and nature of development of the area/layout in which the small developed plot is situated. Secondly, the condition of the acquired land as on the date of preliminary notification, whether it was undeveloped, or partly developed, is considered and appropriate adjustment is made in the percentage of deduction to take note of the developed status of the acquired land.

25. The percentage of deduction (development cost factor) will be applied 'fully where the acquired land has no development. But where the acquired land can be considered to be partly developed (say for example, having good road access or having the amenity of electricity, water, etc.) then the development cost (that is, percentage of deduction) will be modulated with reference to the extent of development of the acquired land as on the date of acquisition. But under no circumstances, will the future use or purpose of acquisition play a role in determining the percentage of deduction towards development cost."

14. However, in Atma Singh's case, the Court, while considering challenge to the fixation of market value of land acquired for a sugar factory, held that deduction of 10% would be reasonable. Paragraphs 15 and 16 of the judgment, which contain the reasons for this conclusion are reproduced below:

"15. The question to be considered is whether in the present case those factors exist which warrant a deduction by way of allowance from the price exhibited by the exemplars of small plots which have been filed by the parties. The land has not been acquired for a housing colony or government office or an institution. The land has been acquired for setting up a sugar factory. The factory would produce goods worth many crores in a year. A sugar factory apart from producing sugar also produces many byproducts in the same process. One of the by-products is molasses, which is produced in huge quantity. Earlier, it had no utility and its disposal used to be a big problem. But now molasses is used for production of alcohol and ethanol which yield lot of revenue. Another by-product begasse is now used for generation of power and press mud is utilised in manure. Therefore, the profit from a sugar factory is substantial. Moreover, it is not confined to one year but will accrue every year so long as the factory runs. A housing board does not run on business lines. Once plots are carved out after acquisition of land and are sold

> to public, there is no scope for earning any money in future. An industry established on acquired -land, if run efficiently, earns money or makes profit every year. The return from the land acquired for the purpose of housing colony, or offices, or institution cannot even remotely be compared with the land which has been acquired for the purpose of setting up a factory or industry. After all the factory cannot be set up without land and if such land is giving substantial return, there is no justification for making any deduction from the price exhibited by the exemplars even if they are of small plots. It is possible that a part of the acquired land might be used for construction of residential colony for the staff working in the factory. Nevertheless, where the remaining part of the acquired land is contributing to production of goods yielding good profit, it would not be proper to make a deduction in the price of land shown by the exemplars of small plots as the reasons for doing so assigned in various decisions of this Court are not applicable in the case under consideration.
>
> 16. Having regard to the entire facts and circumstances of the case, we are of the opinion that a deduction of 10% from the market value of the land, which has been arrived at by the High Court would meet the ends of justice. Therefore, the market value of the acquired land for the purpose of payment of compensation to the landowners has to be assessed at Rs. 1,08,000 per acre".
>
> 16. In our view, the ratio of Atma Singh's case deserves to be invoked in these appeals because the Respondents' land was acquired for a sugar factory. In other words, it will be appropriate to allow a deduction of 10% by way of development charges."

27. Their lordships of the Hon'ble Supreme Court in the case of ***Indraj Singh (dead) through LRs and others vs. State of Haryana and another,*** reported in ***(2013) 14 SCC 491,*** have permitted only deduction of 10% of value towards developments taking into consideration that the area appears to be well developed. It has been held as follows:

> "10. Upon hearing the learned counsel and upon perusal of the impugned judgment and relevant records, we are of the view that the appellants should have been awarded more compensation. Deduction to the extent of 1/3rd of the value of the land is definitely harsh even as per the observations made by the High Court as the land in question is very much in the developed area. The area has been developed by the HUDA and therefore, the deduction of 1/3rd of the value of the land is not justified.
>
> 11. Upon considering all relevant facts, in our opinion, it would be absolutely just if 10% value of the land is deducted instead of 1/3rd because the land is forming part of a well developed area.
>
> 12. The High Court, after deduction of 1/3rd of the amount of the value has awarded Rs.7,43,000/- per acre for irrigated and non-irrigated land. The said value is after deduction of 1/3rd amount of total valuation of the land. The High Court has, thus, in fact, determined the market value of the land at Rs.11,15,000/- per acre and after deducting 1/3rd of the said amount, it has awarded Rs. 7,43,000/- per acre, after rounding off the figure.
>
> 13. The market value of the land in question, as determined by the High Court, is Rs. 11.15 lacs per acre and instead of taking 1/3rd, we direct that

10% of the said value shall be deducted. The claimants shall be entitled to other statutory benefits like solatium, interest etc. on the enhanced compensation."

28. Their lordships of the Hon'ble Supreme Court in the case of ***Union of India vrs. Raj Kumar Baghal Singh & ors.,*** reported in ***(2014) 10 SCC 422,*** have held that deduction towards development costs depends on individual fact situations and in this case their lordships have upheld deduction of 20%. It has been held as follows:

"9. We have considered the rival submissions. Before considering the merits of the rival contentions, we consider it appropriate to refer to the discussion on the issue by the High Court which is as follows:- "In the present case, situation is altogether different. While deciding issue regarding cut, referred to above, argument of counsel for the Union of India that cut imposed is required to be enhanced is also liable to be rejected. In view of situation the land under acquisition, as referred to above, cut imposed to the extent of 20% was perfectly justified. Counsel for the Union of India has tried to support his argument by citing various judgments but no benefit of those judgments can be extended to Union of India because at the time when matter was argued before Additional District Judge, no serious dispute was raised by Union of India regarding potential value of the land under acquisition. No evidence was led to show that the land acquired had no potential for developing it into residential or commercial area. Argument to impose higher cut was rightly rejected by the learned Single Judge, after taking note of evidence on record.

Argument of counsel for the Union of India that since the land was situated at a distance of 1 to 1-1/2 kms of municipal limits, as such, higher cut be imposed, is not justified, in view of evidence on record. It had come in evidence that the land under acquisition was situated next to the municipal limits and was situated very near to golf course. In view of this, no case is made out for further cut as prayed for.

In the present case, learned Single Judge has rightly placed reliance to award compensation upon sale instance Ex. P-21 and Ex.P-22. While determining compensation, reliance has also been placed on statements PW 4, P27, PW10. It had come on record that land subject matter of sale instance, referred to above, was situated within a distance of 20 killas or less from the land under acquisition. Sale deed Ex. P23 was rightly ignored as it pertained to constructed house and there was no evidence on record to show that what was the value of land underneath the constructed portion of the house. Under these circumstances, this Court is of the opinion that award of compensation @ Rs.105.80 paisa per square yard to the claimants by the learned Single Judge was perfectly justified."

10. It is well settled in determining compensation for acquired land, price paid in a bona fide transaction of sale by a willing seller to a willing buyer is adopted subject to such transaction being adjacent to acquired land, proximate to the date of acquisition and possessing similar advantages. Of course, there are other well known methods of valuation like opinion of experts and yield method. In absence of any evidence of a similar transaction, it is permissible to take into account transaction of nearest land around the date of notification under Section 4 of the Act by making a suitable allowance. There can be no fixed criteria as to what would be the

suitable addition or subtraction from the value of the relied upon transaction. In Chimanlal Hargovinddas vs. Special Land Acquisition Officer, Poona and anr.[4], this Court summed up the principle as follows:-

"4. The following factors must be etched on the mental screen:

(1) .....

(2) .....

(3) .....

(4) .....

(5) The market value of land under acquisition has to be determined as on the crucial date of publication of the notification under Section 4 of the Land Acquisition Act (dates of notifications under Sections 6 and 9 are irrelevant).

(6) The determination has to be made standing on the date line of valuation (date of publication of notification under Section 4) as if the valuer is a hypothetical purchaser willing to purchase land from the open market and is prepared to pay a reasonable price as on that day. It has also to be assumed that the vendor is willing to sell the land at a reasonable price.

(7) In doing so by the instances method, the court has to correlate the market value reflected in the most comparable instance which provides the index of market value.

(8) Only genuine instances have to be taken into account. (Sometimes instances are rigged up in anticipation of acquisition of land.) (9) Even post-notification instances can be taken into account (1) if they are very proximate, (2) genuine and (3) the acquisition itself has not motivated the purchaser to pay a higher price on account of the resultant improvement in development prospects.

(10) The most comparable instances out of the genuine instances have to be identified on the following considerations:

(i) proximity from time angle,

(ii) proximity from situation angle.

(11) Having identified the instances which provide the index of market [pic]value the price reflected therein may be taken as the norm and the market value of the land under acquisition may be deduced by making suitable adjustments for the plus and minus factors vis-à-vis land under acquisition by placing the two in juxtaposition.

(12) A balance-sheet of plus and minus factors may be drawn for this purpose and the relevant factors may be evaluated in terms of price variation as a prudent purchaser would do.

(13) The market value of the land under acquisition has thereafter to be deduced by loading the price reflected in the instance taken as norm for plus factors and unloading it for minus factors.

(14) The exercise indicated in clauses (11) to (13) has to be undertaken in a common sense manner as a prudent man of the world of business would do. We may illustrate some such illustrative (not exhaustive) factors:

|Plus factors |Minus factors |

|1. smallness of size |1. largeness of area |

|2. proximity to a |2. situation in the |

road	interior at a distance from the road
3. frontage on a road	3. narrow strip of land with very small frontage compared to depth
4. nearness to developed area	4. lower level requiring the depressed portion to be filled up
5. regular shape	5. remoteness from developed locality
6. level vis-à-vis land under acquisition	6. some special disadvantageous factor which would deter a purchaser
7. special value for an owner of an adjoining property to whom it may have some very special advantage	

(15) The evaluation of these factors of course depends on the facts of each case. There cannot be any hard and fast or rigid rule. Common sense is the best and most reliable guide. For instance, take the factor regarding the size. A building plot of land say 500 to 1000 sq. yds. cannot be compared with a large tract or block of land of say 10,000 sq. yds. or more. Firstly while a smaller plot is within the reach of many, a large block of land will have to be developed by preparing a lay out, carving out roads, leaving open space, plotting out smaller plots, waiting for purchasers (meanwhile the invested money will be blocked up) and the hazards of an entrepreneur. The factor can be discounted by making a [pic]deduction by way of an allowance at an appropriate rate ranging approximately between 20 per cent to 50 per cent to account for land required to be set apart for carving out lands and plotting out small plots. The discounting will to some extent also depend on whether it is a rural area or urban area, whether building activity is picking up, and whether waiting period during which the capital of the entrepreneur would be locked up, will be longer or shorter and the attendant hazards.

(16) Every case must be dealt with on its own fact pattern bearing in mind all these factors as a prudent purchaser of land in which position the judge must place himself.

(17) These are general guidelines to be applied with understanding informed with common sense." Again in Viluben Jhalejar Contractor (D) by LRs. vs. State of Gujarat [5], it was observed:-

"24. The purpose for which acquisition is made is also a relevant factor for determining the market value. In Basavva v. Spl. Land Acquisition Officer, (1996) 6 SCC 640, deduction to the extent of 65% was made towards development charges.

25. In Bhagwathula Samanna, (1991) 4 SCC 506, it has been held: (SCC pp. 510-11, para 11) "11. The principle of deduction in the land value covered by the comparable sale is thus adopted in order to arrive at the market value of the acquired land. In applying the principle it is necessary to consider all relevant facts. It is not the extent of the area covered under the acquisition which is the only relevant factor. Even in the vast area there may be land which is fully developed having all amenities and situated in an advantageous position. If smaller area within the large tract is already developed and suitable for building purposes and have in its vicinity roads, drainage, electricity, communications, etc. then the principle of deduction simply for the reason that it is part of the large tract acquired, may not be justified."

26. In L. Kamalamma, (1998) 2 SCC 385, this Court held: (SCC p. 387, para 6) "Ext. B-30 is a sale deed dated 9-8-1976, the transaction having taken place prior to eight months from the issue of the preliminary notification for acquisition of land in the present case. Having found that the piece of land referred in Ext. B-30 is situated very close to the lands that are acquired under the notification in question the Reference Court and the High Court relied upon the said document and, in our view, rightly. Further when no sales of comparable land were available where large chunks of land had been sold, even land transactions in respect of smaller extent of land could be taken note of as indicating the price that it may fetch in respect of large tracts of land by making appropriate deductions such as for development of the land by providing enough space for roads, sewers, drains, expenses involved in formation of a layout, lump sum payment as also the waiting period required for selling the sites that would be formed."

27. In Administrator General of W.B. v. Collector, (1988) 2 SCC 150, deduction to the extent of 53% was allowed.

28. In K.S. Shivadevamma v. Asstt. Commr. and Land Acquisition Officer, (1996) 2 SCC 62, it was held: (SCC p. 65, para 10) "10. It is then contended that 53% is not automatic but depends upon the nature of the development and the stage of development. We are inclined to agree with the learned counsel that the extent of deduction depends upon development need in each case. Under the Building Rules 53% of land is required to be left out. This Court has laid as a general rule that for laying the roads and other amenities 33-1/3% is required to be deducted. Where the development has already taken place, [pic]appropriate deduction needs to be made. In this case, we do not find any development had taken place as on that date. When we are determining compensation underSection 23(1), as on the date of notification under Section 4(1), we have to consider the situation of the land development, if already made, and other relevant facts as on that date. No doubt, the land possessed potential value, but no development had taken place as on the date. In view of the obligation on the part of the owner to

hand over the land to the City Improvement Trust for roads and for other amenities and his requirement to expend money for laying the roads, water supply mains, electricity etc., the deduction of 53% and further deduction towards development charges @ 33- 1/3%, as ordered by the High Court, was not illegal."

29. In Hasanali Khanbhai & Sons v. State of Gujarat (1995) 5 SCC 422 and Land Acquisition Officer v. Nookala Rajamallu, (2003) 12 SCC 334 : (2003) 10 Scale 307, it has been noticed that where lands are acquired for specific purposes deduction by way of development charges is permissible.

30. We are not, however, oblivious of the fact that normally one-third deduction of further amount of compensation has been directed in some cases. (See Kasturi v. State of Haryana, (2003) 1 SCC 354, Tejumal Bhojwani v. State of U.P., (2003) 10 SCC 525, V. Hanumantha Reddy v. Land Acquisition Officer & Mandal R. Officer, (2003) 12 SCC 642, H.P. Housing Board v. Bharat S. Negi, (2004) 2 SCC 184 and Kiran Tandon v. Allahabad Development Authority, (2004) 10 SCC 745.)

31. In Registrar, University of Agricultural Sciences5 whereupon Mr Ranjit Kumar placed strong reliance, the Court noticed that if the acquisition is made for agricultural purpose, question of development thereof would not arise; but if the sale instance was in respect of a small piece of land whereas the acquisition is for a large piece of land, although development cost may not be deducted, there has to be deduction for largeness of the land and also for the fact that these are agricultural lands. In that view of the matter, deduction at the rate of 33% made by the High Court was upheld. It may not, therefore, be correct to contend, as has been submitted by Mr. Ranjit Kumar, that there cannot be different deductions, one for the largeness of the land and another for development costs."

29. Their lordships of the Hon'ble Supreme Court in the case of ***Bhupal Singh and Others vs. State of Haryana,*** reported in ***(2015) 5 SCC 801***, have held that appropriate deductions are also required to be made and from a discussion of case laws it appears that a deduction of 20% to 75% may be valid, depending on the extent to which the acquired land is required to be developed. It has been held as follows:

"18. Law on the question as to how the Court is required to determine the fair market value of the acquired land is fairly well settled by several decisions of this Court and remains no more res integra. This Court has, inter alia, held that when the acquired land is a large chunk of undeveloped land having potential and was acquired for residential purpose then while determining the fair market value of the lands on the date of acquisition, the appropriate deductions are also required to be made.

19. It is apposite to take note of some of the decisions of this Court on the issue relevant for the disposal of these appeals:

19.1 In Brig. Sahib Singh Kalha & Ors. v. Amritsar Improvement Trust & Ors., (1982) 1 SCC 419, this Court opined that where a large area of undeveloped land is acquired, provision has to be made for providing minimum amenities of town life. Accordingly, it was held that a deduction of 20% of the total acquired land should be made for land over which infrastructure has to be raised (space for roads, etc.). Apart from the aforesaid, it was also held that the cost of raising infrastructure itself (like roads, electricity, water, underground drainage, etc.) needs also to be taken

into consideration. To cover the cost component for raising infrastructure, the Court held that the deduction to be applied would range between 20% to 33%. Commutatively viewed, it was held, that deductions would range between 40% and 53%.

19.2 In Chimanlal Hargovinddas v. Special Land Acquisition Officer, Poona & Anr. (1988) 3 SCC 751 while referring to the factors which ought to be taken into consideration while determining the market value of the acquired land, it was observed that a smaller plot was within the reach of many whereas for a larger block of land there were implicit disadvantages. As a matter of illustration, it was mentioned that a large block of land would first have to be developed by preparing its layout plan. Thereafter, it would require carving out roads, leaving open spaces, plotting out smaller plots, waiting for purchasers (during which the invested money would remain blocked). Likewise, it was pointed out that there would be other known hazards of an [pic]entrepreneur. Based on the aforesaid likely disadvantages it was held that these factors could be discounted by making deductions by way of allowance at an appropriate rate ranging from 20% to 50%. These deductions, according to the Court, would account for land required to be set apart for developmental activities. It was also sought to be clarified that the applied deduction would depend on, whether the acquired land was rural or urban, whether building activity was picking up or was stagnant, whether the waiting period during which the capital would remain locked would be short or long; and other like entrepreneurial hazards.

19.3 In Kasturi & Ors. v. State of Haryana, (2003) 1 SCC 354, this Court opined that in respect of agricultural land or undeveloped land which has potential value for housing or commercial purposes, normally 1/3rd amount of compensation should be deducted depending upon the location, extent of expenditure involved for development, the area required for roads and other civic amenities, etc. It was also opined that appropriate deductions could be made for making plots for residential and commercial purposes. It was sought to be explained that the acquired land may be plain or uneven, the soil of the acquired land may be soft or hard, the acquired land may have a hillock or may be low-lying or may have deep ditches. Accordingly, it was pointed out that expenses involved for development would vary keeping in mind the facts and circumstances of each case. In Kasturi case, it was held that normal deductions on account of development would be 1/3rd of the amount of compensation. It was, however, clarified that in some cases the deduction could be more than 1/3rd in other cases even less than 1/3rd.

19.4 In Lal Chand v. Union of India & Anr., (2009) 15 SCC 769, it was held that to determine the market value of a large tract of undeveloped agricultural land (with potential for development), with reference to sale price of small developed plot(s), deductions varying between 20% to 75% of the price of such developed plot(s) could be made.

19.5 In A.P. Housing Board v. K. Manohar Reddy & Ors., (2010) 12 SCC 707, having examined the existing case law on the point it was concluded that deductions on account of development could vary between 20% to 75%. In the peculiar facts of the case, a deduction of 1/3rd towards development charges was made from the awarded amount to determine the compensation payable.

19.6 In Special Land Acquisition Officer & Anr. v. M.K. Rafiq Saheb, (2011) 7 SCC 714, this Court after having concluded that the land which was the subject-matter of acquisition was not agricultural land for all practical purposes and no agricultural activities could be carried out on it, concluded that in order [pic]to determine fair compensation, based on a sale transaction of a small piece of developed land (though the acquired land was a large chunk), the deduction made by the High Court at 50%, ought to be increased to 60%.

20. After taking note of the aforesaid cases and placing reliance upon the principles laid down therein, this Court in Chandrashekar and Others, (supra) observed as under:

> "20. It is essential to earmark appropriate deductions out of the market value of an exemplar land, for each of the two components referred to above. This would be the first step towards balancing the differential factors. This would pave the way for determining the market value of the undeveloped acquired land on the basis of market value of the developed exemplar land."
>
> 21. As far back as in 1982, this Court in Brig. Sahib Singh Kalha case held, that the permissible deduction could be up to 53%. This deduction was divided by the Court into two components. For the "first component" referred to in the foregoing paragraph, it was held that a deduction of 20% should be made. For the "second component", it was held that the deduction could range between 20% to 33%. It is therefore apparent that a deduction of up to 53% was the norm laid down by the Court as far back as in 1982. The aforesaid norm remained unchanged for a long duration of time, even though, keeping in mind the peculiar facts and circumstances emerging from case to case, different deductions were applied by this Court to balance the differential factors between the exemplar land and the acquired land. Recently however, this Court has approved a higher component of deduction.
>
> 22. In 2009 in Lal Chand case and in 2010 in A.P. Housing Board case it has been held that while applying the sale consideration of a small piece of developed land, to determine the market value of a large tract of undeveloped acquired land, deductions between 20% to 75% could be made. But in 2009 in Subh Ram case, this Court restricted deductions on account of the "first component" of development, as also, on account of the "second component" of development to 33% each. The aforesaid deductions would roughly amount to 67% of the component of the sale consideration of the exemplar sale transaction(s)."

30. In view of the definitive law laid down by the Hon'ble Apex Court, this Court is of the considered view that the Reference Court ought to have allowed 20% deduction towards development charges. The Court has already noticed that the learned Reference Court has not discussed the entire evidence in right perspective. The sale deeds Ext. PW-1/A to PW-1/C have been overlooked. The sale deeds are in proximity to the date of notification under Section 4 of the Act, except one sale deed, which is of the year 2005. These are of the adjoining pieces of lands and even if deductions are made for smaller, exemplar, the claimants are entitled to 20% increase over and above what has been directed

by the learned Reference Court on the basis of the Award made by the Land Acquisition Collector. Though, I hasten to add that the learned Reference Court was justified in granting uniform rate since land acquired was for the same purpose i.e. construction of housing colony, the learned Reference Court has overlooked that the land acquired was in the limits of M.C. Una. It was adjacent to the National Highway. Educational institutions and well developed colonies were in proximity to the acquired land. The value of the land is in proximity to the date of notification under Section 4 of the Act. These factors are also required to be taken into consideration while granting compensation. However, in the interest of justice and in order to balance the equities, award made by learned Reference Court is not required to be modified since 20% of the amount which is ordered to be deducted towards development charges is bound to be set off by 20% increase on the basis of exemplar sale deeds.

31. The appeals and cross-objections are accordingly disposed of without modifying the Award of the learned Reference Court dated 31.12.2010. The Award is upheld for the reasons stated herein above.

****

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

Cr. Appeal No. 23/2014 with
Cr. Appeals No. 123 and 136/2014
Reserved on: March 30, 2016
Decided on: March 31, 2016

1. Cr. Appeal No. 23/2014
Firoz Ansari ..... Appellant
Versus
State of Himachal Pradesh .....Respondent
2. Cr. Appeal No. 123/2014
Vinod Kumar ..... Appellant
Versus
State of Himachal Pradesh .....Respondent
3. Cr. Appeal No. 136/2014
State of Himachal Pradesh ..... Appellant
Versus
Firoz Ansari and another .....Respondents

N.D.P.S. Act, 1985- Section 21 and 22- An election commission party conducted the search of the car during which 13248 Spasmo Proxyvon capsules and 1165 Rexcof Syrup vials were recovered without any permit- accused was tried and convicted by the trial Court- held, that there were three occupants in the car- police had prosecuted only two persons- defence that contraband belonged to third person becomes probable in view of non-explanation for not prosecuting the third person- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room

in the presence of senior police officer- held, that in these circumstances prosecution case was not proved- accused acquitted. (Para-19 to 30)

For the appellant(s) :Mr. Karan Singh Kanwar, Advocate in Cr. Appeal No. 23/2014, Mr. Narender Sharma and Mr. Rajesh Vats, Advocates, in Cr. Appeal No. 123/2014.

For the respondent(s) :Mr. Ramesh Thakur, Deputy Advocate General, for the State, in all the appeals and Mr. Hoshiar Kaushal, Legal Aid Counsel in Cr. Appeal No. 136/2014 for the respondents.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

Cr. Appeal No. 23/2014 and Cr. Appeal No. 123/2014 have been filed by appellants-accused (hereinafter referred to as 'accused' for convenience sake) against Judgment/order dated 2.12.2013 rendered by leaned Special Judge-I, Sirmaur at Nahan, HP in Sessions Trial No. 02-ST/7 of 2013, whereby the accused, who were charged and tried for offence under Sections 21 and 22 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), have been convicted and sentenced to undergo rigorous imprisonment for 4 years and to pay a fine of Rs.50,000/- each, and in default of payment of fine, to further undergo simple imprisonment for one year, for commission of offence under Sections 21 and 22 of the Act. The State has also come in appeal by way of Cr. Appeal No. 136/2014 seeking enhancement of the sentence.

2. Since all the three appeals arise from one judgment and common questions of law and facts are involved in the same, these were taken up together for hearing and are being disposed of vide this common judgment.

3. Prosecution case, in a nutshell, is that on 15.10.2012, on the eve of assembly elections in Himachal Pradesh, a team of election commission headed by Executive Magistrate (PW-1) Shri Rajinder Singh Fishta was present at Khodari Majri barrier for conducting checking of the vehicles. At about 5.30 PM, an Indigo Car No. UK-07-AJ-2004 being driven by accused Vinod reached the barrier in which accused Firoz Ansari was also sitting on the front seat. The election commission party stopped the car but accused Vinod stopped the same at a distance of 20 meters ahead of the place where the checking party was standing. On checking, 5 bags and 5 paper cartons were found in the car in which 13248 Spasmo Proxyvon capsules and 1165 Rexcof Syrup vials were contained. Accused could not produce any permit/licence. Thereafter, PW-10 HC Rajinder Singh separated 480 Spasmo Proxyvon capsules and 209 Rexcof Syrup vials as samples and made it into two separate parcels which were sealed with seal bearing impression 'T' and the remaining Spasmo Proxyvon capsules and Rexcof Syrup vials were put back into the same bags and cartons, which were also sealed with the same seal impression. NCB form Ext. PW-8/B in triplicate was updated and the case property alongwith the aforesaid vehicle was taken into possession vide memo Ext. PW-1/A. Rukka Ext. PW-3/A was drawn by PW-10 HC Rajinder Singh, on the basis of which FIR Ext. PW-3/B was registered with Police Station, Paonta Sahib. Case property was produced before Inspector Bhagat Ram, who resealed the same with seal impression 'A'. He deposited the case property in Malkhana with PW-5 HHC Narayan Singh. He entered the same at Sr. No. 31. On 17.10.2012 PW-5 sent the samples to FSL Junga through PW-7 Constable Navraj Sharma vide RC No. 383/12. He deposited the same at FSL Junga on 18.10.2012. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

4. Prosecution has examined as many as 11 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. Two witnesses were examined from the defence side. Accused were convicted as noticed hereinabove. Hence, two appeals by the accused came to be filed against the conviction by the accused and third one by the State against the inadequacy of sentence.

5. Mr. Karan Singh Kanwar, Mr. Narender Sharma and Mr. Rajesh Vats, Advocates, have vehemently argued that the Prosecution has failed to prove its case against the accused.

6. Mr. Ramesh Thakur, Deputy Advocate General, has vehemently argued that the sentence as awarded against the accused is not commensurate with the gravity of offence and same be enhanced.

7. We have heard the learned counsel for the appellant and also gone through the record carefully.

8. PW-1 Rajinder Fishta, deposed that he was appointed as Station Surveillance Officer Incharge by the Election Commission of India in Paonta constituency. Three police officials, one videographer and one driver were attached with him. On 15.10.2012, they left towards Khodari Majri side for checking. At about 5.30 PM, when they were present at Khodari Majri barrier, an Indigo Car bearing No. UK-07-AJ-2004 of white colour came from Paonta Sahib side, which was stopped by them for checking but the vehicle stopped at a distance of 20 metres ahead. Two persons were found sitting in that vehicle and some bags and paper cartons were kept in the car. On checking of the bags and cartons, Spasmo Proxyvon capsules and vials of Rexcof Syrup were found. Total number of capsules was 13248 and number of vials was 1165. 20 strips containing 480 capsules and 209 vials were separated as samples and packed into parcels which were sealed with seal impression 'T' and remaining drugs were put back in the same bag and cartons which were also sealed with the same seal. NCB form was updated and sample of seal was drawn. Seal was handed over to Sachin Kumar. Seizure memo Ext. PW-1/A was prepared. Case property was produced during the examination-in-chief of PW-1. In his cross-examination, he has admitted that videographer was engaged from Paonta Sahib. When vehicle was stopped for checking, at that time, two persons were sitting in front seat of the car. He did not recollect if another person was sitting in the backseat and whether he was caught in the video. He denied the suggestion that when the police conducted checking of the car, driver of the car told the police that the articles belonged to one Manoj Kumar, who was sitting on the backseat of the car. In further cross-examination he admitted that he has seen the DVD, which was displayed in the Court. In the picture, a person was sitting in the backseat of the car however, neither the person sitting in the backseat of the car nor the vehicle could be identified. Videography was done when vehicle was being checked. In his cross-examination by the learned Defence Counsel, he admitted that the place, where vehicle was stopped, was a busy place. The dickey of the car was opened by the police.

9. PW-2 Sachin Kumar deposed that he was engaged for videography during assembly elections during the year 2012. On 15.10.2012, he alongwith Tehsildar Paonta and Police officials was present at Khodari Majri for conducting videography. At about 5-5.30 PM, when they were present at the barrier, an Indigo Car bearing No. UK-07-AJ-2004 came from Paonta side. It was stopped for checking. Two persons were found sitting in the car. Police checked the vehicle. Capsules and vials were recovered which were kept in bags and paper cartons. Capsules were 13248 and vials were 1165 in number. Police separated samples from the bulk. He did not remember the number of capsules and vials separated. In his cross-examination, he has admitted that in the DVD displayed in the court a person was

seen sitting in the backseat of the car. He also admitted that at that time, besides the police officials, he, Tehsildar, some other persons were also present, who were watching the proceedings.

10. PW-3 Mohinder Singh deposed the manner in which vehicle was stopped, contraband was recovered. HC Rajinder scribed Rukka Ext. PW-3/A. It was handed over to him. He delivered the same to ASI Paramjeet Singh. He recorded FIR Ext. PW-3/B.

11. PW-4 Fateh Singh deposed that he has rented out one shop to a tailor, other shop to Manoj Kumar and third one was in his occupation. Manoj was selling drugs in the shop He was associated by the police on 18.3.2013. He was declared hostile and was cross-examined by the learned Public Prosecutor. He denied the suggestion that on 18.10.2012, accused Vinod Kumar and Firoz Ansari demarcated the shop of Manoj. He admitted that the police has prepared site map. In his cross-examination by the learned Defence counsel, he admitted that he had rented out shop to Manoj Kumar in September 2012. Manoj Kumar belonged to Haripur village situate near Vikasnagar. He had seen Manoj Kumar on the spot on 15.10.2012. He was not aware that he had loaded carton boxes in the car. He admitted that on that day, shop was open and some carton boxes were taken from the shop.

12. PW-5 HHC Narayan Singh deposed that on 15.10.2012 at about 10.40 PM, Inspector/SHO B.R. Mehta had deposited five paper cartons which were sealed with seal impression 'T' and resealed with seal impression 'A' purported to be containing Rexcof vials and five bags which were also sealed with seal 'T' and resealed with seal 'A' purported to be containing Spasmo Proxivon capsules and Rexcof vials. One sealed parcel sealed with seal bearing impression 'T' and resealed with seal impression 'A' purported to be containing 209 Rexcof vials and one sealed parcel sealed with seal bearing impression 'T' and resealed with seal impression 'A', also purported to be containing 480 capsules of Spasmo Proxyvon alongwith samples of seals 'T' and 'A', NCB form in triplicate and vehicle bearing No. UK-07-AJ-2004 were also deposited which were entered at Sr. No. 31 of the Malkhana Register. He sent two samples to FSL alongwith sample seals and NCB form through Constable Navraj Sharma vide RC No. 383/12.

13. PW-7 Constable Navraj Sharma deposed that on 17.10.2012, HHC Narayan Singh handed over two sealed parcels which were sealed with seal impression 'T' and resealed with seal impression 'A' alongwith samples of seals and NCB form. He delivered the same on 18.10.2012 to FSL Junga.

14. PW-8 Inspector Bhagat Ram, deposed that ASI Roshan Lal produced case property on 15.10.2012. He updated relevant columns of NCB form Ext. PW-8/A. Resealing memo Ext. PW-8/B was prepared. Thereafter, he deposited the case property in the Malkhana with HHC Mohinder Singh.

15. PW-10 HC Rajinder Kumar testified the manner in which vehicle was stopped, contraband was recovered. He scribed Rukka Ext. PW-3/A and sent the same to the police station Paonta Sahib through Constable Mohinder Singh. He denied the suggestion that Manoj was sitting in the backseat. He also denied that in the photograph some person was seen sitting in the backseat of the car. Volunteered that the photo pertained to later proceedings when some other person might have sat in the car.

16. PW-11 ASI Roshan Lal, investigated the case. He prepared site plan Ext. PW-11/A. He came to the Police Station and presented the case property and accused persons before SHO/Inspector Bhagat Ram. Resealing was done vide Ext. PW-8/B. Thereafter, he deposited the case property in the Malkhana. On 18.10.2012, accused persons demarcated the shop at Pachhmiwala in Tehsil Vikasnagar from where drugs were

allegedly loaded. He prepared demarcation memo Ext. PW-11/D. He recorded the statements of witnesses Fateh Singh and Ram Singh. He also raided the houses of accused persons but no incriminating material was recovered from their houses. In his cross-examination, he admitted that Fateh Singh had told him that he had rented out shop to Manoj where he stored drugs. Shop which was in possession of Manoj, was not opened by him. He also admitted that on 18 and 21.10.2012, he visited the house of Manoj but he was not traced.

17. DW-1 Karnail Singh deposed that he was running a Dhaba at village Khodari Majri. Khodari Majri bridge is situated at a distance of ½ kms from his Dhaba. On 15.10.2012, accused visited for taking money which he owed to him. He had visited at 3-3.30 PM and remained with him for about 1 or 1 ½ hours. He could not arrange for money to pay to the accused Firoj. At about 5-5.15 PM, he sat in the front seat of the car. There were two more persons in the car, one driver and one another person. In his cross-examination by the learned Public Prosecutor, he admitted that he had financial dealings with accused Firoz. He knew him for the last four years. He had not seen any black bag lying under the front seat of the car.

18. DW-2 Pritam Chand deposed that the accused were known to him. They have visited his shop on 15.10.2012 and they had purchased 5 kgs sweets and three baskets of apple, Banana, dates etc., in connection with engagement ceremony to be performed at Paonta Sahib. In his cross-examination by the learned Public Prosecutor, he deposed that the fruits and sweets were kept in the vehicle of the accused by his servant.

19. Learned advocates appearing for the accused have vehemently argued that the accused have been falsely implicated. Contraband belonged to one Manoj Kumar, who was sitting in the backseat of the car. PW-1 Rajinder Fishta, Tehsildar alongwith other police officials was at Khodari Majri barrier when vehicle was stopped. It has come on record that every vehicle was photographed. DVD was shown to Rajinder Fishta. PW-1 Rajinder Fishta admitted that picture which had been shown to him revealed some person sitting in the backseat but neither the person nor the vehicle could be identified from the slide. Videography was conducted by Sachin Kumar. In his cross-examination, he admitted that he could not say that when he conducted videography, whether some person was sitting on the backseat. He admitted that in the DVD displayed in the Court, some person was seen sitting in the backseat of the car. PW-4 Fateh Singh has testified in his examination-in-chief that he has rented out one shop to tailor, other shop to Manoj and third shop was in his occupation. Manoj was selling drugs in the shop. PW-11 ASI Roshan Lal in his cross-examination admitted that on 18 and 21.10.2012, he visited the house of Manoj, but he was not traced. It is duly proved that there were three occupants in the Car, accused Firoz Ansari and Vinod Kumar and third person was sitting in the backseat. Presence of third person in the backseat of the car has been admitted by PW-1 Rajinder Fishta and PW-2 Sachin Kumar. Presence of third person in the backseat of the car probablises the defence of the accused that the contraband belonged to Manoj Kumar who was sitting in the backseat of the car.

20. Mr. Ramesh Thakur, learned Deputy Advocate General, has vehemently argued that Manoj Kumar was not an occupant in the car. If that was so, there was no occasion for PW-11 Roshan Lal to visit the house of Manoj on 18 and 21.10.2012. Police has not associated any independent witnesses at the time when car was stopped, search, sealing and sampling proceedings were completed at the spot. PW-1 Rajinder Fishta has admitted in his cross-examination that the place, where vehicle was checked, was a busy place. PW-2 Sachin Kumar also deposed that besides the police official, Tehsildar and himself, there were other persons who were watching the proceedings being conducted at the spot. Police ought to have associated independent witnesses. It was neither a secluded nor an isolated place.

21. PW-5 Narayan Singh deposed that he was In Charge Malkhana. Case property was produced at about 10.45 PM on 18.10.2012 by Inspector B.R. Mehta. He made necessary entry in the Malkhana Register. Thereafter, case property was sent to FSL Junga through Constable Navraj Sharma vide RC No. 383/12. PW-7 Navraj Sharma has taken the case property alongwith NCB form to FSL Junga on 18.10.2012.

22. Case property was produced before the Court during the examination of PW-1 Rajinder Fishta. 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)."**

23. 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.

24. Sub-rule (2) Rule 22.18 of Punjab Police Rules, reads as under:

(2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.

Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so.

25. Rule 27.18 of Punjab Police Rules, reads as under:

27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).

Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced

> as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.
>
> (4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.
>
> (5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable.

26. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

27. In this case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer

authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

28. In Punjab Police Rules, also applicable to the State of Himachal Pradesh, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

29. Thus, the prosecution has failed to prove case against accused beyond reasonable doubt.

30. Accordingly, Cr. Appeals No. 23/2014 and 123/2014, are allowed. Judgment/order dated 2.12.2013 rendered by leaned Special Judge-I, Sirmaur at Nahan, HP, in Sessions Trial No. 02-ST/7 of 2013 is set aside. Accused are acquitted of the offence under Section 21 and 22 of the Act, giving them benefit of doubt. They are ordered to be released immediately, if not required by the police in any other case. Fine amount, if any, paid by them shall be refunded to them. Registry is directed to prepare and issue release warrants of the accused to the concerned Superintendent of Jail, forthwith.

31. Cr. Appeal No. 136/2014 preferred by the State fails and is accordingly, dismissed. All pending applications, in all the appeals, also stand disposed of.

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

State of Himachal Pradesh .....Appellant.

Versus

Manjeet Singh & ors. .....Respondent.

Cr. Appeal No. 238 of 2012
Reserved on: March 30, 2016.
Decided on: March 31, 2016.

Indian Penal Code, 1860- Section 302, 307, 323 read with Section 34- L, P and D had gone to Mundan ceremony of grand-son of P- L and P were having conversation after taking meals when accused M and G arrived at the spot and started quarreling with L and P- accused M was holding a glass bottle in his hand and he struck bottle on the head of L- accused G gave beatings to P and L with stick- L died in the incident- accused were tried and convicted by the trial Court for the commission of offences punishable under Sections 302, 307, 323 read with Section 34 of IPC- aggrieved from the judgment, appeal was preferred pleading that accused were to be convicted of the commission of offence punishable under Section 302 of IPC and that sentence imposed upon the accused was inadequate – held, in appeal that there was no pre-meditation nor common intention to kill deceased- accused were not seen carrying any sticks in their hands when they arrived in the courtyard - sticks used by accused were fuel wood- the incident had taken place at the spur of moment – hence, it cannot be said that accused had no intention to cause the death of L but they had knowledge that injuries were likely to cause death of L- hence, trial Court had rightly

convicted the accused of the commission of offences punishable under Sections 302, 307, 323 read with Section 34 of IPC.

Case referred:
Nankaunoo vs. State of Uttar Pradesh, (2016) 3 SCC 317

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment and order dated 30.11.2011 and 5.12.2011, respectively, rendered by the learned Sessions Judge, Kullu, H.P. in Sessions Trial No. 13/2010, whereby the respondents-accused (hereinafter referred to as accused), who were charged with and tried for offence punishable under Sections 302, 307, 323 read with Section 34 IPC, have been convicted and sentenced to undergo imprisonment for three years with fine of Rs. 10,000/- each for the offence punishable under Section 304 (II) IPC and in default of payment of fine, they were further ordered to undergo imprisonment for six months. The accused were also sentenced to undergo imprisonment for three years and to pay fine of Rs. 10,000/- each under Section 307 IPC and in default of payment of fine to further undergo simple imprisonment for six months. For the commission of offence under Section 323 IPC, the accused were sentenced to undergo imprisonment for one year and to pay fine of Rs. 1,000/- each and in default of payment of fine, they were further ordered to undergo simple imprisonment for one month. All the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that on 23.11.2009 at 1:30 AM (mid night), an information was received in the Police Station from Medical Officer, Kullu to the effect that a person in injured condition was brought to the hospital. The rapat Ext. PW-4/A was recorded in writing and ASI Rattan Chand alongwith HC Bir Singh reached RH Kullu. The statement of PW-6 Yuv Raj Ext. PW-6/A was recorded under Section 154 Cr.P.C and sent to Police Station, on the basis of which FIR was registered vide Ext. PW-10/A. According to the averments made in the statement, on 22.11.2009 Lotam Chand, Poshu Ram and Dabe Ram had gone in mundan ceremony of grandson of Bir Singh at Kashladi. After taking meals at 7:30 PM, Lotam Ram and Poshu Ram were having conversation in the courtyard of Mata Chamunda temple situated near house of Bir Singh, who was also present at some distance. In the meantime, accused Manjeet Singh and Garib Chand reached there and started quarrelling with Lotam Chand and Poshu Ram. Accused Manjeet Singh was holding a glass and bottle in his hands and he struck bottle on the head of Lotam Chand. Accused Garib Chand also gave beatings to Poshu Ram and Lotam Chand with danda of *'kail'*. They fell unconscious. When they alongwith Kishan, Nomi Ram and Ganga Ram were shifting injured Lotam Chand and Poshu Ram to the hospital, Lotam Chand died. The dead body of Lotam Chand was left there and Poshu Ram was shifted to hospital. The dead body of deceased was taken into possession and inquest reports Ext. PW-17/C and PW-17/D were prepared and dead body was sent for post mortem examination. PW-16 Sanjeev Chouhan after receipt of the information visited the spot. The accused persons were arrested. Disclosure statements were recorded. Dandas were recovered. Spot map was also prepared. Post mortem report qua Lotam Ram deceased Ext. PW-8/B was obtained. The case property was deposited with MHC. FSL reports Ext. PW-8/C, PW-15/B were obtained

and thereafter final opinion Ext. PW-7/A was obtained from the doctor. 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 18 witnesses. The accused were also examined under Section 313 Cr.P.C. They denied the incriminating circumstances put to them. The learned trial Court convicted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved the case against the accused under Section 302 IPC. He also contended that the sentences imposed under Section 307, 304 (II) and 323 IPC are also inadequate.

5. We have heard learned counsel appearing for the State and gone through the judgment and records of the case carefully.

6. PW-1 Nomi Ram testified that the accused who was in custody disclosed during investigation to the police that he has kept concealed the bottle by which he inflicted injuries to deceased Lotam Chand in the bushes in village Kashladi near Mata Chamunda temple. He also disclosed that the fact is only in his knowledge and he could get the same recovered. Chaman Lal son of Bhagat Ram was also with him. The statement was recorded vide Ext. PW-1/A. He signed the same. Manjeet Singh also signed the memo. In pursuance to the disclosure statement PW-1/A accused Manjeet Singh took the police party and got recovered the bottle which was concealed in the bushes behind Mata Chamunda temple. The same was taken into possession vide memo Ext. PW-1/B. In his cross-examination he deposed that he came to the Police Station alongwith complainant Yuv Raj. He also admitted that accused Manjeet got recovered broken pieces of bottle and not unbroken bottle. The accused got recovered 10-12 broken pieces of bottle in pursuance to the disclosure statement.

7. PW-2 Tara Chand deposed that the accused Garib Chand made a disclosure statement that he has concealed a small piece of wooden danda at Kashladi near water tank in the bushes and this fact was in his knowledge only. He could get recover the same. His statement was recorded vide memo Ext. PW-2/A. Similarly, accused Dharam Chand made disclosure statement to the police disclosing therein that he has concealed piece of wooden danda (Fari Lakri danda) at a place known as Kashladi near the temple in the bushes which fact was known to him only and could get the same recovered. The statement was recorded vide Ext. PW-2/B. In pursuance to the disclosure statements, the recoveries were made. The recovered wooden dandas were taken into possession vide memos Ext. PW-2/C and PW-2/D. In his cross-examination, he admitted that the temple in village Kashladi there is foot path. Adjoining to foot path, there are agricultural fields. He was not aware of the owners of those fields.

8. PW-4 HC Ram Krishan deposed that the case property was deposited with him. The case property which was deposited with him was sent to RH Kullu as well as FSL, Junga.

9. PW-6 Yuv Raj is the material witness. He testified that deceased Lotam Chand was his real brother. On 22.11.2009, he alongwith deceased Lotam Chand, Poshu Ram and Dhabe Ram had gone in mundan sanskar ceremony of grandson of Bir Singh at village Kashladi. At 7:30 PM, they took meals. At that time, his brother deceased Lotam Chand and Poshu Ram were talking with each other in the courtyard of Mata Chamunda temple. He was present at some distance from them. In the meantime, accused Manjeet Singh, Garib Chand who are residents of village Shahita came. He had seen both these

persons quarrelling with his brother deceased Lotam Chand and Poshu Ram injured. Manjeet was holding a bottle in his hand with which he hit on the head of his younger brother Lotam Ram. Garib Dass gave beatings to both Lotam Chand and Poshu Ram with danda of Kail and they became unconscious. At that time, Krishan Chand, Ganga Ram and Nomi Ram were with him. When they were lifting Lotam Chand and Poshu Ram in injured condition to hospital at Kullu, at some distance Lotam Chand died. He was left there on the way and Poshu Ram was hospitalized. His statement was recorded under Section 154 Cr.P.C. vide Ext. PW-6/A. He identified dandas Ext. P-4, P-6 and pieces of bottle Ext. P-2. In his cross-examination he deposed that he had seen deceased Lotam Chand and Poshu Ram from a distance of 12-15 feet. Dhabe Ram was also sitting with him. Besides 30-35 other persons were also in the temple yard. Four persons had come to attack his brother and Poshu Ram and the moment they came they pounced upon his brother and Poshu Ram. Accused Manjeet Singh gave bottle blow on the head of his brother Lotam Ram. His brother had sustained injuries on ear but could not tell it was right or left ear. He admitted about the old enmity with accused Manjeet Singh. In his cross-examination by the Advocate appearing on behalf of accused Garib Chand, he deposed that when Garib Chand gave danda blow to his brother, he ran towards him to rescue him but he ran away. In his cross-examination by the Advocate appearing on behalf of accused Dharam Chand, he deposed that Poshu Ram regained consciousness after 15 days, again deposed that after 15-20 days. Poshu Ram was first taken to PGI and thereafter he was sent back to Kullu hospital. In his cross-examination by the Advocate appearing on behalf of accused Heera Lal PW-6 Yuv Raj deposed that deceased Lotam Chandn was sitting on western side. When the police came to the spot on 23.11.2009, people from village had gathered there. The police did not inquire from them. He could not tell the size of the stone with which Heera Lal hit his brother. He denied the suggestion that Heeral Lal was not present on the spot.

10. PW-7 Dr. Akshat Chandel has examined Poshu Ram and proved MLC Ext. PW-7/A. he noticed following 7 injuries on his person:

"1. Bruise was present over base of neck right side 2 x 2 cm in size and was reddish in colour.

2. Bruise was present over left side of chest below axilla 3 x 3 cm in size reddish brown with underlying swelling present;

3. Bruise was present over left side of back 10 cms above anterior superior iliac spine reddish in colour 2 x 1 cm in size.

4. Bruise over right side of back just above anterior superior iliac spine reddish in colour 2 x 2 cm in size.

5. Burise was present over left arm above the elbow 2 x 1 cm reddish brown in colour.

6. Bruise was present over left forearm 10 cms above wrist volar aspect reddish in colour 2 x 1 cm in size.

7. Swelling was present on left side of skull above parietal region 3 x 3 cm. No discoloration of over lying skin. Fluctuation was present. No bleeding from the site was present. There was no active bleeding from any side."

He advised X-ray chest, posterior anterior view and x-ray skull anterior posterior lateral view. On receipt of chest x-ray report, x-ray was within normal limits whereas x-ray skull showed fracture parietal region right side. On the basis of these reports, he opined that the injury No. 7 was grievous and dangerous to life. Kind of weapon used was blunt. Duration of injuries was 6 to 12 hours. He also referred the patient to

IGMC Shimla for further management. In his final opinion, injuries No. 1 to 7 could have been caused by weapon in parcel 8 & 9.

11. PW-8 Dr. Palzore has conducted the post mortem examination on the dead body. He noticed following injuries on the dead body:

"**Injuries**:

(i) During the post mortem examination, we noticed multiple abrasions on right zygomatic area and right forehead, which were ante mortem in nature;

(ii) A lacerated wound of about 3 cm in size was over right upper eye-lid, which was also ante mortem in nature.

(iii) There was dark brown red blood oozing out of both nostrils, no mark and ligature dissection on or around the neck was seen.

After opening the skull, we noticed a large haematoma present on the parietal occipital region. No fracture of skull or vertebra was seen. There was dark brown blood and haematoma below the right parietal occipital region."

In his opinion, the person died due to head injury leading to brain hemorrhage and shock. The probable time that elapsed between injuries and death was within 1 to 2 hours and between death and post mortem was within 34 hours. The post mortem report is Ext. PW-8/B.

13. PW-11 Poshu Ram is the injured witness. He deposed that he alongwith Yuv Raj, Dhabe Ram and deceased Lotam Chand had gone to attend the mundane ceremony of grandson of Bir Singh. At about 7:30 PM, he alongwith deceased Lotam Chand after having dinner were sitting in the courtyard. The meal was served in the courtyard of Mata Chamunda temple. The people left the spot after taking meals. Some of them were present on the spot. The accused Manjeet Singh alias Manu, Garib Chand, Dharam Chand and Heera Lal were also present on the spot. He had gone to purchase biscuit from a shop at a distance of about 60-70 meters. When he came back, he noticed that deceased Lotam Chand was being mercilessly beaten by the accused. Accused Manjeet Singh was carrying bottle, Dharam Chand and Garib Chand were carrying fuel wood sticks of Kail wood and Heera Lal was having a stone. When he tried to rescue Lotam Chand, the accused persons also attacked him. The deceased was lying unconscious after the beatings given by the accused persons with the bottle, fuel wood sticks and stone. He also fell unconscious after the attack by the accused persons. After hearing noise, the villages came on the spot and he was shifted to the hospital. He regained consciousness after about one month. Deceased died on the spot due to beatings given by the accused persons. He remained admitted in Kullu Valley Hospital, PGI Chandigarh and thereafter in District Hospital Kullu for treatment. He identified broken pieces of bottle taken out from parcel Ext. P-1, fuel wood sticks Ext. P-4 and P-6. In his cross-examination by the Advocate appearing on behalf of accused Manjeet, he admitted that he could not tell about the cause of dispute since he had gone to buy biscuits. In his cross-examination by the Advocate appearing on behalf of accused Garib Chand he could not tell the exact date when he regained consciousness, however, he remained unconscious for one month. Perhaps, he regained consciousness in the month of December. In his cross-examination by the Advocate appearing on behalf of accused Heera Lal he deposed that accused Heera Lal gave beatings to the deceased with the help of stone weighing approximately 5 to 7 kgs. He and deceased Lotam Chand had sustained injuries with stone.

14. PW-12 Dhabe Ram testified that he had gone to attend mundan ceremony of grandson of Bir Singh. Accused persons had also come to attend the function. He and Yuv Raj were sitting in the courtyard of Mata Chamunda temple. After taking meals, people had gone to their houses. At about 7:30 PM, deceased Lotam Chand and Poshu Ram had some arguments over a point with accused persons. Accused Dharam Chand was having fuel wood stick, accused Heera Lal was having stone and accused Manjeet was having glass bottle. There was commotion on the spot. Deceased Lotam Chand and Poshu fell unconscious. They were shifted to the hospital. In his cross-examination by the Advocate appearing on behalf of accused Manjeet, he admitted that Manjeet was carrying empty bottle in his hand which was not broken at the relevant time. He admitted that pieces like Ext. P-2 are easily available everywhere. In his cross-examination by the Advocate appearing on behalf of accused Garib Chand he deposed that distance between Kashladi and Talpini is about 1 ½ to 2 kms. He reached the house of Bir Singh at about 8 or 9:00 AM. He did not know the mode as to how Lotam Chand was shifted to hospital since he had left for his house. In his cross-examination by the Advocate appearing on behalf of accused Dharam Chand he could not tell the exact date when his statement was recorded by the police. In his cross-examination by the Advocate appearing on behalf of accused Heera Lal, he could not tell the injuries sustained by deceased Lotam Chand because he had not seen these injuries. However, blood was oozing out from the nose of deceased Lotam Chand. He could not tell the injuries sustained by Poshu Ram injured.

15. PW-13 Dr. M.K. Kapoor examined x-ray films Ext. PW-13/A-1 to PW-13/A-3. He noticed fracture of skull in the left parietal region as per report Ext. PW-13/B.

16. PW-16 Dr. Lalit Bhardwaj deposed that the patient Poshu Ram was admitted on 24.11.2009 at about 8:45 AM in emergency Neuro Surgery of PGI, Chandigarh. The patient was referred from IGMC with alleged history of assault on 21.11.2009 near Kullu H.P. The patient had history of loss of consciousness. As per the clinical report and CT findings, injuries were grievous in nature. He issued MLC Ext. PW-16/A. The injuries sustained by him were possible with Ext. P-4 and P-6.

17. PW 17 Prem Dass deposed that on 23.11.2009 the case file was handed over to him by ASI Rattan Chand for investigation. He visited the spot and prepared the spot map Ext. PW-17/A. Photographs were also taken. Inquest reports were prepared. The dead body was taken to RH Kullu for post mortem. Thereafter, the statements of the witnesses were recorded as per their versions. Accused made disclosure statements, on the basis of which recoveries were effected. In his cross-examination by the learned Advocate appearing on behalf of accused Manjeet, he admitted that the bottle was broken in Malkhana and during transportation. The statements of other villagers present on the spot was not recorded. Neither Pradhan nor Panch or Lambardar were called to the spot as witnesses of recoveries. In his cross-examination by the learned Advocate appearing on behalf of accused Heera Lal, he admitted that he did not remember as to how many injuries were sustained by the deceased and injured. He has not obtained opinion qua injuries from the doctor.

18. PW-18 Dr. P.L.Thakur deposed that Poshu Ram was admitted in the hospital on 23.11.2009 and referred to PGI Chandigarh and he was again re-admitted on 26.11.2009. The patient was under treatment in PGI Chandigarh and discharged on 5.12.2009.

19. What emerges from the evidence discussed hereinabove is that Lotam Chand deceased and injured Poshu Ram were sitting in the courtyard. The accused Manjeet Singh was carrying the bottle and glass in his hands. He hit Lotam Chand deceased with the

bottle. Other accused gave beatings to Lotam Chand deceased and injured Poshu Ram with dandas and stone. The pieces of broken glasses Ext. P-2 and dandas Ext. P-4 and P-6 were recovered. Lotam Chand deceased died while being carried to the hospital. Injured Poshu Ram was taken to hospital. Inquest papers were prepared by PW-17 SHO Prem Dass. The post mortem of the dead body was also got conducted from the Medical Officer.

20. According to PW-8 Dr. Paljore, the probable time that elapsed between injuries and death was within 1 to 2 hours and between death and post mortem was within 34 hours. The person died due to head injury leading to brain hemorrhage and shock. The post mortem report issued is Ext. PW-8/B. Injured Poshu Ram has received seven injuries as per the statement of PW-7 Dr. Akshit Chandel. PW-11 injured Poshu Ram was also admitted in PGI Chandigarh. PW-16 Dr. Lalit Bhardwaj has examined him. He has issued MLC summary vide Ext. PW-16/A. There was fracture of skull in the left parietal region and injury No. 7 was found to be grievous in nature and dangerous to life.

21. The accused along with victims i.e. deceased Lotam Chand and injured Poshu Ram were present in the courtyard. There was neither pre-meditation nor common intention to kill deceased Lotam Chand. Lotam Chand deceased and Poshu Ram injured were sitting in the courtyard when according to the prosecution accused Manjeet hit the deceased with bottle and other accused gave beatings to the deceased and injured with sticks and stone. It is not the case of the prosecution that accused were seen carrying any sticks in their hands when they were coming to courtyard. Sticks were of fuel wood. According to PW-11 injured Poshu Ram, he and Lotam Chand deceased received injuries with stone. He did not remember the exact part of the body where injuries were sustained by him and Lotam Chand deceased with stone. PW-11 Poshu Ram is the injured witness. In his cross-examination, he admitted that he could not tell the cause of dispute since he had gone to buy biscuits. The police has neither associated Pradhan nor Up-Pradhan or Lambardar as independent witnesses at the time of recoveries made at the instance of the accused.

22. Their lordships of the Hon'ble Supreme Court in the case of ***Nankaunoo vs. State of Uttar Pradesh,*** reported in ***(2016) 3 SCC 317,*** have explained the difference between "intention" and "knowledge" and have held that knowledge is bare awareness and not the same thing as intention and such consequences shall ensue. As compared to "knowledge", "intention" requires something more than the mere foresight of the consequences, namely, the purposeful doing a thing to achieve a particular end. Their lordships have held as follows:

> "11. Intention is different from motive. It is the intention with which the act is done that makes a difference in arriving at a conclusion whether the offence is culpable homicide or murder. The third clause of Section 300 IPC consists of two parts. Under the first part it must be proved that there was an intention to inflict the injury that is present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. Considering the clause thirdly of Section 300 IPC and reiterating the principles in Virsa Singh's case, in Jai Prakash v. State (Delhi Administration) (1991) 2 SCC 32, para (12), this Court held as under:-
>
> "Referring to these observations, Division Bench of this Court in Jagrup Singh case, (1981) 3 SCC 616 observed thus: (SCC p. 620, para 7) "These observations of Vivian Bose, J. have become locus classicus. The test laid down in Virsa Singh case, AIR 1958 SC 465 for the applicability of Clause Thirdly is now ingrained in our legal system and has become part of the rule of law." The Division Bench also further held that the decision in Virsa Singh

case AIR 1958 SC 465 has throughout been followed as laying down the guiding principles. In both these cases it is clearly laid down that the prosecution must prove

(1) that the body injury is present,

(2) that the injury is sufficient in the ordinary course of nature to cause death,

(3) that the accused intended to inflict that particular injury that is to say it was not accidental or unintentional or that some other kind of injury was intended. In other words Clause

Thirdly consists of two parts. The first part is that there was an intention to inflict the injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury. Whereas the second part whether it was sufficient to cause death is an objective enquiry and it is a matter of inference or deduction from the particulars of the injury.

The language of Clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances.

The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue.

Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end."

23. In the instant case, Ext. P-2 is the broken pieces of bottle. PW-17 SHO Prem Dass, in his cross-examination, has categorically admitted that the bottle got broken in malkhana and during transportation. However, surprisingly, no DDR to this effect was lodged. The incident has taken place due to spur of moment in the compound of Chamunda Devi temple. Thus, it cannot be said that the accused persons had committed offence under Section 302 IPC read with Section 34 IPC. They had no intention to cause the death of Lotam Chand deceased. However, they had the knowledge that the injuries were likely to cause his death. It is, in these circumstances, the accused were convicted under Section 304(II) of the IPC instead of Sections 302 IPC.

24. The learned trial Court, taking into consideration the age of the accused has rightly sentenced the accused, as noticed hereinabove, for committing offence under Section 304 (II) IPC and Sections 307 and 323 IPC read with Section 34 IPC. Thus, there is no occasion for us to interfere with the well reasoned judgment and order of the learned trial Court dated 30.11.2011 and 5.12.2011, respectively.

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

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

Smt. Anand Rani and others .....Appellants.

Versus

Sh. Anil Kumar and others ...Respondents

FAO (MVA) No. 66 of 2010

Date of decision: 1st April,2016

Motor Vehicles Act, 1988- Section 166- Deceased was aged 83 years at the time of accident and was drawing pension of Rs.15,878/-- claimants are sons, daughters and widow of deceased- they are entitled to compensation as they have lost their father and husband- claimants have lost source of dependency of Rs.10,000/-- multiplier of '5' is applicable- claimants are entitled to Rs.6,00,000/- (Rs.10,000x12x5), under the head "Loss of income"- claimants are also entitled to Rs.10,000/- each under the heads of 'Loss of love and affection', 'Loss of estate', 'Funeral expenses' and 'Loss of consortium'- thus, total amount of Rs. 6,00,000/- + 40,000/- = Rs.6,40,000/- awarded in favour of the claimants along with interest @ 7.5% per annum from the date of the award on the enhanced amount.

(Para-7 to 11)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

For the appellant: Mr.R.K. Sharma, Sr. Advocate with Mr. Gaurav Thakur, Advocate.

For the respondents: Mr. Anup Rattan, Advocate, for respondent No.2.
Mr.Lalit K. 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 30.10.2009, made by the Motor Accident Claims Tribunal Una, H.P. in MAC Petition No. 13 of 2008, titled *Smt. Anand Rani and others vesus Sh. Anil Kumar and others*, for short "the Tribunal", whereby compensation to the tune of Rs.1,10,000/- alongwith interest @ 9% per annum was awarded in favour of the claimant No. 1 Smt. Anand Rani, hereinafter referred to as "the impugned award", for short.

2. The claimants have questioned the impugned award on the ground of adequacy of compensation and also that all the claimants are entitled to compensation.

3. The driver, owner and insurer have not questioned the impugned award on any ground. Thus, it has attained finality so far as it relates to them.

4. Claimants had sought compensation as per the breaks-ups given in the claim petition which was resisted and contested by the respondents and following issues came to be framed.

(i) Whether the deceased Siri Ram Joshi died in an accident caused due to the rash and negligent driving of the vehicle by respondent No. 2 owned by respondent No. 1? OPP

(ii) If issue No. 1 is decided in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPP

(iii) Whether the vehicle was being plied ion contravention of the terms and conditions of the insurance policy and respondent No. 3 is not liable to pay compensation?

(iv) Relief.

5. Parties have led the evidence.

6. There is no dispute about issues No. 1 and 3. The dispute revolves around issue No. 2 only.

7. Admittedly, the deceased was 83 years of age at the time of accident and was drawing Rs.15878/- as pension at the time of death. The claimants are sons, daughters and widow. All the claimants are entitled to compensation as they have lost father and husband. Learned counsel for the appellant/claimant prayed that the amount may be awarded only in favour of the widow. Thus, the compensation is to be awarded only to the widow.

8. The claimant has lost source of income and partner during the old age. Money is no substitute. Keeping all the things in view, it can be safely said that the claimant has lost source of dependency to the tune of Rs.10,000/- per month keeping in view the 2nd Schedule of 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***, multiplier of "5" is applicable in this case.

9. Viewed thus, the claimant is held entitled to the tune of Rs.10,000x12x5= Rs.6,00,000/-, under the head "Loss of income"

10. I hold that the claimants are 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/-
(iv)	Loss of consortium	:	Rs.10,000/-
			Total Rs.40,000/-

11. Accordingly, the total amount of compensation is awarded in favour of the claimants to the tune of Rs.6,00,000+Rs.40,000/-=Rs.6,40,000/-. Thus, in all, the claimant is held entitled to Rs.6,40,000/-, with interest at the rate of 7.5% per annum from the date of impugned award on the enhanced amount.

12. Having said so, the impugned award is modified as indicated hereinabove. The insurer is directed to deposit the 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

claimant Anand Rani Joshi, through payees' cheque account or by deposing the same in her bank account, strictly in terms of the conditions contained in the impugned award.

13. The appeal stands disposed of accordingly.

14. Send down the record forthwith, after placing a copy of this judgment.

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

Ashok Kumar .....Appellant
Versus
Lajya Devi and others ..... Respondents

FAO No. 13 of 2010.
Decided on : 01.04.2016

Motor Vehicles Act, 1988- Section 149- Claimants had pleaded that deceased was travelling in the vehicle as owner of goods- insurer admitted this fact in the reply- insurer had not led any evidence to prove that offending vehicle was being driven in violation of terms and conditions of the policy- burden was upon the insurer to prove this fact- insurer was saddled with liability in another case arising out of the same accident which has attained finality- Tribunal had wrongly absolved the insurer of the liability- insurer directed to deposit the amount along with interest. (Para-5 to 11)

For the appellant: Mr.Ratish Sharma, Advocate.
For the respondents: Mr.Ajay Chandel, Advocate, for respondent No.6.
Nemo for the other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

Subject matter of this appeal is the award, dated 1st October, 2010, passed by the Motor Accident Claims Tribunal, Chamba, H.P., (for short, the Tribunal), in Claim Petition No.47 of 2008, titled Lajya Devi and others vs. The Oriental Insurance Company Ltd. and another, whereby compensation only to the tune of Rs.5,19,600/-, with interest at the rate of 7.5% per annum from the date of the claim petitoin till deposit, was awarded in favour of the claimants and the owner/insured was saddled with the liability, (for short, the impugned award).

2. The insurer and the claimants have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the owner has questioned the impugned award on the ground that the Tribunal has wrongly fastened the liability on him.

4. Thus, the only question to be determined in this appeal is – Whether the owner/insured came to be rightly saddled with the liability? The answer is in the negative for the following reasons.

5. The claimants, in paragraphs 10 and 24 of the claim petition, have specifically pleaded that the deceased was traveling in the offending vehicle as owner of goods. It is apt to reproduce paragraphs 10 and 24 of the claim petition hereunder:

> *"10. Yes, the deceased was traveling by the ill fated vehicle as owner of goods.*
>
> *24. That the deceased was traveling by the ill fated vehicle alongwith his goods which was being driven by its driver in a very rash and negligent manner. ……."*

6. Owner/insured (original respondent No.2) had filed reply to the claim petition and admitted that the deceased was traveling in the offending vehicle as owner of the goods.

> *"Paras 8 to 10. That the paras No.8 to 10 of the petition are admitted to be correct.*
>
> *Para No.24. That the para No.24 of the petition is incorrect hence denied. The accident did not take place due to rash and negligent driving of answering respondent but it took place due to mechanical failure of vehicle and could not be averted despite of best efforts of the answering respondent."*

7. The insurer has filed the reply to the claim petition, which is quite evasive and cannot be termed as denial to the averments made in the claim petition, in terms of Order 8 of the Code of Civil Procedure.

8. In view of the above, it is not understandable as to how the Tribunal came to the conclusion that the deceased, at the time of accident, was traveling in the offending vehicle as gratuitous passenger, when the claimants specifically pleaded the said fact and the owner admitted the same, as discussed hereinabove.

9. Apart from it, the insurer has not led any evidence to prove that the offending vehicle was being plied in contravention to the terms and conditions of 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 can safely be said that the insurer has failed to prove that the owner has committed willful breach.

10. In addition to above, the impugned award needs to be set aside on another ground that in Claim Petition bearing No.74 of 2008, titled Nimo Devi and another vs. The Oriental Insurance Co. Ltd. and another, decided on 30th April, 2009, arising out of the same accident, the insurer was saddled with the liability. A copy of the award passed in the said petition was placed on record by the learned counsel for the appellant on the last date of hearing, when the learned counsel for the insurer was asked to verify whether the said judgment has attained finality. Today, the learned counsel for the insurer was not in a position to state whether the said judgment has attained finality or not. Be that as it may, the fact remains that in another case, arising out of the same accident, the insurer was saddled with the liability.

11. In view of the above discussion, it is held that the Tribunal has fallen in error in saddling the insured/appellant with the liability and has wrongly discharged the insurer. Accordingly, the impugned award is modified and the insurer is saddled with the liability. The insurer is directed to deposit the amount, alongwith uptodate interest, in the Registry of this Court, within a period of six weeks from today, and on deposit, the Registry is directed to release the amount in favour of the claimants, alongwith interest, through their bank accounts, after proper verification, strictly in terms of the impugned award. The

amount deposited by the insured/appellant is also awarded in faovur of the claimants, in addition to the amount awarded by the Tribunal, as litigation costs throughout.

12. The appeal stands allowed and disposed of accordingly.

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

Cr.A.Nos.75 of 2015 and 227 of 2015.
Reserved on: 4.3.2016.
Date of Decision: April 01, 2016.

1. **Cr.Appeal No.75 of 2015.**
Atul Thakur .....Appellant.
Versus
State of H.P. ...Respondent.

2. **Cr.Appeal No.227 of 2015**:
Rajinder Singh Thakur ... Appellant
Versus
Atul Thakur and others ...Respondents.

Indian Penal Code, 1860- Section 304 Part II- Son of the complainant had left to the house of his friend stating that there was a party and he would not return during the night- a telephonic message was received that son of the complainant was not feeling well and was brought to IGMC- when the complainant reached IGMC, he found his son dead- injuries were noticed on the body of the deceased with sharp edged weapon- accused were tried – accused 'A' was convicted, whereas, other accused were acquitted of the commission of offence punishable under Section 304 Part-II – aggrieved from the judgment, separate appeals were preferred by the complainant and accused- held, that witnesses had consistently deposed about the fact that convict had stabbed the deceased with knife- testimony of PW-11 was corroborated by the testimony of PW-12- Medical Officer noticed stab/incised wound, which could have been caused by means of a knife- opinion of Medical Officer is not sufficient to doubt the testimony of eye-witness- knife was recovered at the instance of convict which further corroborates the prosecution version- convict was armed with deadly weapon and had repeatedly attacked an unarmed person which shows his intention to commit the murder of the deceased- conviction of convict under Section 304 Part-II IPC is modified to Section 302 of IPC. (Para-3 to 20)

Appearing Counsel:
1. Cr.Appeal No.75 of 2015
For the Appellant: Mr. Satyen Vaidya Sr. Advocate with Mr.Vivek Sharma, Advocate.
For the respondent: Mr.M.A.Khan, Additional A.G.

2. Cr.Appeal No.227 of 2015
For the Appellant: Mr. Anoop Chitkara, Advocate
For the respondent: Mr.M.A.Khan, Additional A.G. for respondent –State.
Mr. Manoj Pathak, Advocate for respondent No.2.

The following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

Cr.Appeal No. 75 of 2015

This appeal stands directed against the impugned judgment rendered on 31.12.2014 by the learned Sessions Judge (Forests), Shimla, District Shimla, H.P. in Sessions Trial No. 39-S/7 of 2012 whereby the learned trial Court convicted and sentenced the appellant Atul Thakur to undergo rigorous imprisonment for five years for commission of offence punishable under Section 304 Part II of the Indian Penal Code besides also sentenced him to pay a fine of Rs.10,000/- and in default of payment of fine, he was sentenced to further undergo rigorous imprisonment for one year.

Cr.Appeal No.227 of 2015

2. The instant appeal is preferred by the complainant against the impugned judgment rendered on 31.12.2014 by the learned Sessions Judge (Forests), Shimla, in Sessions Trial No. 39-S/7 of 2012 praying therein that the conviction of accused Atul under Section 304-II IPC be modified to that of conviction under Section 302 IPC. Moreover a prayer has been ventilated therein of the order of acquittal recorded in favour of accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar being also set-aside. However, the State of Himachal Pradesh has neither preferred any appeal for reversing the findings of acquittal recorded in favour of accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar nor has preferred any appeal for enhancement of sentence imposed by the learned trial Court upon accused Atul.

Cr.A.Nos. 75 and 227 of 2015

3. The prosecution story, in brief, is that Rajinder Singh (the complainant) brought the matter to the notice of the police by recording his statement under Section 154 Cr.P.C. Ext.PW-10/A, wherein he has specifically alleged that on 27.7.2011, his son Hitesh had left the house on his motorcycle bearing registration No.HP-63-3235 for computer course. It is further alleged that he had informed his sister as well as his mother that he is going with his friend Akhilesh to his house and will not return in the night since he had to attend a party and will not come back during the night and stayed there. At about 3^{O} Clock accused Atul son of Ram Gopal telephonically informed him that his son was brought to IGMC who was not feeling well and when he reached IGMC he found his son lying dead. It is also alleged that he noticed injuries on stomach, chest, shoulder and other parts of the body of his son with sharp edged weapon and the blood was oozing out. His son was wounded by some body with sharp edged weapon in the intervening night of 27/28.7.2011 and during that period Atul was also with his son. The information qua scuffle which allegedly took place near Tunnel was made in the daily diary and thereafter Investigating Officer along with other police officials visited IGMC. On the statement of Rajinder Singh (complainant), the father of the deceased, FIR was registered.

4. On conclusion of the investigation into the offence, allegedly committed by the accused a final report under Section 173 of the Code of Criminal Procedure stood prepared and filed in the competent Court.

5. The accused, namely, Atul Thakur and Mukesh Thakur were charged by the learned trial Court for theirs committing offences punishable under Sections 302, 201 read with Section 34 of the Indian Penal Code and accused, namely, Nitish Sharma and Sandeep Kumar were charged by the learned trial Court for theirs committing offences punishable under Section 201 read with Section 34 of the Indian Penal Code, to which they pleaded not guilty and claimed trial.

6. In order to prove its case, the prosecution examined as many as 25 witnesses. On closure of the prosecution evidence, the statements of the accused under Section 313 Cr.P.C. were recorded, in which they pleaded innocence. On closure of proceedings under Section 313 Cr.P.C. the accused were given an opportunity to adduce evidence in defence which opportunity stood availed alone by accused Atul by examining DW-1 in his defence.

7. On an appraisal of the evidence on record, the learned trial Court returned findings of conviction under Section 304 Part II against accused/appellant, namely, Atul Thakur whereas it acquitted accused namely, Mukesh Thakur, Nitish Sharma and Sandeep Kumar qua the offences they stood charged with.

8. Mr.Satyen Vaidya, learned Senior Counsel appearing for the appellant/accused/convict Atul Thakur, has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court in exercise of its appellate jurisdiction and theirs standing replaced by findings of acquittal.

9. Mr.Anup Chitkara, learned counsel for the complainant, has also filed an appeal bearing Criminal Appeal No.227 of 2015 for modification of judgment of conviction rendered by the learned Trial Court qua accused Atul Thakur from Section 304 part II to one under Section 302 IPC. The learned counsel for the complainant has with considerable force and vigour contended qua the findings of acquittal, recorded by the learned trial Court in favour of Mukesh Thakur, Nitish Sharma and Sandeep Kumar standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal recorded qua them by the learned trial Court being liable for reversal by this Court, in the exercise of its appellate jurisdiction and theirs standing replaced by findings of conviction and concomitantly an appropriate sentence being imposed upon the accused/respondents.

10. On the other hand, the learned counsel appearing for the accused has with considerable force and vigour, contended qua the findings of acquittal, recorded in their favour by the Court below, standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference, rather meriting vindication.

11. 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.

12. In trite, as stands unfolded by the deposition of two eye witnesses to the occurrence namely, PW-11 Himanshu and PW-12 Manoj Bansal, deceased Hitesh, accused Atul, Mukesh, Manoj alongwith Himanshu and Ashutosh had consumed liquor in a party organized by the deceased in the house of Mukesh whereat an altercation erupted inter se deceased Hitesh and accused Atul spurred by the factum of the former smoking in the presence of the accused which invited an objection from the latter. In sequel to the altercation, which erupted inter se accused Atul and deceased Hitesh, sprouted by the factum of deceased Hitesh smoking in the presence of accused Atul which stood objected to by the latter, both PW-11 and PW-12 ocular witnesses to the occurrence unanimously depose of accused/convict Atul stabbing accused Hitesh with knife Ext.P-10 recovered under recovery memo Ext.PW-3/B. The ocular version qua the illfated incident rendered by PW-11 Himanshu vividly communicates the factum of accused convict Atul striking blows with knife Ext.P-10 on the person of deceased Hitesh sequelling his demise at IGMC,

Shimla. The deposition of PW-11 is lent amplifying corroboration by another ocular witness to the occurrence PW-12. PW-12 too has rendered a deposition qua the ill-fated occurrence bereft of any intra se contradictions viz-a-viz the deposition qua it rendered by PW-11. Moreover their respective depositions on oath qua the ill fated occurrence are also bereft of any inter se contradictions occurring in their respective examinations-in-chief viz.a.viz their respective cross-examinations. In aftermath both the ocular accounts qua the ill-fated occurrence acquire formidable evidenciary value. The formidability of the probative worth acquired by their respective testimonies gets accentuated by theirs omitting to in their respective depositions on oath either improve or embellish upon their previous statements recorded in writing qua the preeminent fact of accused convict Atul stabbing deceased Hitesh in their respective presence sequelling his begetting injuries reflected in Ext.PW-18/A and Ext.PW-23/A. Lack of any unfoldment on an incisive reading of their respective testimonies of theirs either embellishing or improving upon the afore-stated preeminent fact viz.a.viz their previous statements recorded in writing negates any inference of their ocular version qua the ill-fated occurrence standing besmirched with any taint, for belittling their corroborative ocular version qua the ill-fated occurrence of its creditworthiness. In aftermath, the ocular version qua the incident unfolded by the unblemished testimony of PW-11 and PW-12 fastens an inference of accused/convict Atul stabbing deceased Hitesh with knife sequelling injuries on his person reflected in Ext.PW-18/A which injuries ultimately begot his demise at IGMC, Shimla. The medical evidence connotative of stab wounds standing perpetrated on the person of deceased Hitesh stand initially constituted in Ext.PW-18/A proven by PW-18. Therein on his examining the person of deceased Hitesh, he has recorded the hereinafter extracted observations:-

> "(i) One stab/incised wound over front of chest with clear cut margin about 2x1 cm of size;
>
> (ii) Two stab wounds present on the mid auxiliary left side of the chest with clear and clean cut margin. One of size 3x1 cm and other 2x1 cms;
>
> (iii) One stab would on upper abdomen of size 3x2 cm;
>
> (iv) One stab would was present over the left shoulder with clear cut margins of size 2x1 cm and one small incised would 1x1 cm present over the left side of lower chest."

13. He has in his examination-in-chief unfolded with candor of injuries delineated in Ext.PW-18/A being sequelable by user of knife Ext.P-10. In his cross-examination he has rendered a communication of the Autopsy Surgeon being alone competent to depose whether one end of the wound carried clear margins or both the sides of the wounds carried clear margins or acute ends. He in his cross-examination has further unfolded the factum of his not standing capacitated to depose with certainty qua injuries existing on the body of Hitesh being sequelable by user of knife Ext.P-10. Now, it is imperative to advert to the testimony of PW-23, who subjected the body of deceased to postmortem and prepared Ext.PW-23/A, exhibit where stands proven by him wherein he has in extenso on his subjecting the body of the deceased to post mortem delineated the hereinafter extracted injuries:-

> "(i) Red abrasion 1.1x.2 present over left eye-brow;
>
> (ii) Red abrasion .8x.2 present over left side of face;
>
> (iii) Circular red abrasion .15x.15 present over right side of forehead;
>
> (iv) Red abrasion.2x1 on right side of face;
>
> (v) Horizontal incised would 2.4x.1x.1 over right anterior aspect of neck;
>
> (vi) Red contusion 2x1 cm lateral to injury No.5.

Chest:

(vii) Vertical spindle shape incised wound 2x1x1.5 present over left anterior aspect of thorax;

(viii) Stab wound 1.5x1 communicating with left side pleural cavity;

(ix) Oblique stitched stab wound 2.5x1 cm present over left lateral aspect of chest communicating with the left pleural cavity;

(x) Oblique incised stitched wound 2.5x1x1 cm with acute ends regular inverted clean cut;

(xi) Incised wound 2x1x.5 was present over antero lateral aspect of left shoulder;

Abdomen:

(xii) Incised wound of size 3x2x2 with inverted regular clean cut margin;

(xiii) Horizontal incised wound with single stitch in the centre 4x1x1 cm;

Cranium and Spinal Cod:

Pale.

Thorax: Plurae 2.5 liters clotted blood present in the left pleural cavity.

Left Lung: Incised wound 2.5x1x2 cm was present in the left lower lobe.

Abdomen: Stomach 500 CC, partially digested food, mixed with fluid, pungent odor present. Rest pale."

14. He has ascribed irreversible hemorrhagic shock as sequelled by ante mortem injuries to the chest and lung of the deceased to beget his demise. He has also proven Ext.PW-23/B which records the factum of the injuries occurring on the body of the deceased being sequelable thereon with the user of knife Ext.P-10. However, the deposition of PW-23 constituted in his cross-examination unfolding the factum of injuries, 5,7,8 to 12 and 13 being sequelable only with user of double edged sharp weapon arises from the factum of his deposing qua the margins of the wounds, observed by him to be existing on the body of the deceased while holding his post mortem examination, carrying acute ends and clear cut regular margins. The existence thereof on the body of the deceased subjected to post mortem examination by him constrained him to depose of their occurrence thereon ousting the user of knife Ext.P-10. He has hence in his cross-examination dispelled the factum of knife Ext.P10 standing used for infliction of injuries aforesaid noticed by him on the body of deceased while subjecting it to post mortem examination or its constituting the weapon, user whereof begot the injuries delineated by him in his post mortem report Ext.PW-23/A.

15. The aforesaid expositions by PW-23 in his deposition constituted in his cross-examination verging upon his dispelling the user of knife Ext.P-10 in the occurrence of injuries on the person of deceased Hitesh, has prompted a submission on the part of the learned counsel for convict/accused of their hence occurring a sharp discrepancy intra se the ocular version qua the ill fated occurrence existing in the testimonies of ocular witnesses thereto viz.a.viz medical evidence manifested in the testimony constituted in the cross-examination of PW-23 wherein he has dispelled the user of knife Ext.P-10 on the person of the deceased and obviously its begetting the injuries enumerated in Ext.PW-23/A, with a concomitant effect of belittling the ocular version qua the incident enunciated by PW-11 and PW-12 besides as a corollary shaking the bed rock of the prosecution case harboured upon their respective testimonies.

16. For reasons afore-stated, the testimonies of the ocular witnesses to the ill fated occurrence comprised in the unbesmirched testimonies of PW-11 and PW-12 acquire formidable evidentiary value. The foisting of primacy to ocular evidence in the event of an

ocular account qua the occurrence standing not bereft of creditworthiness cannot stand either blunted nor would become tenuous, even in the event of medical evidence comprised in the testimony of the doctor who subjected the body of the deceased to post mortem examination overruling as deposed by PW-11 and PW-12 the user of weapon of offence i.e. knife Ext.P-10 by accused Atul on the person of the deceased and its user thereon by him begetting the injuries noticed by him to, on his conducting an autopsy on his person occurring thereat especially when the predominant reason which prevailed upon him for dispelling the user of knife Ext.P-10 for begetting the injuries noticed by him on the person of deceased on his subjecting it to autopsy, is of injuries No. 5, 7, 8 to 12 and 13 standing observed by him to carry acute ends and clear cut regular margins which special characteristics borne by them stand opined by him to be sequelable by double edged sharp weapon which Ext.P-10 is not. The opinion formed by PW-23 loses its tenacity rather its effect evanesces spurable from the factum of both eye witnesses to the occurrence deposing of convict/accused Atul repeatedly delivering stab blows on the person of the deceased. The factum of convict/accused Atul striking repeated stab blows on the deceased stands unrepulsed as the learned defence counsel has omitted to subject both PW-11 and PW-12 to an efficacious cross-examination qua the facet aforesaid. As a corollary, with hence an inference of accused convict Atul repeatedly stabbing deceased Hitesh stands grooved in evidence of probative worth and vigour, the concomitant deduction which ensues therefrom, is of with accused convict Atul repeatedly stabbing deceased Hitesh with knife Ext.P10 as a corollary his repetitive acts of stabbing the deceased at those places where wounds were noticed by PW-23 to carry acute ends and clear cut regular margins renders the aforesaid striking features borne by the wounds occurring thereon to stand sequelled by his initially thereon stabbing deceased Hitesh with sharp end of Knife Ext.P-10, his withdrawing it there-from where-after he re-stabbed the deceased with the like sharp end of Knife Ext.P-10 at the very same place where injuries No. 5,7,8 to 12 and 13 were noticed in Ext.PW-23/A by PW-23. Consequently, a tenable explication for the aforesaid wounds carrying acute ends and clear cut regular margins stands purveyed. In sequel, the dispelling of user of knife Ext.P-10 by PW-23 and in its begetting the injuries afore-stated loses all its formidability. As a sequitur with the aforesaid explication standing aroused for the discordance intra se the ocular version qua the ill fated occurrence viz-a-viz the medical evidence rather wanes the submission of the learned counsel for the convict/accused Atul of incompatibility intra-se both the aforesaid pieces of evidence, discounting the probative worth of the eye witness account qua the ill fated occurrence. Therefore, there is complete compatibility intra se the medical evidence vis-a-vis the ocular account qua the ill fated occurrence whereupon an invincible conclusion qua the guilt of the accused qua the commission of the offence for which he stood charged, tried and convicted stands clinched.

17. The factum of recovery of weapon of offence i.e. Knife Ext.P-10 under recovery memo Ext.PW-3/B preceding whereat a disclosure statement Ext. PW-11/A stood recorded by the Investigating Officer in the presence of PW-11 and PW-12, both whereof stand proven by both of them to stand prepared in their presence, constitutes its efficacious recovery in the manner ordained by law. In sequel, the proven recovery of Knife Ext.P-10 at the instance of convict accused Atul by the Investigating Officer in the presence of PW-11 and PW-12 amplifyingly fastens immense tenacity to the ocular version qua the ill fated occurrence besides to the medical evidence.

18. The learned trial Court had for infirm and tenuous reasons embedded upon the factum of convict/accused Atul stabbing deceased Hitesh in a sudden fight in a heat of passion, proceeded to record findings of conviction qua him for his committing an offence punishable under Section 304 part II of the Indian Penal Code. However, even if a physical fight had occurred between both the deceased and convict/accused Atul besides even if the

duel which occurred inter se both was in a heat of passion nonetheless the factum of accused/convict Atul wielding a knife Ext.P-10 whereas deceased Hitesh standing unarmed did lend an incompatible empowerment to accused viz-a-viz deceased Hitesh rather with accused/convict Atul standing armed aborted the duel which occurred inter se him and deceased Hitesh to be either free or fair. Only when accused/convict Atul was unarmed as deceased Hitesh was and took to in a sudden fight or scuffle which occurred inter se them perpetrate fist and kick blows on the deceased, yet the fatality of such fist or kick blows may have exculpated the guilt of accused Atul qua his carrying a *mens rea* in his mind to commit murder of deceased rather would have rendered him amenable to avail the benefit of Section 304 part II IPC. However, with convict/accused Atul standing armed with knife Ext.P-10 hence standing possessed with a lethal weapon for foisting in him an unfair leverage besides superiority vis-a-vis deceased Hitesh who stood unarmed hence rendering the scuffle which occurred inter se them to be neither equal nor fair, invites a further inference of especially when he struck repeated blows with knife Ext.P-10 on vital portions of the body of the deceased, of his carrying in his mind the requisite *mens rea* to commit the murder of deceased Hitesh, dehors the factum of a sudden scuffle standing erupted inter se both or its eruption arising in a heat of passion. In aftermath, this Court holds that the accused/convict Atul is guilty of committing an offence punishable under Section 302 IPC. In sequel, the appeal filed by the complainant bearing Criminal Appeal No.227 of 2015 is partly allowed. The judgment of the learned trial Court convicting accused Atul for committing an offence under Section 304 part II stands reversed and modified accordingly. Criminal Appeal No. 227 of 2015 is also directed against the findings of acquittal recorded by the learned trial Court qua accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar. However, the findings of acquittal recorded by the learned trial Court qua accused aforesaid for theirs committing offences for which they stood respectively charged by the learned trial Court do not merit any interference as on a wholesome reading of evidence adduced on record against them, this Court is of the firm view that the appreciation of evidence qua them as done by the learned trial Court does not suffer from any perversity or absurdity nor it can be said that the learned trial Court in recording findings of acquittal in favour of the accused aforesaid has committed any legal misdemeanor, in as much, as, it having mis-appreciated the evidence on record or its omitting to appreciate relevant and admissible evidence. In aftermath this Court does not deem it fit and appropriate that the findings of acquittal recorded by the learned trial Court qua them merits any interference. Moreover, the prosecution stood possessed with evidence as comprised in the testimony of PW-2 to canvass for the accused aforesaid committing offences punishable under Section 201 read with Section 34 IPC. He has in his deposition deposed of the motor cycle owned by deceased standing parked at 103 tunnel. He has also deposed of it not bearing any blood stains. It stood taken into possession under memo Ext.PW-2/A. He has also in his testimony unfolded the factum of accused/convict Atul in his presence disclosing of his alongwith accused Mukesh carrying the deceased to IGMC on Pulsar motorcycle which bore blood stains. The latter motorcycle was taken into possession vide memo Ext.PW-2/B. Even if assumingly of hence the accused concerting to skew the factum of the ill fated occurrence standing not occurred at Summer Hill, nonetheless the efficacy, if any, of the deposition of PW-2 whereupon a charge under Sections 302 and 201 IPC read with Section 34 IPC stood respectively framed against the accused, who however stood acquitted by the learned trial Court, falters rather is blunted by PW-2 deposing in his cross-examination of his being unaware whether Ext.PW-2/B stood signatured by accused Mukesh or not besides by the factum of his deposing therein of his signatures on Ext.PW-2/B standing obtained at IGMC. In sequel the factum of recovery of motor cycle owned by the deceased Hitesh purportedly from 103 tunnel and its bespeaking the factum of the ill-fated occurrence occurred thereat besides its constituting a concert on the part of the accused to negate besides skew the site

of occurrence, stands denuded of its vigour especially when it was found thereat with its keys hence facilitating an inference of its standing carried thereat at the instance of the Investigating Officer for falsely arraying accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar. Accordingly, the judgment of acquittal rendered by the learned Court below qua accused Mukesh Thakur, Nitish Sharma and Sandeep Kumar is maintained and affirmed. The appeal filed by complainant bearing Cr.Appeal No.227 of 2015 is dismissed qua accused aforesaid. The conviction of accused Atul under Section 304 Part-II IPC recorded by the learned trial Court is modified to one under Section 302 IPC.

19. Let the accused/convict Atul Thakur be heard on quantum of sentence on **20th April, 2016.**

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

Bajaj Allianz General Insurance Co. Ltd. .....Appellants.

Versus

Smt. Krishna Sharma and others ....Respondents

FAO (MVA) No. 98 of 2010
Date of decision: 1st April,2016

Motor Vehicles Act, 1988- Section 149- It was contended that vehicle was being driven in breach of the terms and conditions of the route permit- held, that it was for the insurer to prove that vehicle was being driven in breach of insurance policy- there was no satisfactory evidence to prove this fact- hence, insurer was rightly held liable to pay the compensation- deceased was aged 40 years- amount awarded cannot be said to be excessive- interest was awarded on the higher side and should have been @ 7.5% per annum- award modified.

(Para-8 to 11)

For the appellant: Mr. Aman Sood, , Advocate.

For the respondents: Mr. Sanjeev Kuthiala, Advocate, for respondents No. 1 and 2.
Mr.Gaurav Gautam, Advocate, for respondents No. 3 and 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 10.12.2009, made by the Motor Accident Claims Tribunal-II, Solan, camp at Nalagarh, H.P. in MAC Petition No. 4-NL/2 of 2008, titled *Smt. Krishna Sharma and another versus Shri Gulzar Singh and others*, for short "the Tribunal", whereby compensation to the tune of Rs.4,35,000/- alongwith interest @ 12% 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. The claimants, driver and owner have not questioned the impugned award on any ground. Thus, it has attained finality so far as it relates to them.

3. The insurer has questioned the impugned award on the grounds taken in the memo of appeal.

4. Claimants had sought compensation, as per the breaks-ups given in the claim petition, which was resisted and contested by the respondents and following issues came to be framed.

(i) Whether the death of Hitesh was caused on account of rash and negligent driving by the respondent NO.2, as alleged? OPP

(ii) In case issue No.1 is proved in affirmative as to what amount of compensation the petitioner is entitled to and from whom? OPP

(iii) Whether the vehicle at the time of accident was under valid insurance, if so its effect thereof? OPR

(iv) Whether the driver was not holding a proper and valid driving licence, if so, its effect thereof? OPR-3.

(v) Whether the vehicle was being driven plied in violation of the terms and conditions of the policy, if so, its effect thereof? OPR

(vi) Relief

5. Parties have led the evidence.

6. Claimants have examined PW1 Dr. M.R. Verma, PW2 Ashok Kumar, PW3, Hakam Singh and PW4 Kumar Kaushik. The respondent examined RW1 Praman Preet Singh.

7. The learned counsel for the appellant has not questioned the findings returned on issues No. 1, 3 and 4. Thus, the findings returned on these issues are upheld.

8. The learned counsel for the appellant has addressed the arguments viz-a-viz issues No. 2 and 5. According to him, the appellant has proved that the vehicle was being driven in breach of the terms and conditions of the route permit. There is nothing on the file which can be made the basis for holding that the vehicle was being driven in breach of the permit. It was for the insurer to lead evidence to prove that the vehicle was being driven in breach of the insurance policy or in violation of the mandate of Sections 147 and 149 of the Motor Vehicles Act, for short "the Act". The Tribunal has discussed all these issues in paras 11 to 13 of the impugned award, need no interference.

9. It was for the insurer to plead and prove by leading positive evidence that the owner has committed willful breach. As discussed hereinabove, neither there is any evidence on the file nor it is proved.

10. Admittedly, it is proved that the deceased was 40 years of age at the time of accident and the claimants have lost source of hope and help. The amount awarded cannot be said to be excessive rather it is adequate. But the interest awarded is on the higher side. It should have been @ 7.5% per annum.

11. Having said so, the impugned award is modified by providing that the claimants are entitled to compensation awarded by the Tribunal but with interest @ 7.5% per annum from the date of claim petition till its realization.

12. Accordingly, the impugned award is modified as indicated hereinabove. The Registry is directed to release the awarded amount in favour of the claimants, through payees' cheque account or by depositing the same in their bank accounts, 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.

13. The appeal stands disposed of accordingly.

14. Send down the record forthwith, after placing a copy of this judgment.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Court on its own motion ...Petitioner.

Versus

State of Himachal Pradesh and others ...Respondents.

CWPIL No. 1 of 2016
Reserved on: 28.03.2016
Date of order: 01.04.2016

Constitution of India, 1950- Article 226- Affidavits filed stating the steps taken by the Officers to comply with the direction issued by the Court - held, that prima facie all the officers had failed to comply with the direction made by the Court and orders passed by the Court from time to time- SIT directed to find out prima facie who are the officers involved in the commission of the offences - further direction issued to file the details of the deaths and the status of the investigation in respect of District Solan- all the concerned officials directed to file fresh status reports - all the Courts directed not to take up any matter which is directly or indirectly connected with the present writ petition- any order passed by any Court will be subject to the order passed by the Hon'ble Court in the writ petition. (Para-1 to 39)

Present: Mr. Ramakant Sharma, Senior Advocate, as Amicus Curiae, with Ms. Soma Thakur, Advocate.

M/s. R.L. Sood, Bipin C. Negi & Mr. K.S. Banyal, Senior Advocates, with Mr. Vijender Katoch, Advocate.

Mr. Sunil Mohan Goel, Advocate, for the intervener.

Mr. Shrawan Dogra, Advocate General, with Mr. M.A. Khan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate General, for the respondents-State.

Mr. Hamender Chandel, Advocate, for respondent No. 5.

Mr. Naresh K. Sood, Senior Advocate, with Mr. T.S. Chauhan, Advocate, Advocate, for respondent-State Pollution Control Board.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

The Chief Secretary to the Government of Himachal Pradesh has filed affidavit/status report in terms of the directions contained in order dated 25th February, 2016 and 3rd March, 2016, and has expressed profound and sincere apologies for not complying with/carrying out the directions contained in paras 40 and 44 of the order, dated 25th February, 2016, is accepted.

2. The said affidavit/status report does disclose that the Chief Secretary to the Government of Himachal Pradesh has taken steps to comply with the directions, is directed to file follow-up action/ fresh status report.

3. Ms. Anuradha Thakur, Secretary (I&PH) to the Government of Himachal Pradesh, has also filed affidavit in compliance to para 6 of the order, dated 3rd March, 2016, read with the orders passed from time to time, which finds place at pages No. 1425 to 1434 of the paper book.

4. It also contains the details relating to the action drawn by the Chief Secretary and the said Secretary to comply with the directions made by this Court and also to ensure smooth water supply of safe and clean drinking water to Shimla town and how to design the schemes.

5. In para 4 of the affidavit/status report, it has been reported that they have decided to allow Mr. Suman Vikrant to continue as the Chairman of the Committee, is permitted.

6. The said affidavit/status report also contains the details of the steps taken for creation of the statutory body. Video conference was held with the Ministry of Urban Development, Government of India, on 4th March, 2016 and deliberations were made.

7. In compliance to the directions contained in paras 17 and 18 of order, dated 3rd March, 2016, the particulars of the officers, who were manning the posts with effect from 18th September, 2014, till the jaundice outbreak, have been given at pages No. 1437 to 1440 of the paper book (Annexures R-II and R-III).

8. *Prima facie,* it appears that all the said officers have failed to comply with the directions made by this Court in CWPs No. 441 of 2007 and 4122 of 2014 and the orders passed from time to time, are directed to show cause as to why they should not be punished in terms of the mandate of the Contempt of the Courts Act.

9. It is made clear that in case, contempt proceedings have already been initiated against any of the officers, whose names are figuring in Annexures R-II and R-III, no fresh rule is to be framed.

10. In terms of the directions contained in para 12 of the order, dated 3rd March, 2016, the Secretary (I&PH) was directed to indicate as to what procedure was followed by the officers/officials while releasing the amount in favour of the contractor and the officer(s)/official(s), who had passed the bills.

11. The status report is silent about the same, though, in para 5 of the same, it has been stated that the procedure contained in Annexure R-I was followed for releasing the amount. But, what procedure was followed, how much amount was released and whether the amount was released after following due procedure, i.e. after following codal formalities, is not forthcoming.

12. The Secretary (I&PH) is directed to furnish fresh status report indicating as to whether the procedure was rightly followed or a slip was given to the procedure in order to make the payments to the contractor and who were the officers/officials, who had processed the bills and made the orders for releasing the payment.

13. She is also directed to explain why departmental proceedings have not been initiated so far against the officer(s)/official(s) involved, which was the mandate of para 40 (v) of order, dated 25th February, 2016 read with para 14 of order, dated 3rd March, 2016.

14. Status reports are to be filed only in this Public Interest Litigation in terms of the directions passed by this Court from time to time read with this order and filing of status report/compliance report in CWP No. 4122 of 2014 is dispensed with for the time being.

15. All the Deputy Commissioners, Superintendents of Police except Superintendent of Police, Shimla, and Chief Medical Officers have filed status reports, which

are on record, do disclose that they are taking steps to do the needful as required in terms of the orders passed from time to time.

16. The Superintendent of Police, In charge, SIT, has filed the status report, which is at pages 1871 to 1873 of the paper book. The perusal of the same does disclose that SIT is trying to conclude the investigation, but it is not known whether they have been able to find out, *prima facie,* who are the officers/persons involved in the commission of the offences right from the year 2007.

17. SIT is directed to do the needful and comply with the directions contained in orders, dated 25th February, 2016 and 3rd March, 2016, and submit status report by or before the next date of hearing. Any deviation shall be viewed seriously.

18. SIT has also reported that some more deaths have taken place in Shimla, but has not given the details. The report is silent viz-a-viz the investigation carried out by them relating to District Solan, is directed to file details of the deaths and the status of the investigation in respect of District Solan.

19. At this stage, it is stated at the Bar that the Chief Engineer, National Highways, US Club, Shimla, be arrayed as a party-respondent in the array of respondents, because some needful is to be done at National Highway near Tara Mata Temple at BCS, Shimla, to ensure smooth water supply of safe and clean drinking water to Shimla town and the State be directed to make the payments, which would be required for doing the needful and also to compensate the damages, if any, caused.

20. Accordingly, Chief Engineer, National Highways, US Club, Shimla, is arrayed as party-respondent, shall figure as respondent No. 46 in the array of respondents. Registry to carry out necessary entries in the cause title.

21. Issue notice to newly added respondent No. 46. Mr. J.K. Verma, learned Deputy Advocate General, waives notice on behalf of the said respondent.

22. Respondent No. 46/concerned authority is directed to remain present on spot and allow the concerned department to do the needful as per the rules occupying the field and in case, steps are required, which may cause damage, be done at the cost of said department and that department has to bear all the expenses in order to ensure smooth, safe and clean water supply to Shimla town.

23. All the concerned authorities/officers/officials including the Deputy Commissioners, Superintendents of Police and Chief Medical Officers are directed to file fresh status reports in terms of the directions passed by this Court in terms of orders, dated 25th February, 2016, 3rd March, 2016 and the directions passed hereinabove by or before the next date of hearing.

24. Learned Advocate General stated at the Bar that some directions have been passed by the Hon'ble High Court while hearing the bail applications and it is very difficult for the officers to comply with the directions passed by this Court in this Public Interest Litigation.

25. It is apt to record herein that the Deputy Commissioner, Kangra at Dharamshala, has reported that there was on-going problem of water stagnation in the middle of the market near old Bus Stand, Kangra town, due to the blockage and while complying with the Court directions, the Sub Divisional Magistrate, Kangra, had drawn action under Section 133 and 144 of the Code of Criminal Procedure (for short "CrPC") in order to do the needful, but the concerned person filed an application before learned ACJM, Kangra, who directed to register a case against the SDM, Tehsildar and the other officers in Kangra under Section 156 (3) CrPC, which is coming in the way of passing the orders and

virtually the SDM is caught by the said orders and it be made clear as to whose orders are to be complied with. It has further been reported that the said person had caused a blockage of *"Gair Mumkin Nalli"* (drain) as recorded in the revenue record.

26. Learned Advocate General reported that perhaps learned ACJM, Kangra, was not aware about the orders passed by this Court and he has passed the orders in ex-parte. Had he issued the notice, the officers concerned also would have informed him about the orders passed by this Court. Further prayed that orders be passed so that the directions can be complied with without any hindrance.

27. This Court has issued directions contained in paras 50 and 51 of order, dated 25th February, 2016, which read as under:

> *"50. All the Courts in the State of Himachal Pradesh are directed not to take up any matter, which is directly or indirectly connected with CWPIL No. 10 of 2015, CWP No. 3511 of 2015 and CWPIL No. 1 of 2016. Any person, who is aggrieved or wants clarification, is at liberty to approach this Court.*
>
> *51. It is made clear that SIT, police agencies, accused persons and other affected persons are at liberty to approach the Court(s) of competent jurisdiction for redressal of their grievances in FIR No. 03/16, dated 6th January, 2016, registered at P.S. Dhalli, which is being investigated by SIT, as discussed hereinabove."*

28. In view of the above, the Courts of competent jurisdiction were given liberty only to hear the matters arising out of FIR No. 03/16 with clear cut direction to all the Courts in the State of Himachal Pradesh not to take up any matter which is directly or indirectly connected with CWPIL No. 10 of 2015, CWP No. 3511 of 2015 and CWPIL No. 1 of 2016.

29. We wonder, how ACJM Kangra has made the directions, as discussed hereinabove. He is directed to submit the report.

30. It is made clear that the orders passed by this Court relating to the subject matter shall occupy the field. Any order passed by any other Court, Civil or Criminal, shall not come in the way of the officers to do the needful as required under the law in order to comply with the directions passed by this Court.

31. The Commissioner, Municipal Corporation, Shimla, Member Secretary, Pollution Control Board and the Chief Engineer (I&PH) have also filed the status reports, the perusal of which does disclose that they have taken some steps to do the needful.

32. Additional Chief Secretary, i.e. the Principal Secretary (Education) to the Government of Himachal Pradesh has not filed affidavit in terms of the directions contained in para 24 of the order, dated 3rd March, 2016, is directed to show cause as to why he has failed to file the affidavit. He is also directed to file affidavit in terms of para 24 of order, dated 3rd March, 2016.

33. Additional Chief Secretary (Urban Development & TCP) has also not filed the affidavit in terms of para 21 of order, dated 3rd March, 2016. Mr. J.K. Verma, learned Deputy Advocate General, stated at the Bar that the affidavit will be filed during the course of the day. His statement is taken on record. Additional Chief Secretary (Urban Development & TCP) is also directed to file fresh status report by or before the next date of hearing.

34. At the request of the learned Advocate General, the personal appearance of the Superintendent of Police, Shimla, is dispensed with for today, is directed to file fresh affidavit in terms of the previous orders read with this order.

35. Mr. Tikender Singh Panwar, Deputy Mayor, Municipal Corporation, Shimla, has submitted a letter, dated 26th March, 2016, with respect to the outcome of the workshop held on 4th March, 2016, by the Municipal Corporation, Shimla, relating to the subject matter of this Public Interest Litigation, which finds place in the noting file of the case, is made part of the file.

36. In terms of the directions contained in para 35 of the order, dated 3rd March, 2016, the Senior Administrative Officer (H), PGI, Chandigarh, has informed, vide letter, dated 15th March, 2016, that no death of any resident of the State of Himachal Pradesh has taken place due to Hepatitis A/Hepatitis E (jaundice) with effect from 23rd February, 2016 to 10th March, 2016.

37. In compliance to order, dated 25th February, 2016, the State has deposited a sum of ₹ 20,00,000/- before the Registry.

38. It has been reported by the Registrar (Judicial) that the Secretary (I&PH) filed the details of 388 officers/officials, including the Law Officers, Draftsman, Drivers, PAs and Stenographers and that is why contempt proceedings have not been framed.

39. It is worthwhile to record herein that contempt proceedings are to be framed against those officers/officials, who were manning the Lift Water Supply Scheme, Ashwani Khad and were responsible to take all care and precaution, and not against the other officers/officials, i.e. Law Officers, Draftsman, Drivers, PAs, Stenographers and other ministerial staff.

CMP No. 1864 of 2016

40. Granted. The application is disposed of.

41. The personal appearance of all the officers except those who are facing contempt proceedings and the Superintendent of Police, Shimla, is dispensed with for the time being.

42. All the respondents/officers are directed to file fresh status reports by or before the next date of hearing. List on **3rd May, 2016.** Copy **dasti.**

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No. 1971 of 2011
with CWP No.1972 of 2011
Reserved on: 21.3.2016
Decided on: 01.04.2016

CWP No.1971 of 2011

Faryad Bhatti ...Petitioner

Versus

High Court of H.P ...Respondent

CWP No.1972 of 2011

Roop Singh Thakur ....Petitioner

Versus

High Court of HP ....Respondent

Constitution of India, 1950- Article 226- Petitioners were working as Superintendents and on account of increase in court work they were deputed to discharge the functions of Court Secretaries, which they did from 2.4.2007 to 7.1.2009- they preferred a representation claiming salary and allowances payable to the Court Secretaries but this representation was turned down by the respondent- petitioners claimed salary for the post of Court Secretaries- held, that a person merely asked to discharge the duties of higher post cannot be treated on promotion and cannot get the salary of the higher post- fundamental Rule 49 also does not provide that additional pay is admissible to government servant who is asked to hold current charge of urgent duties of another post, irrespective of the duration of this charge- petition dismissed. (Para- 4 to 11)

Cases referred:

Ramakant Shripad Sinai Advalpalkar Vs. Union of India AIR 1991 SC 1145

State of *Haryana Vs. S.M. Sharma & ors 1993 Supp (3) SCC 252*

Mohinder Pal Puri Vs.State of HP & anr 2013 (2)SLC 1017

A.Francis Vs. Management of Metropolitan Transport Corporation Ltd, Tamil Nadu (2014)13 SCC 283

For the Petitioners: Mr.B.C. Negi, Senior Advocate with Mr. Pranay Pratap Singh, Advocate.

For the Respondent: Mr. Vikas Rathore, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

The sole question to be determined in these petitions is as to whether an employee who has simply been deployed to discharge his duties on higher post without actually been appointed either on substantive or officiating capacity can be held entitled to the salary and allowances of the higher post.

2. Both the petitioners in March, 2007 had been working as Superintendents and on account of increase in court work, because of the elevation of new Hon'ble Judges to this Court, they were deputed to discharge the functions of Court Secretaries, which they did so with effect from 2.4.2007 to 7.1.2009. They preferred a representation on 30.4.2009 claiming salary and allowances payable to the Court Secretaries, however, the same was turned down by the respondent on 5.11.2009, leading to the filing of instant petitions.

3. The respondent in its reply has averred that the petitioners were simply deployed to discharge the duties of Court Secretaries and were never appointed as such in accordance with the Rules in any capacity including substantive or officiating and thus no legal right whatsoever is conferred upon the petitioners to claim salary of higher post. It is further averred that in terms of Rule 49 of the FRSR Part-1 (General Rules), payment of salary of higher post can only be claimed in a situation where a government servant is appointed to officiate as a temporary measure against such higher post and would not be applicable to a case where the government servant is simply deployed on a higher post in view of the administrative exigency. It is further averred that it was on account of pendency

of Writ petition No.1743 of 2002 titled as ***Tek Ram & Ors*** *Vs.* ***Hon'ble High Court of HP & Ors*** and later on LPA No.7 of 2007 in which the vires of the Recruitment and Promotion Rules of the Officers and Staff of the Registry was under challenge, that no promotion could be made against the vacant posts of Court Secretaries, which in turn compelled the respondent to depute the petitioners to work as Court Secretaries on the elevation of new Judges to this Court.

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

4. Sh.B.C. Negi, learned Senior counsel for the petitioners has vehemently argued that claim of the petitioners is squarely covered under Fundamental Rule 49 (for short 'Rule') and thus there is no reason or logic for the respondent for not paying the petitioners the salary and allowances payable to the Court Secretaries.

5. Before we advert to the interpretation of Rule 49, we may notice that an identical issue on the principles involved in the instant case came up for consideration before the Hon'ble three Judges of the Hon'ble Supreme Court in **Ramakant Shripad Sinai Advalpalkar Vs. Union of India AIR 1991 SC 1145,** wherein it was categorically held that where an officer who substantively holds a lower post and is merely asked to discharge the duties of a higher post cannot be treated as a promotion and in such case he does not get the salary of the higher post, but gets only 'charge allowance'. It was further held that such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only discharges the duties of the higher post essentially as a stop gap arrangement. It is apt to reproduce relevant portion of the judgment which reads thus:

> *"4. On the first contention, the very terms of the office order dated 30th August, 1963 (Exhibit A) is clear and conclusive. It says :*
>
> > *"Shri Ramakanta Sripada Sinai Advol-palcar, acting 3rd grade officer of the Caixa Economica de Goa will perform the duties of the Treasurer of Caixa Economica de Goa, vice Shri Antonio Xavier Furtado, who died this morning. Shri Advolpalcar should assume the function of the post from today.*
> >
> > *Shri Advolpalcar will draw besides the monthly salary of his own post as acting 3rd grade officer an allowance of Rs. 100/- p.m. which is payable to the post of treasurer under the existing rules....." (Emphasis supplied)*
> >
> > *The arrangements contemplated by this order plainly does not amount to a promotion of the appellant to the post of Treasurer. The distinction between a situation where a Government servant is promoted to a higher post and one where he is merely asked to discharge the duties of the higher post is too clear to require any reiteration. Asking an officer who substantively holds a lower post merely to discharge the duties of a higher post cannot be treated as a promotion. In such a case he does not get the salary of the higher post; but gets only that in service parlance is called a "charge allowance". Such situations are contemplated where exigencies of public service necessitate such arrangements and even consideration of seniority do not enter into it. The person continues to hold his substantive lower post and only*

discharges the duties of the higher post essentially as a stop-gap arrangement.

6. Similar issue thereafter came up for consideration before the Hon'ble Supreme Court in **State of *Haryana*** *Vs.* ***S.M. Sharma & ors 1993 Supp (3) SCC 252,*** where too the incumbent though an SDO was entrusted with the charge of the post of Executive Engineer and it was held as under:

"11.Sharma was given the current duty charge of the post of Executive Engineer under the orders of the Chief Administrator and the said charge was also withdrawn by the same authority. We have already reproduced above Rule 4(2) of the General Rules and Rule 13 of the Service Rules. We are of the view that the Chief Administrator, in the facts and circumstances of this case, was within his powers to issue the two orders dated June 13. 1991 and January 6, 1992.

12.We are constrained to say that the High Court extended its extraordinary jurisdiction under Article 226 of the Constitution of India to a frivolity. No one has a right to ask for or stick to a current duty charge. The impugned order did not cause any financial loss or prejudice of any kind to Sharma. He had no cause of action whatsoever to invoke the writ jurisdiction of the High Court. It was a patient misuse of the process of the Court. "

7. At this stage, we may now advert to the provisions of FR-49 which reads thus:

"*F.R. 49. The State Government may appoint a Government servant already holding a post in a substantive or officiating capacity to officiate, as a temporary measure, in one or more of other independent posts at one time under that Government. In such cases, his pay is regulated as follows:-*

(i) Where a Government servant is formally appointed to hold full charge of the duties of a higher post in the same office as his own and in the same cadre/line of promotion, in addition to his ordinary duties, he shall be allowed the pay admissible to him, if he is appointed to officiate in the higher post, unless the competent authority reduces his officiating pay under Rule 35; but no additional pay shall, however, be allowed for performing the duties of a lower post;

(ii) Where a Government servant is formally appointment to hold dual charges of two posts in the same cadre in the same office carrying identical scales of pay, no additional pay shall be admissible irrespective of the period of dual charge:

Provided that if the Government servant is appointed to an additional post which carries a special pay, he shall be allowed such special pay;

(iii) Where a Government servant is formally appointed to hold charge of another post or posts which is or are not in the same office, or which, though in the same office, is or are not in the same cadre/line of promotion, he shall be allowed the pay of the higher post or of the highest post if he holds charge of more than two posts in addition to ten percent of the presumptive pay of the additional post or posts, if the additional charge is held for a period exceeding 45 days but not exceeding 3 months:

Provided that if in any particular case it is considered necessary that the Government servant should hold charge of another post or posts for a period

exceeding 3 months, the concurrence of the Finance Department shall be obtained for the payment of the additional pay beyond the period of 3 months;

(iv) where an officer is formally appointed to hold full additional charge of another post, the aggregate of pay and additional pay shall in no case exceed Rs.80,000/-

(v) No additional pay shall be admissible to a Government servant who is appointed to hold current charge of the routine duties of another post or posts irrespective of the duration of the additional charge;

(vi) If compensatory or sumptuary allowances are attached to one or more of the posts, the Government servant shall draw such compensatory or sumptuary allowances as the State Government may fix:

Provided that such allowances shall not exceed the total of the compensatory and sumptuary allowances attached to all the posts."

8. It would be evident from the perusal of FR-49 (5) that no additional pay is admissible to government servant who is appointed to hold current charge of urgent duties of another post, irrespective of the duration of this charge. Even in the instant case, it was on account of elevation of new Hon'ble Judges to this Court that the petitioners were deputed to discharge the functions of Court Secretaries.

9. Similar issue came up before a Coordinate Bench in the case of **Mohinder Pal Puri Vs.State of HP & anr 2013 (2)SLC 1017,** wherein this Court held as under:

"5. F.R. 49(5), unambiguously clarifies that no additional pay is admissible to a government servant, who is appointed to hold current charge of urgent duties of another post, irrespective of the duration of the additional charge. Also our specific attention is invited to sub-rule (3) of F.R. 49, in support of the petitioner's claim. Said Rule, also, in the given facts, is inapplicable. Petitioner was not formally appointed to hold charge of another post. Also it cannot be said that the post of Commandant is not in the same cadre/line of promotion. As such, in our considered view, petitioner's claim for grant of additional pay and fixation of higher pay for the purpose of pension stands rightly rejected by the Tribunal.

6. The Apex Court in Selvaraj vs. Lt. Governor of Island, Port Blair and others, (1998) 4 SCC 291, had the occasion to deal with a case where for justifiable reasons, even though the petitioner could not be promoted, but was also made to discharge the duties of a higher post, his claim for salary for higher post was disallowed.

7. The Apex Court in (1997) 6 SCC 200, Mohd. Swaleh vs. Union of India and others, repelled the contention of an employee basing his claim for higher salary under the Rule in question, on the principle of quantum merit.

8. The Apex Court in D.D.Suri vs. Union of India and another, (1979) 3 SCC 553, while dealing with Rule in question has also disallowed the claim of an employee for additional salary of the post for which he was to discharge additional duties. In the said decision, the Court considered the applicability of the fundamental rules in extenso.

9. Thus we see no reason to interfere in the impugned order.

10. The Apex Court in Secretary-cum-Chief Engineer, Chandigarh vs. Hari Om Sharma and others, (1998) 5 SCC 87, referred to by learned counsel for the petitioner, in the given facts is not applicable. Petitioner therein was promoted

as Junior Engineer, however, such promotion was neither on regular basis nor was he paid salary for the said post. It is in these circumstances, the Apex Court granted relief to the petitioner holding that order of promotion cannot be considered as a stop-gap-arrangement.

11. Reliance by the petitioner on the decision of the Apex Court in Selvaraj vs. Lt. Governor of Island, Port Blair and others, (1998) 4 SCC 291, is misconceived as in the said case also, the Apex Court was dealing with the case where the employee was posted and asked to discharge duties only of a higher post."

10. On similar lines is the decision rendered by the Hon'ble Supreme Court in **A.Francis Vs. Management of Metropolitan Transport Corporation Ltd, Tamil Nadu (2014)13 SCC 283,** wherein it was observed as under:

"6. *The order dated 28.28.2.2001, by which the appellant was ALLOWED TO DISCHARGE DUTIES IN THE POST OF Assistant Manager had made it clear that the appellant would not be entitled to claim any benefit therefrom including higher salary and further that he would continue to draw his salary in the post of Assistant Labour Welfare Officer. If the above was an express term of the order allowing him to discharge duties in the higher post, it is difficult to see as to how the said condition can be overlooked or ignored. The decision of this Court in (1998) 5 SCC 87 was rendered in a situation where the incumbent was promoted on ad hoc basis to the higher post. The aforesaid decision is also distinguishable inasmuch as there was no specific condition in the promotion order which debarred the incumbent from the salary of the higher post. Such a condition was incorporated in an undertaking taken from the employee which was held by this Court to be contrary to public policy."*

11. In view of the aforesaid exposition of law, prayer of the petitioners for grant of salary and allowances of the post of Court Secretary cannot be countenanced and being devoid of any merit cannot be acceded to. These petitions are sans merit and are accordingly dismissed, leaving the parties to bear the costs.

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BEFORE HON'BLE MR JUSTICE RAJIV SHARMA, J.

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

Cr. Appeal No. 383 of 2006.
Reserved on: March 31, 2016.
Decided on: April 01, 2016.

Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989- Section 3(1)(x)- **Indian Penal Code, 1860-** Section 506- Accused came to the house of the complainant, a member of scheduled caste- accused abused his old parents and other lady members of the family- complainant requested the accused not to do so on which accused said 'Chamara teri yeh auquat ki tu mera sath zabaan larae'- complainant requested him not to repeat the expression "chamar" repeatedly but the accused threatened to kill him- brother of the complainant came at the spot who was also threatened- PW-1 also arrived at the spot and requested the accused not to abuse complainant and family members on which accused

said 'Tusan Rajputan chamar sar par charah rakhey hain"- matter was reported to the police on which FIR was registered- accused was tried and convicted by the trial Court- there was discrepancy regarding the person who had lodged the original complaint- name of 'S' was not mentioned in the complaint- no witness from neighbourhood was examined by the prosecution- parents or sister-in-law of the complainant were not cited as witnesses- in these circumstances, prosecution case was not proved- appeal accepted- accused acquitted.

(Para-10 to 13)

For the appellant: Mr. Rajesh Mandhotra, Advocate.
For the respondent: Mr. Neeraj K. Sharma Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 16.11.2006, rendered by the learned Special Judge, Kangra at Dharamshala, H.P. in Sessions Case No. 15-N/VII of 2005, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Section 3 (1) (x) of the Scheduled Caste and Scheduled Tribe (Prevention of Atrocities) Act, 1989 (hereinafter referred to as the Act) and under Section 506 IPC was convicted and sentenced to undergo rigorous imprisonment for a period of one year and to pay fine of Rs. 2000/- under Section 3(1) (x) of the Act. In default of payment of fine, the convict was further ordered to undergo simple imprisonment for a period of two months. No separate sentence was awarded under Section 506 IPC.

2. The case of the prosecution, in a nut shell, is that PW-2 complainant Pritam Chand filed a complaint Ext. PW-2/A in the Special Court on 24.5.2004 alleging therein that he and accused i.e. appellant Inderjeet Singh were permanent residents of Village and Post Office Guryal, Tehsil Nurpur, Distt. Kangra, H.P. The complainant belongs to scheduled caste (sub-caste Chamar) and the accused belongs to Rajput community. On 30.3.2004, at about 8:30 AM, when the complainant returned to his house from the fields, he found that the accused had come to his house. He was threatening and abusing his old parents and other lady members of the family. The complainant requested the accused not to do so, however, the accused uttered following words against him; "*Chamara teri yeh auquat ki tu mera sath zabaan larae*". He requested him not to repeat the expression "chamar" repeatedly. However, the accused threatened to kill him. In the meantime, Bishan Singh PW-3, brother of the complainant reached on the spot. The accused also threatened Bishan Singh. PW-1 Sukh Dev son of Bhim Singh, caste Rajput also reached the spot and requested the accused not to abuse complainant and his family members. The accused replied in the following words; "*Tusan Rajputan chamar sar par charah rakhey hain*". The complainant moved an application on 31.3.2004 before the Pradhan Scheduled Castes Welfare Sabha, Tehsil Nurpur. The complaint was sent by the Pradhan to the SHO, Police Station, Nurpur on 4.4.2004 after making enquiry on the spot. However, the police did not take any action. PW-4 Raj Kumar, brother of complainant moved an application before the Deputy Commissioner, Kangra at Dharamshala requesting him for making immediate inquiry and taking suitable action against the accused on 12.5.2004. It is, in these circumstances, the complaint was filed under Section 3(1) (x) of the Act. The Special Court framed charges against the accused under Section 3(1) (x) of the Act and under Section 506 IPC on 19.1.2006.

3. The prosecution, in order to prove its case, has examined as many as 4 witnesses, namely, Sukh Dev Singh PW-1, Pritam Singh, PW-2, Bishan Singh PW-3 and Raj Kumar PW-4. The accused was also examined under Section 313 Cr.P.C. He has denied the

prosecution case. The learned trial Court convicted and sentenced the accused, as noticed hereinabove.

4. Mr. Rajesh Mandhotra, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Neeraj K. Sharma, Dy. Advocate General, for the State has supported the judgment of the learned trial Court dated 16.11.2006.

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

6. PW-1 Sukh Dev Singh testified that he knew the accused and complainant. According to him, complainant belongs to *"chamar"* caste and accused belongs to *"Rajput"* caste. On 30.3.2004, at about 8:00 AM, he was going to his fields. He was passing by the side of the house of the complainant. Accused was present there near the house of the complainant. The accused was abusing the complainant. He was calling him *"chamar"* repeatedly. He told him that complainant could not compete with him being a scheduled caste. He advised the accused not to do so. The complainant felt humiliated. The family members of the complainant were also present there. In his cross-examination, he deposed that his house is about 500 meters away from the house of the complainant. He admitted that during the previous night, one woman had died adjacent to his house. She was cremated on the next day at about 2:00 PM. He had not gone to bring coffin for her. He did not enter the house of the complainant. He had not accompanied the complainant to the Pradhan of the Scheduled Castes in connection with this case. In his further cross-examination, he admitted that the daughter and wife of the accused were the candidates for Anganwari teacher.

7. PW-2 Pritam Chand is the complainant. He deposed that he came back to his house from the fields on 30.3.2004 at about 8:30 AM. When he returned to his house from the fields, he found that the accused was standing in his verandah. The accused was threatening and abusing his old parents and other lady members. He requested the accused not to do so, however, the accused uttered following words against him; "*Tum chamaron ke dimag charh gay hain aur tum chamar sar par baith gaye hain*". He requested him not to repeat the expression *"chamar"* repeatedly and speak decently. The accused asked him to call his niece Renu Bala, however, he told him to talk instead of calling her. However, the accused threatened to kill him and told him that "*Oai chamara toon mere saath jawan lara raha hai*". He was humiliated and insulted by the utterances of the accused. He asked him not to behave in that manner. In the meantime, Bishan Singh, brother of the complainant reached on the spot. The accused also threatened Bishan Singh. Sukh Dev also reached on the spot and requested the accused not to abuse the complainant and his family members. However, accused told Sukh Dev that *rajputs* have spoiled the minds of the *"chamars"*. He moved the complainant Mark "A" to the Pradhan "*Anusuchit Jaati Kalyan Sabha, Nurpur*". The complaint was forwarded by the Pradhan to the SHO, Police Station, Nurpur on 4.4.2004 after making enquiry on the spot. However, the police did not take any action. Raj Kumar, his brother moved an application before the Deputy Commissioner, Kangra at Dharamshala requesting him to make immediate inquiry and take suitable action against the accused on 12.5.2004. In his cross-examination, he admitted that he has not written in the complaint that Sukh Dev had also come on the spot and in his presence the accused called his brother as *"chamar"*.

8. PW-3 Bishan Singh is the brother of the complainant. According to him, they belong to *chamar* caste and accused was *Rajput*. On 20.3.2004 (sic 30.3.2004), at about 8/8:30 AM, he returned from his fields. At that time, he noticed that the accused was abusing his brother Pritam by saying that he is a *"chamar"*. In the meantime, Sukh Dev

also reached on the spot who asked the accused not to harass them. On this the accused replied that "*tum rajputon ne inko sir per chadah diya hai*". Thereafter, he went from the spot. In his cross-examination, he admitted that there were 5-7 houses in their neighbourhood.

9. PW-4 Raj Kumar testified that the complainant is his brother. On 30.3.2004 when he returned from his work, he was told by the complainant Pritam Chand that the accused had come to their house in the morning and he had abused Pritam Chand in the name of caste and insulted him. In his cross-examination, he admitted that complaint Ext. PW-2/B was written by his maternal Uncle Des Raj. The police visited the spot but they were not informed about the visit.

10. PW-2 Pritam Chand deposed that the original complaint Ext. PW-2/B was written by his brother Raj Kumar at their house. However, PW-4 Raj Kumar deposed that Ext. PW-2/B, complaint was written by his maternal Uncle Sh. Des Raj. According to the prosecution, at the time of incident on 30.3.2004, PW-1 Sukh Dev was present on the spot. He requested the accused not to utter derogatory remarks against the complainant and his family members. However, fact of the matter is that the name of Sukh Dev has not been mentioned in the complaint. PW-2 Pritam Chand has admitted in his cross-examination specifically that he did not write in the complaint that Sukh Dev had also come to the spot and accused called his brother as '*chamar*'. In case PW-1 Sukh Dev was present on the spot, his name ought to have been mentioned in the complaint. There were 5-7 houses in the neighbourhood of complainant's house but no witness from these houses was cited by the prosecution.

11. PW-1 Sukh Dev has admitted that his daughter and wife of the accused were the candidates for Anganwari worker. This could be the reason for PW-1 Sukh Dev to depose falsely against the accused. Neither the parents nor the sister-in-law of the complainant were cited as witnesses by the complainant who were admittedly present in the house on 30.3.2004.

12. Now, as far as the statement of PW-4 Raj Kumar is concerned, it is hearsay since he was told by complainant Pritam Chand that accused had come to their house in the morning and he had abused Pritam Chand in the name of caste and had insulted him. He was not present on the spot.

13. Thus, the prosecution has miserably failed to prove the case against the accused under Section 3(1) (x) of the Act as well as under Section 506 IPC. The learned trial Court has not correctly appreciated the oral as well as documentary evidence available on record.

14. Consequently, the appeal is allowed. Judgment of conviction and sentence rendered by the learned trial Court dated 16.11.2006 is set aside.

****

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

Jatinder Kumar. ...Petitioner

Versus

Kusum Lata. ...Respondent

CMPMO No. 439 of 2015

Date of decision: 1.4.2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff filed a suit for seeking permanent prohibitory injunction for restraining the defendant from raising any construction over the best, valuable and exclusive portion of the land- an application seeking interim relief was also filed- defendant pleaded that land was partitioned during the life time of 'B'- trial Court allowed the application- appeal was preferred which was dismissed- held, that mere fact that property is joint is not sufficient to seek an injunction- every case is to be decided on the basis of facts and circumstances of that particular case- law regarding the injunction in a case of co-owners has been settled in ***Ashok Kapoor Vs. Murthu Devi***, **I L R 2015 (III) HP 1312 –** order set aside and Courts directed to decide the application in accordance with the parameters laid down in ***Ashok Kapoor Vs. Murthu Devi's*** case.

Cases referred:
Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram, AIR 1961, Punjab 528
Praduman Singh Vs. Narain Singh, 1992 (2) SLJ 897.
Brij Lal Vs. Puran Chand, 2011(1 Him L.R. 80
Roop Chand Vs. Indra AIR 1997 MP 200
Ashok Kapoor Vs. Murthu Devi, decided on 24.6.2015

For the Petitioner: Mr. Nimish Gupta, Advocate.
For the Respondent: Mr.Adarsh K. Vashishta, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (oral).

This petition under Article 227 of the Constitution of India is directed against the order passed by learned Additional District Judge, Chamba, whereby affirmed the order passed by Civil Judge (Senior Division) Chamba in an application filed under Order 39 Rules 1 and 2 C.P.C.

2. Brief facts leading to filing of the instant petition are that the plaintiff/respondent filed a suit for prohibitory injunction restraining the defendant/petitioner, his agents, servants and workmen from raising any forcible and illegal construction over the best, valuable and excessive portion of the joint suit land comprised in Khatta Khatauni No. 863/967, Khasra No. 3268, 3298, 3311, 10045/3312, 3410, 3411, 3414 Kita 7 measuring 483-04 square yards, situated at Mauza Chamba Shehar-II, Pargana Panjla, Tehsil and District Chamab, H.P. till it is partitioned by meets and bounds. Along with the suit an application for injunction under Order 39 Rule 1 and 2 C.P.C. for restraining the respondents from raising any forcible or illegal construction was also filed.

3. It was alleged that the suit land was joint amongst the parties and no partition had taken place and therefore, no co-sharer was competent to raise construction or change the nature of the suit land in any manner whatsoever. But still the petitioner with a view to grab the best portion of the joint land had started raising construction of the house and he be restrained from doing so.

4. It the written statement as also reply to the application under Order 39 Rule 1 and 2 C.P.C., the petitioner alleged that the respondent/plaintiff along with her children and one Sh. Ramesh Kumar were recorded as joint tenants to the extent of 2/8 shares,

however they had already covered more than their share in the entire land in the shape of using it as grave yard for burying their parents and husband of the present plaintiff. It was further alleged that the property had already been partitioned during the life time of Sh. Brij Lal. It was further alleged that the share of the plaintiff/respondent at best is 2/8th share, whereas the petitioner is the owner of ½ share of the suit land.

5. The learned trial Court allowed the application by holding that *"it is well settled law that none of the co-sharers can raise construction or change the nature of the land till the same is partitioned by regular process of law or without the consent of other co-sharer."* This observation was made after placing reliance upon the judgment of Hon'ble Punjab and Haryana High Court in ***Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram, AIR 1961, Punjab 528*** and ***Praduman Singh Vs. Narain Singh, 1992 (2) SLJ 897***.

6. On appeal being carried out to the learned lower Appellate Court, the order passed by learned trial Court was affirmed, that too, by again placing reliance on Sant Ram Nagina's case supra, as also relying upon the judgment passed by this Court in ***Brij Lal Vs. Puran Chand, 2011(1 Him L.R. 80*** and another judgment in ***Roop Chand Vs. Indra AIR 1997 MP 200***, to conclude that till and so long there was no proof of partition of family settlement, a co-sharer cannot be permitted to raise construction over the joint land.

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

7. There appears to be a total misconception regarding the preposition of law involved in the present case. There can be no strait jacket formula to hold and conclude that in the absence of partition, a co-sharer cannot under any circumstance be permitted to raise construction over the joint land. This aspect of the matter has been considered by me in ***CMPMO No. 52 of 2014***, titled as ***Ashok Kapoor Vs. Murthu Devi***, decided on 24.6.2015 in the following manner:-

> *"9. Property held in common, by two or more persons, whatever be its nature or origin, is said to be joint property and the owners thereof joint owners. Joint property envisages a community of interest (ownership) and a commonality of possession vested in the entire body of owners called co-sharers/joint owners. This body of owners is joint, both in possession and in ownership of the property and every co-sharer shall be owner in possession of every inch of the joint estate. Inherent in his status as a co-sharer/joint owner and flowing from his status as a joint owner or a co-sharer of the joint property is the right to assert ownership with respect to every part and parcel of the joint property. The status as a co-sharer would be preceded by a tangible act of conferring proprietary status, whether by way of membership of a co-parcenary or by devolution of interest, pursuant to inheritance or by assignment of property by sale etc.*
>
> *10. A co-sharer asserts joint title and possession even, where other co-sharers/joint owners are in separate possession of different parcels of land and as a natural consequences, a co-sharer in possession of a specific area of joint property possesses the property for and on behalf of all other co-sharers/joint owners. Co-sharers may and often do for the purpose of better management of the joint estate hold separate possession of parcels of joint land. This separation of possession, without a corresponding intent, to sever the joint status of the community of joint owners does not confer a right upon a co-sharer in separate possession to assert his separate ownership. A joint owner, therefore, would be owner of a specific share in the entire joint*

property but would not be entitled to claim separate ownership of any specific and particular portion of the joint property till such time, as the property remains joint.

11. A joint owner/co-owner, just as an individual owner, has an inherent right to alienate the joint property, limited to the extent and the nature of his share holding. Upon transfer of his share or a part thereof, a co-sharer transfer only such rights as vest in him as a joint owner, namely, his specified share or a part thereof in the community of joint owners with commonality of possession. A vendee from such a joint owner or a co-sharer would, therefore, receive the property so transferred, with all the rights and liabilities that vested in his vendor, namely, a right to assert a community of interest (ownership) and a commonality of possession in the entire joint estate and alongwith the entire body of joint/co-owners. This conclusion draws sustenance from Section 44 of the Transfer of Property Act which reads as under:

> *"44. Transfer by one co-owner. – Where one of two or more co-owners of immovable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred."*

12. The legal relationship between co-owners is not regulated by any statute. It is governed by judicial decisions, and the principles laid down by judicial decisions are based on the principle of equity, justice and good conscience.

*13. In **Kennedy** versus **De Trafford**, **1897 AC 180** it was held by the House of Lords that there was no fiduciary relation between tenants in common of real estate as such; nor could one tenant in common of real estate by leaving the management of the property in the hands of his co-tenant impose upon him an obligation of a fiduciary character.*

14. The statute (4 Ann. c. 16, Section 27) has long been repealed; but the principle under lying it has been adopted as a part of the common law of England in Britain as well as in countries which have adopted the English common law.

15. In India also the principle of the English common law on the point has been adopted by the Judges on grounds of justice, equity and good conscience.

16. It is well settled that a co-owner merely as a co-owner is not an agent for the other co-owners: ["See Abu Shahid v. Abdul Hoque, 1940 1 ILR (Cal) 110. But he may become an agent for the others by a contract, express or implied.

*17. In **Sukh Dev** versus **Parsi and others AIR 1940 Lahore 473**, a Division Bench of Lahore High Court held that a co-sharer, who is in exclusive possession of any portion of a joint Khata can transfer that portion subject to adjustment of the rights of the other co-sharers therein at the time of partition and that the other co-sharers' rights will be sufficiently safeguarded if they are granted a decree by giving them a declaration that the possession of the transferees in the land in dispute will be that of a co-sharer(s), subject to*

adjustment at the time of partition. It is apt to reproduce the following observations:-

> *"The sole point for decision is whether a cosharer in a joint holding, who is in exclusive possession of a certain plot of land, has a right to sell the same, and if so whether the transferee has a right to remain in possession of such a plot until partition. It is not disputed on behalf of the respondent that the defendants could sell their share (or any fraction thereof) in the holding; but it is contended that no cosharer is entitled to sell any specific plot as he is not the sole owner thereof. In support of this contention the learned counsel relied chiefly on three rulings of the Allahabad High Court, viz. AIR 1920 All 111, AIR 1928 All 59 and AIR 1935 All 771.*
>
> *The facts of the present cases seem to be however distinguishable as the defendants in selling the plots did not assert that they were exclusive owners thereof. The learned Judge in Chambers has remarked in his judgment that there was an assertion of exclusive title by the defendants in the present suits by sale of specific plots. But this does not appear to be correct. No sale deeds were executed; and it appears from the mutations that the defendants merely purported to transfer their interest in these plots as cosharers. As cosharers they had a right to remain in possession of these plots till partition subject to adjustment at the time of partition and they seem to have transferred the same right to the vendees. This is indicated by the fact that the sale is shown in the column of cultivation and not in the column of proprietorship according to the rules governing mutation proceedings. Moreover, the defendants have made it clear in their written statements also that they only claim to hold the plots sold "until partition subject to the rights of the other cosharers and subject to adjustment at partition. If the defendants merely transferred the plots subject to the rights of the other cosharers and subject to adjustment at the time of partition," it is difficult to see how the rights of the other cosharers can be prejudiced in any way. It is well settled that if a cosharer is in established possession of any portion of an undivided holding, not exceeding his own share, he cannot be disturbed in his possession until partition (see AIR 1938 Lah 465 and the other rulings cited therein).*
>
> *As a result, it has been held that a cosharer who is in such possession of any portion of a joint khata, can transfer that portion subject to adjustment of the rights of the other cosharers therein at the time of partition (see AIR 1925 Lah 518, AIR 1929 Lah 168 and AIR 1939 Oudh 243. This view seems to be consistent with the principle embodied in S. 44, T.P. Act, regarding transfers of their 'interest' in joint property by cosharers. The learned counsel for the respondent urged that the defendants in these cases were not in possession for a very long time. It appears however that they were in possession for some years at least before the sales and there seems to be no good ground for holding that they could not transfer the plots unless their possession extended to 12 years or more as suggested by the learned counsel. The defendants did not claim to have acquired any adverse title. All that they claimed was that they were entitled to remain in*

undisturbed possession till partition. They were certainly in possession for some years before the sales as stated above and the learned counsel for the respondent has not been able to show that the other cosharers had any right to disturb their possession until partition."

18. A Full Bench of the Allahabad High Court in ***Chhedi Lal and another*** *versus* ***Chhotey Lal AIR (38) 1951 Allahabad 199*** *observed that while a co-sharer is entitled to object to another co-sharer exclusively appropriating the land to himself to the detriment of the other co-sharer, the question as to what relief should be granted was considered in light of all earlier decisions and it was held as follows:-*

"25. As a result of the foregoing discussion, it appears to us that the question of the right of co-sharers in respect of joint land should be kept separate and distinct from the question as to what relief should be granted to a co-sharer, whose right in respect of joint land has been invaded by the other co-sharers-either by exclusively appropriating and cultivating land or by raising constructions thereon. The conflict in some of the decisions has apparently risen from the confusion of the two distinct matters. While therefore a co-sharer is entitled to object to another co-sharer exclusively appropriating land to himself to the detriment of other co-sharers, the question as to what relief should be granted to the plaintiff in the event of the invasion of his rights will depend upon the circumstances of each case. The right to the relief for 'demolition and injunction will be granted or withheld by the Court according as the circumstances established in the case justify. The Court may feel persuaded to grant both the reliefs if the evidence establishes that the plaintiff cannot be adequately compensated at the time of the partition and that greater injury will result to him by the refusal of the relief than by granting it. On the contrary if material and substantial injury will be caused to the defendant by the granting of the relief, the Court will no doubt be exercising proper discretion in withholding such relief. As has been pointed out in some of the cases, each case will be decided upon its own peculiar facts and it will be left to the Court to exercise its discretion upon proof of circumstances showing which side the balance of convenience lies. That the Court in the exercise of its discretion will be guided by considerations of justice, equity and good conscience cannot be overlooked and it is not possible for the Court to lay down an inflexible rule as to the circumstances in which the relief for demolition and injunction should be granted or refused."

19. The interse rights and liabilities of the co-sharers were a subject matter of a Division Bench decision of the Punjab and Haryana High Court in ***Sant Ram Nagina Ram*** *versus* ***Daya Ram Nagina Ram AIR 1961 Punjab 528*** *and the following propositions inter alia were settled:-*

"1. A co-owner has an interest in the whole property and also in every parcel of it.

2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.

3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.

4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.

5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition."

20. In ***Jose Caetano Vaz*** *versus* ***Julia Leocadia Lucretia Fernandes AIR 1969 Goa 90****, it was held as under:-*

"6. The upshot of the above discussion is that a co-owner, though in possession of the joint property, has no right to change the user of that property without the consent of the other co-owners, and that if the aggrieved co-owner comes to the Court with due promptness for restraining the defendant from raising a building on the joint property the Court can very legitimately decree prohibitory injunction, and if in the meantime any structure has been raised a decree for mandatory injunction can also be granted."

21. In ***Sachindra Nath Sarkar and others*** *versus* ***Binapani Basu and others AIR 1976 Calcutta 277****, the Calcutta High Court after taking into consideration the earlier judgments summed up the position of law as follows:-*

"18. Consistent with the decisions of this Court, the position in law is as follows:--

(a) the co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property, absolutely and simply be cause he is a co-owner.

(b) before an injunction can be issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or accustomed user of the joint property would be inconvenienced or interfered with.

(c) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience."

22. In ***Gouri and others*** *versus* ***Dr. C.H. Ibrahim and another AIR 1980 Kerala 94****, on general principle it was laid down that if several owners are in possession of an undivided property, none of them has a right to appropriate to his exclusive use any portion of the property as that will effect a*

compulsory partition in his own favour according to his choice. It is pertinent to note the observation of the Court at para 11 extracted hereunder:-

> *"11. The law is that the right of a co-owner to raise construction or to make other improvement on the common property really depends on the consent, express or implied, or on the sufferance of the other co-owners. And when one co-owner commences to build without seeking the consent of the others and in spite of the protest to the construction, the possession, of the co-owner raising the construction at once becomes wrongful and the work will have to be stopped by an order of injunction. The wrongful possession or an ouster by a co-owner is itself an injury to the other co-owners and the latter would not he required to prove any other injury to them in order to sustain action for injunction. (See: Mitra's Co-ownership and Partition -- Fifth Edition pp. 127 & 128)."*

23. The proposition as settled by the Division Bench of the Punjab and Haryana High Court in ***Sant Ram's case*** *(supra) was affirmed by a Full Bench decision of the Punjab and Haryana High Court in* ***Bhartu*** *versus* ***Ram Sarup 1981 PLJ 204****.*

24. In ***Rukmani and others*** *versus* ***H.N. Thirumalai Chettiar AIR 1985 Madras 283****, a Division Bench of the Madras High Court held that a co-sharer cannot be allowed to cause prejudice to the other co-sharer by putting up a substantial construction during the pendency of the suit for partition filed by the co-sharer. It was held:-*

> *"The respondent, being a co-sharer, cannot be allowed to cause prejudice to the other co-sharers by putting up a substantial construction during the pendency of a suit for partition filed by the co-sharers."*

25. In ***Prakash Chand Sachdeva*** *versus* ***The State and another AIR 1994 SC 1436****, the Hon'ble Supreme Court held:-*

> *"3....when claim or title are not in dispute and the parties on their own showing are co-owners and there is no partition, one cannot be permitted to act forcibly and unlawfully and ask the other to act in accordance with law....".*

26. In ***Prakash S.Akotkar and others*** *versus* ***Mansoorkha Gulabkha and others AIR 1996 Bombay 36****, a learned single Judge of the Bombay High Court held that a co-owner in possession of the property is for and on behalf of other co-owners and the co-owners out of possession were not in possession cannot claim injunction against other co-sharers. The other co-sharer cannot claim injunction so as to exclude the other co-owners from exercising their rights as co-owners. It is apt to reproduce paras 4 and 5 of the report which reads thus:-*

> *"4. Here, nature of injunction sought is of importance. The plaintiff sought injunction against all the defendants from interfering with his exclusive possession. It should be noted that these defendants include not only the first defendant who executed the agreement to sell but also the three other sons of Noor Jahan. It goes without saying that these sons have since alienated the property to defendants 5 and 6. Even assuming that even if the plaintiff who was put in possession by the first defendant on the execution of agreement to sell, the question*

in the context is as to the character of possession which the first defendant could have conveyed, for the character of possession has nexus with the prima facie case pleaded by the plaintiff. Ordinarily, a co-owner has equal right and interest in the whole property along with other co-owners. Every co-owner has right of enjoyment and possession equal to that of the other co-owners and he has interest even in every infinitesimal portion of the property. In other words, the title and possession of a co-owner is co-extensive with the interest of other co-owners. Being co-owner the first defendant cannot have any right to represent the title and possession of other co-owners. The learned counsel for their 1st respondent relied on AIR 1971 Madh Pra 23 (Tikam Chand Lunia v. Rahim Khan Ishak Khan) to contend that he is entitled to maintain the application for injunction in such circumstances. Even assuming that the first defendant has validly executed the agreement to sell, that agreement to sell cannot create any interest in the property, it can only create all obligation annexed to the ownership of the property. Therefore, the right of the respondent, if at all, is to enforce the agreement to sell. The photo copy of the plaint placed before me by Mr. Khapre, learned counsel for appellants, shows that the plaintiff seeks enforcement of the agreement to sell against all the six defendants. This certainly would mean that the plaintiff admits the title not only of the first defendant, but admits the title of defendants 2 to 4 - the brothers of 1st respondent - as well as that of the alienees defendants 5 and 6 in favour of whom defendants 1 to 4 have since executed a sale-deed. Necessarily it should follow that the plaintiff has no hostile claim except a prayer to enforce specifically the agreement to sell. Even the decision relied on by the learned counsel for respondents, AIR 1971 Madh Pra 23, cited supra, does not say that a stranger who obtained an agreement to sell from one of the co-sharers is in the same position of a co-owner. The learned counsel then relied on 1984 Mah LJ 915 (Nandkumar v. Laxmibai). There it is held, a person in possession under S. 53-A of Transfer of Property Act is entitled to maintain an application for injunction under O. 39, R. 1. There can be no dispute as to the said proposition. In the context, even if it is assumed that the plaintiff is in possession that possession can only be of a co-owner. The learned counsel also relied on a decision in AIR 1960 Ker 27 (Joseph v. John). All that is held in the said decision is that when a co-owner transfers the entire property as owner to a stranger the possession of such stranger will become hostile to that of the non-alienating co-owner. In this connection it is necessary to refer to a later decision of the apex court as to the character of possession of a co-owner in possession. In the decision in Karbalai Begum v. Mohd. Sayeed AIR 1981 sc 77: 1980 All LJ 902 the Supreme Court observed, the legal position of a co-owner in possession would be that of a constructive trustee on behalf of the other co-sharer who is not in possession and that right of the co-sharer would be deemed to be protected by the trustee. Then a person in such a position cannot prima facie without anything more unilaterally change the character of his possession so as to confer a better title to his assignee, much less on one in favour of whom he has executed only an agreement to sell. Here the agreement to sell itself was in 1994. There is no case that the first

defendant-the son of Noor Jahan - was ever in hostile possession. In such circumstances, the learned counsel for respondents cannot build up an argument on the basis of such possession claiming that an alienee can maintain an application under Order XXXIX, Rule 1 against the non-alienating co-owner. The learned counsel for the 1st respondent further relied on AIR 1958 Cal 614 (Paresh Nath Biswas v. Kamal Krishna Choudhary). All that is held in that decision is, upon transfer to a stranger of an undivided house by a co-owner, the co-owner cannot claim joint possession along with other co-owners under Section 44 of the Transfer of Property Act. It is further held that upon a transfer to a stranger of an undivided share of a family dwelling-house by a co-sharers can maintain a suit for injunction for restraining the stranger transferee from exercising any act of joint possession in respect of the share transferred. This decision cannot help the respondents.

5. As noticed, the character of possession of the plaintiff in the circumstances can only be that of a co-owner even if the possession passed under agreement to sell. The Division Bench of Punjab High Court in the case of Sant Ram Nagina Ram v. Daya Ram Nagina Ram, AIR 1961 Punj 528 has considered the whole question as to the rights and liabilities of co-owners and also the condition under which one could presume ouster. It is held therein that a co-owner has an interest in the whole property and also in every parcel of it; and that possession of the joint property by one co-owner is, in the eye of law, possession of all even if all but one are actually out of possession. Then it proceeds to hold that this condition will prevail unless ouster is proved. With due regard to the aforesaid facts and circumstances, particularly the fact that defendants 1 to 4 are governed by Mohammaden Law, there can be no doubt that their interest is that of co-owners. The first defendants has no right prima facie to bind the interest of defendants 2 to 4. Having found so, the aliences of the defendants 1 to 4 who are defendants 5 and 6 must be deemed to have stepped into shoes of at least defendants 2 to 4 though prima facie the rights of first defendant annexed with the obligation under the agreement to sell. Having found the character of possession as co-owner, as indicated above, the only question that arises for determination is, whether a co-owner, in possession is entitled to an injunction of this nature against the other co-owners. Once it is found that the possession of co-owner is for the on behalf of other co-owner is for and on behalf of other co-owners, the other co-owner cannot claim injunction of this nature so as to exclude the other co-owners from exercising their right as co-owners. Therefore the respondents/plaintiffs have no prima facie case. Consequently on this short ground, the order of the Civil Judge, Sr. Dn., is liable to be set aside. The order is therefore set aside the the instant appeal is allowed. It needs hardly he mentioned that the observations made in this order are only for the purposes of disposal of the claim of the respondents under Order XXXIX, Rules 1 and 2, Code of Civil Procedure."

27. In ***Bachan Singh*** *versus* ***Swaran Singh AIR 2001 Punjab and Haryana 112,*** *a Division Bench of the Punjab and Haryana High Court on*

consideration of judicial pronouncements on the rights and liabilities of the co-sharers and their right to raise constructions to the exclusion of the others was of the following opinion:-

> *"(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."*

*28. In **Tanusree Basu and others** versus **Ishani Prasad Basu and others (2008) 4 SCC 791**, the Hon'ble Supreme Court was dealing with the cases of co-sharers and it was held that a co-owner in exclusive possession of the joint property would be entitled to an injunction and it was held as under:-*

> *"13. There cannot be any doubt or dispute as a general proposition of law that possession of one co-owner would be treated to be possession of all. This, however, in a case of this nature would not mean that where three flats have been allotted jointly to the parties, each one of them cannot be in occupation of one co-owner separately.*
>
> *14. We have noticed hereinbefore that the plaintiffs-appellants themselves in no uncertain terms admitted that by reason of mutual adjustment the parties had been in separate possession of three flats, viz., flat Nos. 201, 202 and 301. If they were in possession of the separate flats, plaintiffs as co-owners could not otherwise have made any attempt to dispossess the first respondent by putting a padlock. The padlock, according to the first respondent, as noticed hereinbefore, was put by the plaintiffs-appellants immediately after the appeal preferred by them in the High Court was dismissed.*
>
> *15. The padlock was directed to be removed by the learned Civil Judge by an order dated 21.11.2006. We do not find any illegality therein.*
>
> *16. It is now a well-settled principle of law that Order 39, Rule 1 of the Code of Civil Procedure (Code) is not the sole repository of the power of the court to grant injunction. Section 151 of the Code confers power upon the court to grant injunction if the matter is not covered by Rules 1 and 2 of Order 39 of the Code. (See Manohar Lal Chopra v. Seth Hiralal AIR 1962 SC 527 and India Household and Healthcare Ltd. v. LG Household and Healthcare Ltd. (2007) 5 SCC 510).*
>
> *17. Strong reliance has been placed by Mr. Banerjee on a judgment of Bombay High Court in Bhaguji Bayaji Pokale & Ors. v. Kantilal Baban*

Gunjawate [1998 (3) CCC 377 (Bom.)] wherein it was held: (AIR p.117, para 8).

> *"8[7]. With regard to second substantial question of law, i.e. the co-owner cannot claim an order of injunction against another co-owner with regard to the property owned jointly, the learned Counsel for the appellants had relied upon the Apex Court's judgment reported in Mohammad Bagar v. Naim-un-Nisa Bibi AIR 1956 SC 548 The Apex Court has very categorically held in para No. 7 as under:*
>
> *"7…….The parties to the action are co-sharers, and as under the law, possession of one co-sharer is possession of all co-sharers, it cannot be adverse to them, unless there is a denial of their right to their knowledge by the person in possession, and exclusion and ouster following thereon for the statutory period."*

It was observed : (AIR p.117, para 10)

> *"10….Similarly, the legal position that the co-owner or co-sharer of the property can never claim ownership by adverse possession of the other share. This is also a well settled law."*

18. We are concerned in this case with a question whether if a co-owner was in specific possession of the joint property, he could be dispossessed therefrom without the intervention of the court. In this case, the first respondent is not claiming title of adverse possession. The said decision has, therefore, no application to the fact of the present case.

19. Reliance has also been placed by Mr. Banerjee on Abu Shahid v. Abdul Hoque Dobhash AIR 1940 Cal 363, Hemanta Kumar Banerjee and others v. Satish Chandra Banerjee and others AIR 1941 Cal 635 and Jahuri Sah and others v. Dwarika Prasad Jhunjhunwala AIR 1967 SC 109.

20. In Abu Shahid (supra), the question which arose for consideration was in regard to plea of ouster vis-a-vis rendition of accounts. We are not concerned with such a question in this case.

21. In Hemanta Kumar Banerjee (supra), the question which arose for consideration was as to whether the rule against partition amongst co-sharers is an elastic one. Again, we are not concerned with such a question here.

22. In Jahuri Sah (supra), this Court opined: (AIR p.112, para 12)

> *"12. What we have to consider then is whether the contract for payment of compensation is not enforceable. It is no doubt true that under the law every co-owner of undivided property is entitled to enjoy the whole of the property and is not liable to pay compensation to the other co-owners who have not chosen to enjoy the property. It is also true that liability to pay compensation arises against a co-owner who deliberately excludes the other co-owners from the enjoyment of the property. It does not, however, follow that the liability to pay compensation arises only in such a case and no other. Co-*

> *owners are legally competent to come to any kind of arrangement for the enjoyment of their undivided property and are free to lay down any terms concerning the enjoyment of the property. There is no principle of law which would exclude them from providing in the agreement that those of them as are in actual occupation and enjoyment of the property shall pay to the other co-owners compensation"*
>
> *These observations do not assist the case of the appellants. If parties by mutual agreement entered into possession of separate flats, no co-sharer should be permitted to act in breach thereof."*

29. In ***Jai Singh and others*** *versus* ***Gurmej Singh 2009 (1) SLJ (SC) 714****, the Hon'ble Supreme Court was seized of a matter involving interse rights and liabilities of a co-sharer and it upheld the principles as laid down in* ***Bhartu's case*** *(supra).*

Before proceeding further and after having noticed the judgments of various Courts, let me now make a note of the position of law as laid down by this Court.

30. In ***Parduman Singh and another*** *versus* ***Narain Singh and another 1991 (2) SLC 215****, it was held that a co-sharer has no right to make construction over the land in dispute which is joint interse the parties to the disadvantage of the opposite party and it is not proper for the Court to allow the continuation and completion of the construction on the condition that it would be demolished if it is ultimately found that the party raising the construction had no right or had exceeded his right in raising the construction.*

31. In ***Nagesh Kumar*** *versus* ***Kewal Krishan AIR 2000 HP 116****, this Court after relying upon* ***Parduman Singh's case*** *(supra), held as follows:-*

> *"16. A co-sharer is entitled to claim Injunction when another co-sharer threatens to exclusively appropriate joint land to himself to the detriment of other co-shares by constructing a structure thereon.*
>
> *17. In view of the above, the plaintiff has made out a case for grant of temporary injunction as prayed for by him and as was granted by the learned Senior Sub-Judge.*
>
> *18. In a cause when a co-sharer has sued for permanent prohibitory Injunction restraining the other co-sharer from raising any construction over the land jointly owned by them, it Is not just and proper to permit the co-sharer against when the relief of injunction has been claimed, to continue/ complete construction of a house/structure on such land.*
>
> *19. The Apex Court while dealing with a similar situation in Harish Chander Verma v. Kayastha Pathshala Trust, 1988 (1) JT (SC) 625 has held as follows :*
>
> > *"I.....In appeal against the decree for permanent injunction the High Court by the impugned order has permitted the defendant-respondent herein to raise construction subject to the condition that In the event of the decree being affirmed the construction shall have to be pulled down.*
> >
> > *2. Apart from the convenience the parties and equity arising in the facts of the case, a larger principle is involved in the matter. On the face of a decree for permanent injunction is it*

appropriate for the appellate Court to allow it to be nullified before the appeal is disposed of. We are of the view that the answer has to be in the negative."

20. Similar view has been taken by this Court in Parduman Singh v. Narain Singh, 1991 (2) Sim LC 215."

32. In ***Shiv Chand*** *versus* ***Manghru and others, 2007 (1) Latest HLJ (H.P.) 413****, this Court has held as follows:-*

"7. The view taken by the first appellate Court that one of the persons in joint possession can raise construction on a portion of the joint property provided the area sought to be covered does not exceed his share, is contrary to the proposition of law. The law is very clear that a person in joint possession of immovable property cannot change the nature of the suit property unless the property is partitioned or the other persons in joint possession consent to such change in the nature of the property….

8. Coming to the next question, the view taken by the learned first appellate Court is again erroneous. Persons in settled joint possession of immovable property are supposed to respect the right to joint possession of each other in the same fashion and manner as the owners in joint possession. Therefore, the view taken by the learned first appellate Court that both the parties being encroachers, either of them can change the nature of the property without partition or without consent of the other is contrary to well settled proposition and principles of law. Hence, this question is also answered in favour of the plaintiff-appellant."

33. In ***Payar Singh*** *versus* ***Narayan Dass and others 2010 (3) Shim. LC 205****, after taking note of* ***Nagesh Kumar and Parduman Singh's cases****, this Court held as follows:-*

"12.The respondents in the written statement have specifically pleaded that parties are in separate possession under family arrangement. The petitioner has also constructed his house on the joint land. It is not the stand of the petitioner that respondents are raising construction on an area which is more than their share. The case of the respondents is that petitioner has constructed his house on a better portion of the land. The under construction house of the respondents is away from the National Highway 21 whereas the house of the petitioner abuts N.H. 21. The respondents have placed on record on the file of revision photographs of under construction house of the respondents. The photographs indicate sufficient gap between the already constructed house of petitioner and under construction house of the respondents over which even slab has been placed. It is the case of the respondents in written statement that they are in separate possession of the land in family arrangement. This fact has not been denied by filing replication. The respondents are claiming possession over the suit land under family arrangement i.e. with the consent of the petitioner over which they are raising construction. The respondents have thus established prima facie case, balance of convenience, irreparable loss in their favour. In these circumstances, no fault can be found with the impugned judgment. In revision the scope is limited as held in The Managing Director (MIG) Hindustan

Aeronautics Ltd. Balanagar, Hyderabad and another Vs. Ajit Prasad Tarway, Manager (Purchase and Stores) Hindustan Aeronautics Ltd. Balanagar, Hyderabad, AIR 1973 SC 76. The suit is for permanent prohibitory and mandatory injunction. The rights of the parties will be decided in the suit. It has not been established that the view taken by the learned District Judge does not emerge from the material on record."

34. In ***Kalawati and another*** *versus* ***Sudhir Chand and others 2011 Law Suit (HP) 692 (CMPMO No.193 of 2010)*** *decided on 13.04.2011, after taking into consideration the ratio of the judgment in* ***Bachan Singh's case*** *(supra), this Court held as follows:-*

*"8.**K**eeping in view the fact that substantial construction had been raised even before the suit had been filed and defendants have collected huge amount of material on the spot, in my view no irreparable harm and injury will be caused to the Plaintiffs in case such construction is allowed to go on. On the other hand, if the Defendants are permitted to continue to raise the construction, the interest of the Plaintiffs can be protected by making it clear that the construction raised shall be subject to the final decision of the suit and in case the suit is decreed in favour of the Plaintiffs then Defendants will either demolish the portion in excess of their share or shall hand over the same to the Plaintiffs without asking for any compensation for building costs."*

35. In ***Brij Lal*** *versus* ***Puran Chand, 2011 (1) Him. L.R. 80,*** *it has been held as under:-*

"8. The partition proceedings are pending before the competent authority. Though the defendant as DW-1 has made reference about some family partition, however, he has neither given any date nor month or year when the family partition took place. He has admitted that the suit land measuring 11-12 bighas was joint of the parties. In his written statement, he has claimed not only that he was in exclusive possession, but also exclusive title to suit land to the exclusion of plaintiff and other co-sharers. Since the land in question has not been partitioned, the defendant could not be permitted to raise any construction thereon without working out any arrangement or with consent of the co-owners. If he wanted to raise any construction, he ought to have sought consent of the other co-owners since the land was joint. The learned District Judge has rightly relied upon Sant Ram Nagina Ram Vs. Daya Ram Nagina Ram, AIR 1961, Punjab, 528 and the judgment rendered by this Court in Prithi Singh Vs. Bachitar Singh, 1969 DLT 583 while dismissing the appeal."

36. In ***Amin Chand and another; Chet Ram*** *versus* ***Chet Ram and others; Amin Chand and others*** *in* ***Civil Revision No.153 and 161 of 2005*** *decided on 07.04.2010, after making note of the judgments in* ***Bachan Singh and Nagesh Kumar's cases*** *(supra), it was held as under:-*

"12. It is true that in case the land is jointly owned and possessed by the plaintiff and other co-sharers and has not been partitioned, the plaintiff would have been held entitled to the grant of injunction in his favour restraining the defendants from changing the nature of the suit land or raising any construction till partition. However, that can be so

in case the land had been sold by some other person than the plaintiff himself who did not place any restriction in the sale deed on the powers of defendant No.1 to raise construction till partition or made a reference as to which particular portion of the land, whether abutting the State Highway or on the backside, has been sold to defendant No.1. The sale deed in question is dated 26.6.1995 executed by the plaintiff in favour of defendant No.1 and a perusal of the same shows that it has been clearly mentioned that four biswas of land has been sold to defendant No.1 who shall be entitled to use it in any manner he likes and the possession has also been delivered to him. In case the plaintiff wanted to put some restrictions on the powers of defendant No.1 to raise construction or he had an idea that defendant No.1 may not encroach the whole land abutting the State Highway out of the total share of the plaintiff and other co-owners, he could have placed a restriction upon the powers of the defendant to raise construction over this particular portion of the land. It may be that the plaintiff represented to the defendant and showed him the land abutting the State Highway and once the defendant had purchased the land and the possession had been given to him of four biswas of land out of the total land and no restriction had been placed as to his powers to raise construction till partition. There is no specification as to whether the land abuts the State Highway or otherwise. In equity, the plaintiff cannot be held entitled to file the suit for an injunction and claim the relief of temporary injunction till the matter is settled by a civil court. In equity, the plaintiff is not entitled to temporary injunction in his favour till the question is decided by the civil court as to which of the parties was in possession or which particular portion of the land was sold to defendant No.1 and which land was given in possession to defendant No.1 in pursuance of the sale deed effected by the plaintiff. All these questions are left open to be decided by the civil court but for the present, in equity, the plaintiff cannot be said to be entitled to the relief of an injunction in his favour. This is particularly so when the defendant has pleaded that he has raised construction over the suit land by spending Rs.1.00 lac, as pleaded in the written statement. The defendant shall not encroach or cover more land than what construction has been raised by him already, which he will be entitled to complete till the disposal of the suit. However, the construction being so raised by the defendant shall be subject to the rights of other co-sharers on partition and in case the defendant raises any construction beyond his share or that portion falls to the share of another co-sharer on partition, defendant No.1 will have to demolish this construction which shall be raised by him at his own risk. This will be subject to adjustment at the time of partition to which either of the parties are entitled to apply and get the appropriate relief."

37. In ***Jagdish Ram*** *versus* ***Vishwamitter and others Latest HLJ 2012(HP) 1427****, this Court held that the possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession. Mere occupation of larger portion or even of entire joint property does not amount to ouster as the possession of one is deemed to be on behalf of all. The remedy of a co-owner who is out of possession and not in possession is by way of suit for partition or for actual joint possession.*

38. In ***Munshi Lal*** *versus* ***Rajiv Vaidya 2013 (2) Him.L.R. 1172****, this Court held as follows:-*

> *"13. The petitioner at the most is a co-sharer. He cannot change the nature of the suit land without the consent of other co-sharers and without partitioning the suit land. The petitioner at this stage has failed to identify his possession on specific 0-14-09 bigha land out of the suit land. The two courts below after appreciation of material on record have granted interim injunction in favour of respondent. It cannot be said that decisions taken by the two courts below are without jurisdiction or suffer from error of law, which require correction by way of petition under Article 227 of Constitution of India. There is no merit in the petition."*

39. I myself in ***Prabhu Nath and another*** *versus* ***Sushma 2014 (2) Shim. LC 1003*** *after taking into consideration the ratio of judgments in* ***Nagesh Kumar, Shiv Chand and Brij Lal's cases*** *(supra) held as under:-*

> *"3. Admittedly the parties are co-owners and it is settled that every co-owner has every right over each inch of land. The possession of one co-sharer is possession of all, and therefore, the co-sharer cannot change the nature of the suit land to the detriment of another co-owner unless the land is partitioned or can do so with the consent of other co-sharers. This view has been consistently followed in a number of judgments by this Court."*

40. In ***Joginder Singh & others*** *versus* ***Suresh Kumar and others AIR 2015 HP 18,*** *after taking into consideration the judgments in* ***Nagesh Kumar and Bachan Singh's cases****, it was held:-*

> *"19. The defendant admittedly has raised the construction up to plinth level over a portion of the suit land, without getting the same partitioned. He, by doing so, has threatened to evade the rights of other co-sharers including the plaintiffs therein. He, being not in exclusive possession of the vacant suit land over which he intends to raise the construction, hence cannot be permitted to go ahead with construction in violation of the rights and interest of other co-sharers therein."*

41. The exposition of law as enunciated in the various judgments referred above including those of this High Court, insofar as the rights and liabilities of the co-owners is concerned, gives rise to the following propositions:-

> *1. A co-owner has an interest in the whole property and also in every parcel of it.*
>
> *2. Possession of joint property by one co-owner is in the eye of law, possession of all even if all but one are actually out of possession.*
>
> *3. A mere occupation of a larger portion or even of an entire joint property does not necessarily amount to ouster as the possession of one is deemed to be on behalf of all.*
>
> *4. The above rule admits of an exception when there is ouster of a co-owner by another. But in order to negative the presumption of joint possession on behalf of all, on the ground of ouster, the possession of a co-owner must not only be*

exclusive but also hostile to the knowledge of either as, when a co-owner openly asserts his own title and denies that of the other.

5. Passage of time does not extinguish the right of the co-owner who has been out of possession of the joint property except in the event of ouster or abandonment.

6. Every co-owner has a right to use the joint property in a husband like manner not inconsistent with similar rights of other co-owners.

7. Where a co-owner is in possession of separate parcels under an arrangement consented by the other co-owners, it is not open to any body to dispute the arrangement without the consent of others except by filing a suit for partition.

8. The remedy of a co-owner not in possession, or not in possession of a share of the joint property, is by way of a suit for partition or for actual joint possession, but not for ejectment. Same is the case where a co-owner sets up an exclusive title in himself.

9.Where a portion of the joint property is, by common consent of the co-owners, reserved for a particular common purpose, it cannot be diverted to an inconsistent user by a co-owner, if he does so, he is liable to be ejected and the particular parcel will be liable to be restored to its original condition. It is not necessary in such a case to show that special damage has been suffered.

42. It can further be safely concluded that co-owners hold property by several and distinct titles but by unity of possession. Actual physical possession is not indispensable, the requirement being of the right to possession of the common property.

43. As a corollary to the aforesaid right, any co-owner, in the absence of any agreement to the contrary, has a right to enter upon the common property and take possession of the whole, subject to the equal right of the other co-owners with whose right of possession he has no right to interfere.

44. A co-owner's possession of the common property is not prima facie adverse against another co-owner, because such possession is considered as one on behalf of all the co-owners, except when there is clear proof of ouster or assertion of a hostile title.

45. As each co-owner is entitled to possess every bit of the common property and is not restricted to enjoyment according to his share so long as he does not deny to the other co-owners an equal right of possession and enjoyment of the common property, he is under no obligation either to account for or to pay compensation to such co-sharers. The matter is different if there is objection from the other co-sharers and no amicable arrangement is arrived at. That would equally be the case where there is ouster or denial of the title of the other co-owners and an assertion of a hostile title in himself.

46. On consideration of the various judicial pronouncements and on the basis of the dominant view taken in these decisions on the rights and liabilities of

the co-sharers and their rights to raise construction to the exclusion of others, the following principles can conveniently be laid down:-

i) a co-owner is not entitled to an injunction restraining another co-owner from exceeding his rights in the common property absolutely and simply because he is a co-owner unless any act of the person in possession of the property amounts to ouster prejudicial or adverse to the interest of the 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.

(v) before an injunction is issued, the plaintiff has to establish that he would sustain, by the act he complains of some injury which materially would affect his position or his enjoyment or an accustomed user of the joint property would be inconvenienced or interfered with.

(vi) the question as to what relief should be granted is left to the discretion of the Court in the attending circumstances on the balance of convenience and in exercise of its discretion the Court will be guided by consideration of justice, equity and good conscience.

47. The discretion of the Court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff:-

(i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction;

(ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's right or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and

(iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted.

In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the Court with clean hands."

8. It would be evident from the aforesaid discussion that there is no invariable rule that until and unless partition is carried out, a co-sharer under no circumstance can be permitted to raise construction over the land which is joint *inter se* the parties. The lis will have to be decided on basis of the facts and circumstances obtaining in a particular case.

9. Having said so, I find no difficulty in concluding that the orders passed by the learned Courts below are not in tune with the law. Consequently, the same are ordered

to be set aside and the application under Order 39 Rule 1 and 2 CPC is directed to be heard afresh strictly in accordance with the parameters laid down by this Court in Ashok Kapoor's case supra.

Accordingly, the present petition is allowed in the aforesaid terms, 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, J.

CWP No.4077 of 2015 alongwith CWPs No.4265 of 2015 and 18 of 2016.
Judgment reserved on: 23.03.2016.
Date of decision: April 01, 2016.

1. **CWP No.4077 of 2015.**

Ms. Lata Devi .....Petitioner.

Versus

Subordinate Selection Board Hamirpur and another .....Respondents.

For the Petitioner : Mr. Dushyant Dadwal, Advocate.

For the Respondents: Ms.Archana Dutt and Ms.Aruna Sharma, Advocates, for respondent No.1.
Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma, Mr.V.S.Chauhan, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondent No.2.

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2. **CWP No.4265 of 2015.**

Usha Devi .....Petitioner.

Versus

Himachal Pradesh Subordinate Services Selection Board and another .....Respondents.

For the Petitioner : Mr. Ramakant Sharma, Advocate.

For the Respondents: Ms.Archana Dutt and Ms.Aruna Sharma, Advocates, for respondent No.1.
Mr.Shrawan Dogra, Advocate General with Mr.Romesh Verma, Mr.V.S.Chauhan, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General, for respondent No.2.

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3. CWP No.18 of 2016.

Ms.Asha Kumari .....Petitioner.

Versus

H.P. Subordinate Selection Board Hamirpur .....Respondent.

For the Petitioner : Mr. Dushyant Dadwal, Advocate.

For the Respondent : Ms.Archana Dutt and Ms.Aruna Sharma, Advocates.

Constitution of India, 1950- Article 226-Petitioners appeared in the selection process for the post of Steno-Typist- they claimed that respondents have deviated from the terms and conditions of the advertisement and the whole process deserves to be declared null and void- petitioners had attained the requisite speed in shorthand and typing, - they were required to be awarded full marks and the candidate with a faster speed could not have been awarded higher marks than the petitioners-, deviating from the terms and conditions of the advertisement- respondents pleaded that evaluation has been carried out as per the prevalent formula approved by the respondents – the formula was hosted on the web page of the respondents as per the directions given by Public Service Commission- held, that advertisement lays down only a benchmark or bottom line i.e. the eligibility criterion for selection- a candidate after qualifying the minimum requirement should excel on merits to get appointment- the mere fact that petitioners had attained the prescribed speed would make them eligible for consideration, but will not entitle them for being awarded maximum marks- maximum marks will be awarded to the candidate having maximum speed coupled with error-less shorthand or typing speed as the case may be- petitioners were aware that they would have to compete in further test which would be evaluated on the basis of high speed and error-free shorthand and typing tests of the candidates- petitioners are presumed to be aware that the advertisement only prescribed the basic eligibility criteria and further details would be available in the rules- every candidate appearing in the test is deemed to be aware that he/she has to excel and only then he/she can be considered on merits- petitioners had participated in the selection process and cannot challenge the method of selection- petitioners have already approached Administrative Tribunal and have obtained interim order - same has not been assailed and fresh writ petition is not maintainable- petition dismissed. (Para-3 to 17)

Cases referred:

Bedanga Talukdar versus Saifudaullah Khan and others (2011) 12 SCC 85

Duddilla Srinivasa Sharma and others versus V.Chrysolite (2013) 16 SCC 702

Public Service Commission, Uttaranchal versus Jagdish Chandra Singh Bora and another (2014) 8 SCC 644

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

Madras Institute of Development Studies and another vs. K. Sivasubramaniyan and others (2016) 1 SCC 454

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

Since common question of law and fact arise for consideration in these petitions, they were taken up together for consideration and are being disposed of by a common judgment.

2. The petitioner(s) have participated in the selection process for the post of Steno-typist and now their grievance is that the respondents at the time of final evaluation have while filling up these posts deviated from the terms and conditions of the advertisement and, therefore, the entire process deserves to be declared null and void. It is averred that once the petitioner(s) had attained the requisite speed in shorthand as also in typewriting, then they were required to be awarded full marks and the candidate with a

faster speed could not have been awarded higher marks than the petitioner(s) thereby defeating the very terms and conditions as set out in the advertisement.

3. In response to the petitions, the respondents have questioned the very maintainability of the petitions on the ground that no injustice has been caused to the petitioner(s). It is further averred that the evaluation of the answer-sheets of typing skill test of all the candidates has been carried out as per the prevalent formula/mechanism devised and approved by the respondents in the year 2011 under the mandate of Rule 15.1 of Business and Procedure, 2004 of the Board which is as under:-

> "Mode of selection for the post of Steno-typist, Junior Scale Stenographer and Senior Scale Stenographer is as under:
>
> 1. Objective type written screening test (MCQ) consisting of General English and Hindi upto 10+2 standard, General Knowledge including General Knowledge of Himachal Pradesh, Everyday Science, Current affair & Logic.
>
> = 100 Marks.
>
> 2. Skill test in Shorthand either in English or Hindi and typewriting on computer of prescribed speed (as per R&P Rules) of Hindi & English for those who qualify objective type screening test. = 100 Marks
>
> 3. Interview of those who qualify shorthand and typing skill test.
>
> = 30 marks
>
> The distribution of 100 marks for skill tests for the post of Steno-typist, Junior Scale Stenographer is made as under:

	Total Marks for skill test	**:**	**100**
i.	Shorthand (English or Hindi)	:	40
ii.	Typewriting Test (English)	:	30
iii.	-do- (Hindi)	:	30

> The distribution of 100 marks for Skill tests for the post of Senior Scale Stenographer is made as under:

	Total Marks for skill test	**:**	**100**
i.	Shorthand (English)	:	30
ii.	Shorthand (Hindi)	:	30
iii.	Typewriting Test (English)	:	20
iv.	-do- (Hindi)	:	20

> **FORMULA TO WORK-OUT THE TYPING SPEED & MARKS**:
>
> 5% mistakes of the total words typed may be ignored.
>
> **No. of total words typed - (No. of Mistakes x 10) = Net speed**
> **Time**
>
> Maximum Marks (MM)
>
> Qualifying Marks (QM) = 60% of MM (as per DGET Norms)
>
> Qualifying Penalty Marks (QPM) = MM – QM.
>
> **Marks obtained: Maximum Marks x Net speed - Qualifying Penalty Marks (QPM)**
>
> **Qualifying Speed.**
>
> **FORMULA TO EVALUATE THE SHORTHAND ANSWER SHEET:**
>
> i. 5% of total words relaxation in mistakes.

ii. For next 10 mistakes, half mark for each mistake to be deducted.

iii. For other mistakes, 01 marks for each mistake to be deducted."

4. It is also averred that the aforesaid formula/mechanism has been hosted on the web page of the respondents as per the directions given by the H.P. State Administrative Tribunal.

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

5. At the outset, we may make note of the contents of the advertisement issued on 08.07.2014 and the relevant code for our purpose is 403 and the same reads as under:-

<table>
<tr>
<td>"403

Steno-typist</td>
<td>i) Should have passed 10+2 examination or its equivalent rom a from a Board of School Education/University recognized by the H.P. Govt.

ii) Should possess the following speed in Shorthand and Type writing on computers in both the language i.e. English & Hindi at the time of initial recruitment.

Speed in shorthand Speed in Typewriting on computers
<table>
<tr><td>English</td><td>Hindi</td><td>English</td><td>Hindi</td></tr>
<tr><td>60</td><td>60</td><td>25</td><td>25</td></tr>
</table>
Provided that at the time of initial recruitment the candidate shall have to pass shorthand test in either of the language i.e. in Hindi or English at the prescribed speed.

Provided further that the candidates will have to pass typewriting test in both the languages at the time of initial recruitment.

Provided further that the incumbent having passed shorthand in one language at the time of initial recruitment at the at the prescribed speed shall have to pass the shorthand test in second language either in Hindi or English whichever may be as prescribed supra within a period of three years from the date of appointment. The appointment letter of such candidate (s) who does not qualify the shorthand test in second language shall contain the specific condition that he shall have to pass the test in shorthand test in second language within a period of three years and if he qualifies the test in shorthand test in second language within a period of three years he will be eligible to draw his annual increment from due dates and the candidate(s) who qualifies the said test after three years will be eligible to draw his first increment only from the date of qualifying the prescribed test.

iii) Should have a knowledge of word processing in computer as prescribed by the recruiting authority.

Desirable knowledge of customs, manner and dialects of Himachal Pradesh and suitability for appointment in the peculiar conditions prevailing in the Pradesh."</td>
</tr>
</table>

6. The criteria for selection is prescribed in the rules, whereas, it is only the conditions of eligibility and other details that are set out in the advertisement. The advertisement contains the details of the number of posts available for selection and also prescribes therein the essential qualifications and other eligibility criteria. The Court, at this stage, is only required to oversee and ensure that the procedure being adopted by the respondents for filling-up the posts in question is fair and transparent.

7. It would be evident from the advertisement that the qualification prescribed therein only indicates a benchmark or bottom line i.e. the eligibility criteria for selection. It is only those candidates, who qualify and meet the minimum prescribed qualification who can further be considered for selection which in turn would then be determined upon their performance and ultimately determine the merit of the respective candidates. The mere fact that the petitioner(s) had attained the prescribed speed would only make them eligible for further consideration, but would not entitle them for being awarded maximum marks. The maximum marks would obviously be awarded for maximum speed coupled with error-less shorthand or typewriting speed as the case may be.

8. Faced with this situation, the learned counsel for the petitioner(s) would contend that the selection process has to be conducted strictly in accordance with the stipulated selection procedure and the same needs to be scrupulously maintained. There can be no relaxation in the terms and conditions of the advertisement and the respondents could not have themselves changed the eligibility criteria by raising the benchmark which was not stipulated in the advertisement. It is further contended that the respondent could not have changed the norms of recruitment process during the pendency of the selection process.

9. In support of their contentions, the learned counsel for the petitioner(s) have placed reliance upon judgments of the Hon'ble Supreme Court in ***Bedanga Talukdar*** *versus* ***Saifudaullah Khan and others (2011) 12 SCC 85, Duddilla Srinivasa Sharma and others*** *versus* ***V.Chrysolite (2013) 16 SCC 702, Public Service Commission, Uttaranchal*** *versus* ***Jagdish Chandra Singh Bora and another (2014) 8 SCC 644*** and ***Renu and others*** *versus* ***District and Sessions Judge, Tis Hazari Courts, Delhi and another (2014) 14 SCC 50.***

10. There can be no quarrel with the proposition that the advertisement is sacrosanct and has, therefore, to be religiously followed. But, then the moot question is as to whether the respondents have in any manner deviated from rules and advertisement.

11. We may, at this stage, note that the petitioner(s) after undergoing written/screening test have been shortlisted to appear in the typing and shorthand skill tests and were thus fully aware of the requirement of excellence in the tests. They were fully aware that they would have to compete in the further test which would be evaluated on the basis of the high speed and error-free shorthand and typing tests of the candidates. The petitioner(s) are presumed to be aware that the advertisement only prescribes the basic eligibility criteria and further details would be available in the rules, statutory instructions and guidelines etc. and would further be presumed to be fully aware and conscious that allocation of marks would be based entirely on performance.

12. Even otherwise, every candidate who participates and undergoes a selection is deemed to be aware that he/she has to excel as it would be then alone that he/she can be considered on merits. After-all, the selection means to pick out the best and most suitable candidate based upon performance.

13. Therefore, in such circumstances, we are at a loss to understand as to how the respondents have given a complete go-by to the advertisement or have not adhered to the same in letter and spirit as alleged. Rather, it is the petitioner(s), who have proceeded with this litigation on fallacious premises.

14. That apart, it would be noticed that the petitioner(s) in pursuance to the advertisement have participated in the selection process with their eyes wide open. In case, the petitioner(s) entertained any doubt regarding awarding of any marks or had found any other discrepancy in the advertisement, then they should have sought clarification from the respondents before participating in the selection process. But, having participated in the selection process, the petitioner(s) cannot now turn around and question the method of selection. This is the settled position of law and to buttress the same we only need to refer to a recent judgment of the Hon'ble Supreme Court in ***Madras Institute of Development Studies and another*** vs. ***K. Sivasubramaniyan and others (2016) 1 SCC 454***, wherein the Hon'ble Supreme Court held as under:-

> "14. *The question as to whether a person who consciously takes part in the process of selection can turn around and question the method of selection is no longer res integra.*
>
> *15.* *In Dr. G. Sarana vs. University of Lucknow & Ors., (1976) 3 SCC 585, a similar question came for consideration before a three Judges Bench of this Court where the fact was that the petitioner had applied to the post of Professor of Athropology in the University of Lucknow. After having appeared before the Selection Committee but on his failure to get appointed, the petitioner rushed to the High Court pleading bias against him of the three experts in the Selection Committee consisting of five members. He also alleged doubt in the constitution of the Committee. Rejecting the contention, the Court held: (SCC p.591, para 15)*
>
> > *"15. We do not, however, consider it necessary in the present case to go into the question of the reasonableness of bias or real likelihood of bias as despite the fact that the appellant knew all the relevant facts, he did not before appearing for the interview or at the time of the interview raise even his little finger against the constitution of the Selection Committee. He seems to have voluntarily appeared before the committee and taken a chance of having a favourable recommendation from it. Having done so, it is not now open to him to turn round and question the constitution of the committee. This view gains strength from a decision of this Court in Manak Lal's case where in more or less similar circumstances, it was held that the failure of the appellant to take the identical plea at the earlier stage of the proceedings created an effective bar of waiver against him. The following observations made therein are worth quoting: (AIR p.432, para 9)*
> >
> > > *'9. ..It seems clear that the appellant wanted to take a chance to secure a favourable report from the tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point.' "*
>
> *16.* *In Madan Lal & Ors. vs. State of J&K & Ors. (1995) 3 SCC 486, similar view has been reiterated by the Bench which held that: (SCC p.493, para 9)*
>
> > *"9. Before dealing with this contention, we must keep in view the salient fact that the petitioners as well as the contesting successful*

candidates being respondents concerned herein, were all found eligible in the light of marks obtained in the written test, to be eligible to be called for oral interview. Up to this stage there is no dispute between the parties. The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla 1986 Supp. SCC 285, it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

17. In Manish Kumar Shahi vs. State of Bihar, (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed: (SCC p. 584, para 16)

"16. We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

18. In the case of Ramesh Chandra Shah and others vs. Anil Joshi and others, (2013) 11 SCC 309, recently a Bench of this Court following the earlier decisions held as under: (SCC p.320, para 24)

"24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents."

15. In addition to the aforesaid, we also find that the petitioner in CWP No.4077/2015 has already approached the H.P. State Administrative Tribunal by filing

O.A.No.2900/2015 and the said petition is still pending before the learned Tribunal and infact on 26.08.2015 the learned Tribunal passed the following order:-

> "Heard. Notice.
>
> Ms. Aruna Sharma, learned standing counsel waives service of notice on behalf of the sole respondent.
>
> Reply be filed within four weeks.
>
> In so far as prayer for interim relief is concerned, suffice it to say that the respondent-Board shall evaluate the performance of the candidates in the typing skill test strictly in accordance with the criteria/rules/regulations holding the field, which may also be put in the public domain.
>
> List on **28.09.2015.**
>
> Copy dasti."

16. Though, a copy of the order has been placed as Annexure P-8 with the petition, but the same has not been assailed before this Court. Once, that is so, then the instant petition is not maintainable as the petitioner without assailing the order of the learned Tribunal cannot directly file and maintain the present petition before this Court in matters covered under the provisions of the Administrative Tribunal Act. It is only against the orders passed by the learned Tribunal whether interlocutory or final that a writ petition can be filed before this Court.

17. That apart, CWPs No.4265/2015 and 18/2016 have directly been filed before this Court without first approaching the learned Administrative Tribunal and are, therefore, not maintainable before this Court.

18. In view of the aforesaid discussion, not only are the petitions not maintainable before this Court but they even lack merit and, therefore, dismissed as such. The parties are left to bear their own costs. The pending applications, if any, also stand disposed of. The Registry is directed to place a copy of this judgment on the files of connected matters.

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

Laxman .....Appellant.

Vs.

HRTC and another .....Respondents

FAO (MVA) No. 117 of 2010
Date of decision: 1st April,2016

Motor Vehicles Act, 1988- Section 166- Claimant suffered 15% disability- he remained in the hospital for 26 days and had to engage an attendant- Tribunal awarded Rs. 9390/- towards medical and hospitalization expenses but has fallen in error in not awarding the compensation under the head 'Pain and suffering', 'Loss of amenities of life' and 'Loss of income'- claimant will not be in a position to earn anything after his retirement except pension- hence, amount of Rs.1 lac awarded under the head 'loss of income'- he will be suffering pain throughout his life, thus, amount of Rs.50,000/- awarded under the head 'pain and suffering' and Rs.50,000/- awarded under the head 'loss of amenities of life'- thus, claimant is entitled to Rs.2 lacs (1 lac+ 50,000/- + 50,000)- in addition to the amount

awarded by the tribunal along with interest @ 7.5% per annum from the date of the award till realization. (Para-4 to 7)

For the appellant:	Mr. G.R. Palsara, Advocate.
For the respondents:	Mr. N.K. Thakur, Sr. Advocate with Mr. Jagdish Thakur, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 27.2.2010, made by the Motor Accident Claims Tribunal-II, Mandi, H.P. in Claim Petition No. 51 of 2003, titled *Sh. Laxman versus Himachal Road Transport Corporation and another*, for short "the Tribunal", whereby compensation to the tune of Rs.24,390/- was awarded in favour of the claimant and insurer 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 as it relates to them.

3. The claimant has questioned the impugned award on the ground of adequacy of compensation.

4. Admittedly, the claimant/appellant met with an accident and suffered 15% disability. He remained admitted in the hospital for 26 days and during the said period, he had to engage attendant. The Tribunal has awarded Rs.9390/- towards medical and hospitalization expenses, has fallen in an error in not awarding the compensation under the head "Pain and suffering, "Loss of amenities of life" and "Loss of income."

5. It is admitted and pleaded that he has suffered 15% disability which he will be carrying throughout his life. At least, some amount, under the head "Loss of income" was to be awarded in his favour because after retirement, he will not be in a position to earn anything except pension. Thus it is held that the claimant is, at least, entitled to *lump sum* of Rs.1, 00,000/- under the head "loss of income."

6. The claimant has also suffered pain and will be undergoing the same throughout his life. He stands deprived of his amenities of life. Thus, I deem it proper to award Rs.50,000/- under the head "Pain and suffering" and Rs.50,000/- under the head "loss of amenities of life".

7. Viewed thus, the claimant is held entitled to Rs.1,00,000/- +Rs.50,000/- +Rs.50,000. Total Rs.200,000/, in addition to the amount already awarded by the Tribunal with interest @ 7.5% per annum from the date of the impugned award till its realization.

8. Accordingly, the impugned award is modified as indicated hereinabove. The insurer is directed to satisfy the award and is directed to deposit the 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 claimant, through payees' cheque account or by depositing the same in his bank account, strictly in terms of the conditions contained in the impugned award.

9. The appeal stands disposed of accordingly.

10. Send down the record forthwith, after placing a copy of this judgment.

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

Manoj Kumar and others .....Appellants

Versus

Rajesh Kumar and others ..... Respondents

FAO No. 60 of 2010.
Decided on: 01.04.2016

Motor Vehicles Act, 1988- Section 166- An FIR was registered against the driver of the offending bus- challan was also filed against the driver before the Court of competent jurisdiction- PW-1 stated that driver had suddenly applied the break which shows the rash and negligent driving of the driver- negligence has to be determined on the preponderance of probabilities and not beyond the reasonable doubt- in these circumstances, Tribunal had rightly held that accident had taken place due to rash and negligent driving of the driver of the offending bus.

Motor Vehicles Act, 1988- Section 166- Deceased was a house wife and was working in a factory – her income cannot be less than Rs. 3,000/- per month- after deducting 1/3rd amount from the income of the deceased towards her personal expenses, loss of dependency is Rs. 2,000/- P.M.- the age of the deceased was 32 years at the time of accident- multiplier of '14' is applicable- hence, claimants are entitled to Rs.3,36,000/- (Rs.2000 x 12 x 14) towards the loss of dependency- they are also entitled to Rs.10,000/- each under the heads 'Loss of love and affection', 'Loss of estate', 'Loss of consortium' and 'Funeral expenses'- thus, claimants are also entitled to Rs.3,76,000/- (Rs.3,36,000/- + Rs.40,000/-) along with interest @ 7.5% per annum from the date of filing of the claim petition. (Para-16 to 21)

For the appellants: Mr.Rupinder Singh, Advocate.

For the respondents: Mr.Karan Singh Kanwar, Advocate, for respondents No.1 and 2.
Mr.G.D. Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

Subject matter of this appeal is the award, dated 17th December, 2009, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., (for short, the Tribunal), in Claim Petition No.55-MAC/2 of 2008, titled Manoj Kumar and others vs. Rajesh Kumar and others, whereby compensation only to the tune of Rs.50,000/- under the head 'no fault liability' came to be awarded in faovur of the claimants, (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 as it relates to them.

3. Feeling aggrieved and dissatisfied with the impugned award, the claimants have challenged the impugned award by the medium of instant appeal.

4. The claimants had 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.6,71,000/-, as per the break-ups given in the Claim Petition.

5. Respondents resisted the claim petition by filing replies.

6. On the pleadings of the parties, the following issues came to be framed:

"1. Whether Smt.Devo Devi died due to rash and negligent driving of bus No.HP-17-5410 being driven by respondent No.1 Rajesh Kumar on 19.4.2008 at about 9.40 AM near village Nariwala, as alleged? OPP

2. In case issue No.1 is proved in affirmative, to what amount of compensation the petitioners are entitled top and from whom? OPP

3. Whether the drive of the bus did not possess a valid and effective driving licence at the time of accident, as alleged? OPR-3

4. Whether the bus in question was being plied in violation of the terms and conditions of Insurance policy, as alleged? OPR-3

5. Relief."

7. In order to prove their claim, the claimants examined Head Constable Dhanbir Singh as PW-1, Shri Ran Singh as PW-2 and Smt.Reena Devi as PW-3. On the other hand, the respondents examined RW-2 Attar Singh and RW-3 Babu Ram, while the driver of the offending bus appeared in the witness box as RW-1.

8. In addition, the claimants have proved the documents produced before the Tribunal, the detail of which is given in the impugned award.

9. Qua the accident, FIR Ext.PW-1/A, bearing No.162/2008, dated 19.4.2008, was registered at Police Station, Paonta Sahib, a perusal whereof clearly establishes that the same was lodged against the driver of the offending bus. Challan was also presented against the driver of the offending vehicle under Sections 279 and 304-A of the Indian Penal Code before the court of competent jurisdiction.

10. Apart from it, Head Constable PW-1 Dhanbir Singh deposed that the driver of the offending vehicle, at the relevant point of time, had suddenly applied the brakes on the request of the Conductor of the bus, who was asked by the said deceased for stopping the bus. The Tribunal has discussed the said fact in paragraph 11 of the impugned award and held that the claimants were not able to prove the said factum by leading a reliable evidence and, therefore, the Tribunal concluded that the driver was not negligent in driving the vehicle in question.

11. However, while going through the evidence led by the claimants, particularly, the statement of PW-1 Head Constable Dhanbir Singh, one comes to an inescapable conclusion that the accident had taken place because of the rash and negligent driving of the driver. Had the driver not applied the brakes suddenly on the asking of the Conductor and had he taken due care while stopping the bus, the accident would have been averted.

12. It is beaten law of the land that the negligence on the part of the driver of the offending vehicle has to be decided on the hallmark of preponderance of probabilities and not on the basis of proof beyond reasonable doubt, as is required in civil and criminal cases.

13. Having said so, it is held that the driver of the offending vehicle had driven the bus in question rashly and negligent as a result of which the deceased fell down from the bus, sustained injuries and succumbed to the same lateron. Accordingly, the findings

recorded by the Tribunal on issue No.1 are set aside and issue No.1 is decided in favour of the claimants and against the respondents.

14. Before issue No.2 is taken up, I deem it proper to deal with issues No.3 and 4. Onus to prove these issues was on the insurer, has not led any evidence to prove both these issues. The Tribunal, while deciding these issues, has clearly held that the driver was having a valid and effective driving licence at the time of accident and that the bus was being plied as per the route permit, which findings have not been challenged by the insurer by filing an appeal, thus, the same have attained finality.

15. However, I have gone through the driving licence proved on record as RW-1/B, which shows that the driver was having a valid and effective driving licence to drive the offending vehicle. The factum of the offending vehicle being duly insured is not in dispute. The insurer has failed to prove that the owner had committed willful breach of the terms and conditions contained in the insurance policy. Accordingly, the findings returned by the Tribunal on these issues are upheld.

16. Coming to issue No.2, claimants No.1 to 3 are the sons and daughter of deceased Devo Devi while claimant No.4 is her husband. It is pleaded in the claim petition that the deceased, albeit being a house wife, was working in a factory and was earning Rs.3,000/- per month. Even if it is taken that the deceased was a house wife, her income cannot be said to be less than Rs.3,000/- per month. Thus, the monthly income of the deceased is taken to be Rs.3,000/-. After deducting 1/3rd amount from the income of the deceased towards her personal expenses, the monthly loss of source of dependency to the claimants can be said to be Rs.2,000/-.

17. It has been pleaded in the claim petition that the age of the deceased, at the time of her death, was 32 years, while the postmortem report as well as other documents proved on record, do disclose that the age of the deceased, at the time of death, was 38 years. Thus, it is held that the deceased, at the time of death, was 38 years of age and the appropriate multiplier applicable is of 14.

18. In view of the above, it is held that the claimants lost source of dependency to the tune of Rs.2000 x 12 x 14 = Rs.3,36,000/-.

19. This Court cannot be oblivious to the fact that the claimants No.1 to 3 have lost the affection of their mother for their entire life and claimant No.4, being the husband of the deceased, has lost his life companion. Thus, the claimants, in addition to above, are also held entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of estate', loss of consortium' and 'funeral expenses'.

20. Having said so, the claimants are held entitled to Rs.3,76,000/- as compensation under the following heads:

i) Loss of source of dependency:	Rs.3,36,000/-
ii) Loss of love and affection:	Rs.10,000/-
iii) Loss of estate:	Rs.10,000/-
iv) Loss of consortium	Rs.10,000/-
v) Funeral expenses:	Rs.10,000/-
Total:	Rs.3,76,000/-

21. The above amount shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit. The insurer is directed to deposit the entire amount, alongwith up-to-date interest, in the Registry of this Court, within a period of six weeks from today and on deposit, the Registry is directed to release the said amount in favour of the claimants, in equal shares, through their bank accounts, after proper identification.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s Micromax Informatics Ltd. ...Petitioner

Versus

State of Himachal Pradesh and others ...Respondents

CWP No. 4779 of 2015
Judgment reserved on: 22.3.2016
Date of Decision: 01.4.2016.

Constitution of India, 1950- Article 226- Petitioner was paying value added tax @ 5% on cell phone chargers, which were being sold along with cell phones in a single package, while the phones were taxable @ 13.75%- a notice was issued to the petitioner and it was asked to pay the differential VAT @ 8.75 % (13.75%-5%)- held, that there is an alternative and efficacious remedy available under the H.P. VAT Act, 2005 and the writ petition is not maintainable- petition dismissed..

Case referred:
State of Punjab Vs. M/s Nokia India, AIR 2015 SC 1068

For the petitioner: Mr.Surjit Ghosh and Mr.Rahul Mahajan, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition is directed against the order passed by the Assessing Authority under the Value Added Tax Act (for short 'VAT Act'), whereby the petitioner has been directed to deposit into the Government Treasury a sum of Rs.24,52,973/-.

2. The facts leading to filing of the instant petition are that the petitioner was paying Value Added Tax (for short 'VAT') @ 5% on cell phone chargers, which were being sold along with cell phones in a single package, while those were in fact taxable @ 13.75%. The Excise and Taxation Officer issued notice to the petitioner under Section 16(8) of the VAT Act, directing it to produce all its returns with TR's, balance sheet, total number of cell phone charges sold and copies of assessment orders, if any, for the years 2010-11, 2011-12, 2012-13, 2013-14 and 2014-15 (up to 30.11.2014).

3. In response to the notice, the petitioner submitted that the cell phone chargers were being sold with cell phones in a single package and therefore, could not be taxed separately. It is further contended that cell phone chargers, which had no separate

value, were being sold with the cell phones in a single package and therefore, could not be taxed separately.

4. The Assessing Authority considered the submissions of the petitioner and held that the entry No. 60 (f) (vii) of Part-II A of Schedule A of the H.P. VAT Act, 2005 was pari materia, identical and verbatim the same as that of entry No. 60 (6) (g) of the Punjab VAT Act. He further held that while construing the Punjab VAT Act, the Hon'ble Supreme Court in ***State of Punjab Vs. M/s Nokia India, AIR 2015 SC 1068*** had categorically held that *"the mobile/cell phone charger is an accessory to cell phone and it is not a part of the cell phone. Further held that the battery charger cannot be held to be a composite part of the cell phone but is an independent product which can be sold separately, without selling the cell phone."* The Assessing Authority thereafter assessed the charger at Rs.48/- as held out by the petitioner and thereafter directed the petitioner to pay the differential VAT of 8.7% (i.e. 13.75%-5%) and after calculating the same directed the petitioner to pay the aforesaid amount.

5. The petitioner has questioned this order on a number of grounds, as taken in the writ petition.

We have heard the learned counsel for the petitioner and have gone through the records of the case.

6. On 23.12.2015 the case came up for consideration and after addressing the arguments for some time, the petitioner sought time to justify the maintainability of the writ petition. It is not in dispute that there is an alternative remedy available by way of appeal under the H.P. VAT Act, 2005, but the petitioner would contend that the same would not operate as a bar while entertaining the petition under Articles 226/227 of the Constitution of India. Evidently, the order impugned herein is based solely and entirely on the judgment rendered by the Hon'ble Supreme Court in Nokia India's case supra and therefore, no exception to the same that too on hyper technical ground is permissible.

7. Identical issues relating to both of question of alternative remedy as also regarding levy of VAT @ 13.75% on the mobile chargers have already been considered by this Court in ***CWP No. 1596 of 2015***, ***Samsung India Vs. State of H.P. and others***, decided on 20.6.2015, wherein it was held:-

> *"**6.** It is not in dispute that respondents No. 3 and 4 are authorities constituted under the H.P. VAT Act, 2005, and therefore, even if it is assumed that there is an illegal or irregular exercise of jurisdiction the same would not result in the order being without jurisdiction. Even if there has been some defect in the procedure followed during the hearing of the case, it does not follow that the authority has acted without jurisdiction. It may make the order irregular or defective, but the order cannot be a nullity so long as it has been passed by an authority which was competent to pass the order. There is basic difference between want of jurisdiction and an illegal or irregular exercise of jurisdiction and if there is non compliance of rules of procedure, the same cannot be a ground for granting one of the writs prayed for. In either case, the defect, if any, can according to the procedure established by law be corrected only by a court of appeal or revision.*
>
> ***7.** In **Janardhan Reddy & others** vs. **The State of Hyderabad & others AIR 1951 SC 217,** the Hon'ble Supreme Court has held as follows:-*

> "6. ……. *But, for the purpose of the present case, it is sufficient to point out that even if we assume that there was some defect in the procedure fold at the trial, it does not follow that the trial Ct. acted without jurisdiction. There is a basic difference between want of jurisdiction & an illegal or irregular exercise of jurisdiction, & our attention has not been drawn to any authority in which mere non-compliance with the rules of procedure has been made a ground for granting one of the write prayed for. In either case, the 'defect, if any, can according to the procedure established by law be corrected only by a Ct. of appeal or revision. Here, the appellate Ct. which was competent to deal with the matter has pronounced its judgment against the petitioners. & the manner having been finally decided is not one to be reopened in a proceeding under Art. 32 of the Constitution."*

8. *Now in so far as the contention of the petitioner that a subsequent judgment i.e.* ***Nokia's*** *case (supra) cannot be used to change the course of past assessment is concerned, it is more than settled that the judgments of the courts declare the law as it was always. Though the courts some time order that the judgments would have prospective effect, but in absence of such restrictions, the law declared by the courts is deemed to be always the law so interpreted i.e. the law as it stood right from the beginning as per its decision.*

9. *In* ***Sarwan Kumar and another*** *vs.* ***Madan Lal Aggarwal (2003) 4 SCC 147,*** *the Hon'ble Supreme Court has held as follows:-*

> *"20. ……..When the court decides that the interpretation given to a particular provision earlier was not legal, it declares the law as it stood right from the beginning as per its decision. In Gian Devi Anand's case (supra) the interpretation given by the Delhi High Court that commercial tenancies were not heritable was overruled being erroneous. Interpretation given by the Delhi High Court was not legal. The interpretation given by this Court declaring that the commercial tenancies heritable would be the law as it stood from the beginning as per the interpretation put by this Court. It would be deemed that the law was never otherwise."*

10. *Similarly in* ***Assistant Commissioner, Income Tax, Rajkot*** *vs.* ***Saurashtra Kutch Stock Exchange Limited (2008) 14 SCC 171,*** *the Hon'ble Supreme Court has held as follows:-*

> *"35. In our judgment, it is also well- settled that a judicial decision acts retrospectively. According to Blackstonian theory, it is not the function of the Court to pronounce a `new rule' but to maintain and expound the `old one'. In other words, Judges do not make law, they only discover or find the correct law. The law has always been the same. If a subsequent decision alters the earlier one, it (the later decision) does not make new law. It only discovers the correct principle of law which has to be applied retrospectively. To put it differently, even where an earlier decision of the Court operated for quite some time, the decision rendered later on would have retrospective effect clarifying the legal position which was earlier not correctly understood.*
>
> *36. Salmond in his well-known work states;*

> *"The theory of case law is that a judge does not make law; he merely declares it; and the overruling of a previous decision is a declaration that the supposed rule never was law. Hence any intermediate transactions made on the strength of the supposed rule are governed by the law established in the overruling decision. The overruling is retrospective, except as regards matters that are resjudicatae or accounts that have been settled in the meantime". (emphasis supplied)*

11. *In so far as the maintainability of the writ petition is concerned, the facts herein are similar to the ones in* ***M/s Indian Technomac Company Ltd.*** *case (supra), wherein this court was confronted with the proposition regarding the maintainability of the petition when an alternative remedy existed under the H.P. VAT Act, 2005 and this court held as follows:-*

> *"6. Before we deal with the question of maintainability of the writ petitions, we deem it proper to make a brief reference to the averments contained in the leading writ petition, (CWP No.4779 of 2014), which are, by and large, similar in the other writ petitions. It is averred in the writ petition that the Assessing Authority has not heard the petitioners before making the impugned orders, and thus, have been passed without providing sufficient opportunity of being heard to the writ petitioners. It is also pleaded that the impugned orders have been passed in a biased manner, under the dictation of high officials. It is further pleaded that the impugned orders have been passed without jurisdiction, though, during the course of hearing, as discussed hereinabove, no such argument was advanced to substantiate the fact that the Assessing Authority passed the impugned orders without jurisdiction or that the said Authority has acted with bias.*
>
> *7. Now, coming to the core question of maintainability of the writ petitions, in terms of the HP VAT Act, 2005, the Assessing Authority is vested with the authority to pass orders and against such orders, provision of appeal is envisaged, and the orders passed in the appeal, are further appealable to the Tribunal. Section 48 of the HP VAT Act, 2005 further provides that the order of the Tribunal can be assailed by way of revision before the High Court.*
>
> *8. We deem it proper to reproduce Sections 45, 46 and 48 of the HP VAT Act, 2005 here under:*
>
> > *"**45**. **Appeal**. - (1) An appeal from every original order passed under this Act or rules made thereunder shall lie-*
> >
> > *(a) if the order is made by an Assessing Authority or by an officer–in–charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, to the Deputy Excise and Taxation Commissioner;*
> >
> > *(b) if the order is made by the Deputy Excise and Taxation Commissioner, to the Commissioner or the Additional Excise and Taxation Commissioner, posted at the State Headquarters;*
> >
> > *(c) if the order is made by the Commissioner or the Additional Excise and Taxation Commissioner posted at the State*

Headquarters any officer exercising the powers of the Commissioner, to the Tribunal.

(2) An order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Additional Excise and Taxation Commissioner posted at the State Headquarters or by the Commissioner or any officer, on whom the powers of the Commissioner are conferred, shall be further appealable to the Tribunal.

(3) Every order of the Tribunal, the Commissioner or any officer exercising the powers of the Commissioner or the Additional Excise and Taxation Commissioner posted at the State Headquarters or the order of the Deputy Excise and Taxation Commissioner or of the Assessing Authority or an officer in-charge of check-post or barrier or any other officer not below the rank of an Excise and Taxation Officer, if not challenged in appeal or revision, shall be final.

(4) No appeal shall be entertained unless it is filed within sixty days from the date of communication of the order appealed against, or such longer period as the Appellate Authority may allow, for reasons to be recorded in writing.

(5) No appeal under sub-section (1) shall be entertained by an Appellate Authority unless such appeal is accompanied by satisfactory proof of the payment of the tax (including interest payable) or of the penalty, if any, imposed or both as the case may be:

Provided that if such Authority is satisfied that the dealer is unable to pay the tax (including interest payable) assessed or the penalty, if any, imposed or both, he may, for reasons to be recorded in writing, entertain an appeal without the tax (including interest payable) or penalty or both having been paid in full or after part payment of such tax (including interest payable) or penalty or both.

(6) Subject to such rules of procedure as may be prescribed, an Appellate Authority may pass such order on appeal as it deems just and proper.

***46. Revision**.- (1) The Commissioner may, of his own motion, call for the record of any proceedings which are pending before, or have been disposed of by, any Authority subordinate to him, for the purpose of satisfying himself as to the legality or propriety of such proceedings or order made therein and, on finding the proceedings or the orders prejudicial to the interest of revenue, may pass such order in relation thereto as he may think fit:*

Provided that the powers under this sub-section shall be exercisable only within a period of five years from the date on which such order was communicated.

(2) The State Government may, by notification, confer on any officer powers of the Commissioner under sub-section (1) to be exercised subject to such conditions and in respect of such

areas as may be specified in the notification and such officer shall be deemed to be the Commissioner for the purposes of sub-section (1).

(3) The tribunal, on application made to it against an order of the Commissioner under this section within sixty days from the date of the communication of the order, for the purpose of satisfying itself as to the legality or propriety of such order, may call for and examine the record of any such case and may pass such orders thereon as it thinks just and proper.

(4) No order shall be passed under this section, which adversely affects any person unless such person has been given a reasonable opportunity of being heard.

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***48. Revision to High Court**. - (1) Any person aggrieved by an order made by the tribunal under sub-section (2) of section 45 or under sub-section (3) of section 46, may, within 90 days of the communication of such order, apply to the High Court of Himachal Pradesh for revision of such order if it involves any question of law arising out of erroneous decision of law or failure to decide a question of law.*

(2) The application for revision under sub-section (1) shall precisely state the question of law involved in the order, and it shall be competent for the High Court to formulate the question of law.

(3) Where an application under this section is pending, the High Court may, or on application, in this behalf, stay recovery of any disputed amount of tax, penalty or interest payable or refund of any amount due under the order sought to be revised:

Provided that no order for stay of recovery of such disputed amount shall remain in force for more than 30 days unless the applicant furnishes adequate security to the satisfaction of the Assessing Authority concerned.

(4) The application for revision under sub-section (1) or the application for stay under sub-section (3) shall be heard and decided by a bench consisting of not less than two judges.

(5) No order shall be passed under this section which adversely affects any person unless such person has been given a reasonable opportunity of being heard."

9. Provision of sub section (1) of Section 45 of the HP VAT Act, 2005 clearly provides that if the order is made by an Assessing Authority or by an officer–in–charge of the check post or barrier or any other officer not below the rank of the Excise and Taxation Officer, the appeal against such order shall lie to the Deputy Excise and Taxation Commissioner; if the order is made by the Deputy Excise and Taxation Commissioner, the same can be appealed before the Commissioner or the Additional Excise and Taxation Commissioner, posted at the State Headquarters; and if the order is made by the Commissioner or the Additional Excise and Taxation

Commissioner posted at the State Headquarters any officer exercising the powers of the Commissioner, the same is appealable before the Tribunal. Sub Section (2) of Section 45 of the HP VAT Act, 2005 further provides that an order passed in appeal by a Deputy Excise and Taxation Commissioner or by the Additional Excise and Taxation Commissioner posted at the State Headquarters or by the Commissioner or any officer, on whom the powers of the Commissioner are conferred, shall be appealable before the Tribunal.

10. Admittedly, the impugned orders, in the present cases, have been issued by the Assistant Excise and Taxation Commissioner cum-Assessing Authority. Therefore, remedy of appeal is available to the petitioners as per Section 45 of the HP VAT Act, 2005.

11. Now, the question which arises for determination is – when an Act provides mechanism to have remedy(ies), can a writ lie in the given circumstances? The answer is in the negative for the following reasons. It is well settled principle of law that High Courts have imposed rule of self limitation in entertaining the writ petition in terms of writ jurisdiction when alternative remedy is available. High Court must not interfere if there is adequate efficacious alternative remedy available and the practice of approaching the High Court, without availing the remedy(ies) provided, must be deprecated, unless express case is made out.

12. The Apex Court in ***Union of India and another vs. Guwahati Carbon Limited, (2012) 11 SCC 651,*** *while dealing with the similar question, has observed in paragraphs 8, 9, 10, 11, 14 and 15 as under:*

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, AIR 1979 SC 1250. In the said decision, this Court was pleased to observe that: (SCC p.88, para 23)*
>
> > *"23. ……. when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner and all the -other forums and modes of seeking remedy are excluded."*
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> *9. A Bench of three learned Judges of as Court, in Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433, held: (SCC p.440, para 11)*
>
> > *"11……The Act provides for a complete- machinery to challenge an order of assessment, and the impugned orders of assessment can only be challenged by the mode prescribed by the Act and not by a petition under Article 226 of the Constitution. It is now well recognised that where right or liability is created by a statute which gives a special remedy for 1 enforcing it, the remedy provided by that statute must be availed…."*

10. In other words, existence of an adequate alternate remedy is a factor to be considered by the writ court before exercising its writ jurisdiction (See Rashid Ahmed v. Municipal Board, Kairana, 1950 SCR 566).

11. In Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1, this Court held:

> *"15. Under Article 226 of the Constitution, the High Court, having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar in at least three contingencies, namely, where the writ petition has been filed for the enforcement of the Fundamental Rights or where there has been a violation of the principle of natural justices or where the order or proceedings are wholly without jurisdiction or the vires of an Act is challenged....."*
> *xxxxxxxxxxx xxxxxxxxxxx xxxxxxxxxxxxx*
> *14. Having said so, we have gone through the orders passed by the Tribunal. The only determination made by the Tribunal is with regard to the assessable value of the commodity in question by excluding the freight/ transportation charges and the insurance charges from the assessable value of the commodity in question. Since what was done by the Tribunal is the determination of the assessable value of the commodity in question for the purpose of the levy of duty under the Act, in our opinion, the assessee ought to have carried the matter by way of an appeal before this Court under Section 35L of the Central Excise Act, 1944.*

15. In our opinion, the assessee ought not to have filed a writ petition before the High Court questioning the correctness or otherwise of the orders passed by the Tribunal. The Excise Law is a complete code in order to seek redress in excise matters and hence may not be appropriate for the writ court to entertain a petition under Article 226 of the Constitution. Therefore, the learned Single Judge was justified in observing that since the assessee has a remedy in the form of a right of appeal under the statute, that remedy must be exhausted first. The order passed by the learned Single Judge, in our opinion, ought not to have been interfered with by the Division Bench of the High Court in the appeal filed by the respondent/assessee."

13. The Apex Court in ***Nivedita Sharma vs. Cellular Operators Association of India and others, (2011) 14 SCC 337,***

after discussing its various earlier decisions, held that the High Court had committed error in entertaining the writ petition without noticing and referring to the relevant provisions of law applicable in that case, which contained statutory remedy of appeal and accordingly set aside the order of the High Court in terms of which the writ petition was entertained. It is apt to reproduce paragraphs 24 and 25 hereunder:

> *"24. Section 19 provides for remedy of appeal against an order made by the State Commission in exercise of its powers under sub-clause (i) of Clause (a) of Section 17. If Sections 11, 17 and 21 of the 1986 Act which relate to the jurisdiction of the District Forum, the State Commission and the National Commission, there does not appear any plausible reason to interpret the same in a manner which would frustrate the object of legislation.*
>
> *25. What has surprised us is that the High Court has not even referred to Sections 17 and 19 of the 1986 Act and the law laid down in various judgments of this Court and yet it has declared that the directions given by the State Commission are without jurisdiction and that too by overlooking the availability of statutory remedy of appeal to the respondents."*

14. The Apex Court in a recent decision in ***Commissioner of Income Tax and others vs. Chhabil Dass Agarwal, (2014) 1 SCC 603,*** *has discussed the law, on the subject, right from the year 1859 till the date of judgment i.e. 8th August, 2013. We deem it proper to reproduce paragraphs 12, 13, 15, 16 and 17 hereunder:*

> *"12. The Constitution Benches of this Court in K.S. Rashid and Sons vs. Income Tax Investigation Commission, AIR 1954 SC 207; Sangram Singh vs. Election Tribunal, AIR 1955 SC 425; Union of India vs. T.R. Varma, AIR 1957 SC 882; State of U.P. vs. Mohd. Nooh, AIR 1958 SC 86 and K.S. Venkataraman and Co. (P) Ltd. vs. State of Madras, AIR 1966 SC 1089, have held that though Article 226 confers very wide powers in the matter of issuing writs on the High Court, the remedy of writ is absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to the conclusion that there has been a breach of the principles of natural justice or the procedure required for decision has not been adopted. (See: N.T. Veluswami Thevar vs. G. Raja Nainar, AIR 1959 SC 422; Municipal Council, Khurai vs. Kamal Kumar, (1965) 2 SCR 653; Siliguri Municipality vs. Amalendu Das, (1984) 2 SCC 436; S.T. Muthusami vs. K. Natarajan, (1988) 1 SCC 572; Rajasthan SRTC vs. Krishna Kant, (1995) 5 SCC 75; Kerala SEB vs. Kurien E. Kalathil, (2000) 6 SCC 293; A. Venkatasubbiah Naidu vs. S. Chellappan, (2000) 7 SCC 695; L.L. Sudhakar Reddy vs. State of A.P., (2001) 6 SCC 634; Shri Sant Sadguru Janardan Swami (Moingiri Maharaj); Sahakari*

Dugdha Utpadak Sanstha vs. State of Maharashtra, (2001) 8 SCC 509; Pratap Singh vs. State of Haryana, (2002) 7 SCC 484 and GKN Driveshafts (India) Ltd. vs. ITO, (2003) 1 SCC 72).

13. In Nivedita Sharma vs. Cellular Operators Assn. of India, (2011) 14 SCC 337, this Court has held that where hierarchy of appeals is provided by the statute, the party must exhaust the statutory remedies before resorting to writ jurisdiction for relief and observed as follows: (SCC pp.343- 45 paras 12-14)

> *"12. In Thansingh Nathmal v. Supdt. of Taxes, AIR 1964 SC 1419 this Court adverted to the rule of self-imposed restraint that the writ petition will not be entertained if an effective remedy is available to the aggrieved person and observed: (AIR p. 1423, para 7).*

'7. … The High Court does not therefore act as a court of appeal against the decision of a court or tribunal, to correct errors of fact, and does not by assuming jurisdiction under Article 226 trench upon an alternative remedy provided by statute for obtaining relief. Where it is open to the aggrieved petitioner to move another tribunal, or even itself in another jurisdiction for obtaining redress in the manner provided by a statute, the High Court normally will not permit by entertaining a petition under Article 226 of the Constitution the machinery created under the statute to be bypassed, and will leave the party applying to it to seek resort to the machinery so set up.'

13. In Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433 this Court observed: (SCC pp. 440-41, para 11)

> *'11. … It is now well recognised that where a right or liability is created by a statute which gives a special remedy for enforcing it, the remedy provided by that statute only must be availed of. This rule was stated with great clarity by Willes, J. in Wolverhampton New Waterworks Co. v. Hawkesford, 141 ER 486 in the following passage: (ER p. 495)*
>
> > *"… There are three classes of cases in which a liability may be established founded upon a statute. … But there is a third class viz. where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it. … The remedy provided by the statute must be followed, and it is not competent to the party to pursue the course applicable to cases of the second class. The form given by the statute must be adopted and adhered to."*

The rule laid down in this passage was approved by the House of Lords in Neville v. London Express Newspapers Ltd., 1919 AC 368 and has been reaffirmed by the Privy Council in Attorney General of Trinidad and Tobago v. Gordon Grant and Co. Ltd., 1935 AC 532 (PC) and Secy. Of State v. Mask and Co., AIR 1940 PC 105. It has also been held to be equally applicable to enforcement of rights, and has been followed by this Court throughout. The High Court was therefore justified in dismissing the writ petitions in limine.'

14. In Mafatlal Industries Ltd. v. Union of India, (1997) 5 SCC 536 B.P. Jeevan Reddy, J. (speaking for the majority of the larger Bench) observed: (SCC p. 607, para 77)

> *'77. … So far as the jurisdiction of the High Court under Article 226—or for that matter, the jurisdiction of this Court under Article 32—is concerned, it is obvious that the provisions of the Act cannot bar and curtail these remedies. It is, however, equally obvious that while exercising the power under Article 226/Article 32, the Court would certainly take note of the legislative intent manifested in the provisions of the Act and would exercise their jurisdiction consistent with the provisions of the enactment.'" (See: G. Veerappa Pillai v. Raman & Raman Ltd., AIR 1952 SC 192; CCE v. Dunlop India Ltd., (1985) 1 SCC 260; Ramendra Kishore Biswas v. State of Tripura, (1999) 1 SCC 472; Shivgonda Anna Patil v. State of Maharashtra, (1999) 3 SCC 5; C.A. Abraham v. ITO, (1961) 2 SCR 765; Titaghur Paper Mills Co. Ltd. v. State of Orissa, (1983) 2 SCC 433; H.B. Gandhi v. Gopi Nath and Sons, 1992 Supp (2) SCC 312; Whirlpool Corpn. v. Registrar of Trade Marks, (1998) 8 SCC 1; Tin Plate Co. of India Ltd. v. State of Bihar, (1998) 8 SCC 272; Sheela Devi v. Jaspal Singh, (1999) 1 SCC 209 and Punjab National Bank v. O.C. Krishnan, (2001) 6 SCC 569)*

14. In Union of India vs. Guwahati Carbon Ltd., (2012) 11 SCC 651, this Court has reiterated the aforesaid principle and observed: (SCC p.653, para 8)

> *"8. Before we discuss the correctness of the impugned order, we intend to remind ourselves the observations made by this Court in Munshi Ram v. Municipal Committee, Chheharta, (1979) 3 SCC 83. In the said decision, this Court was pleased to observe that: (SCC p. 88, para 23).*
>
> *'23. … when a revenue statute provides for a person aggrieved by an assessment thereunder, a particular remedy to be sought in a particular forum, in a particular way, it must be sought in that forum and in that manner, and all the other forums and modes of seeking [remedy] are excluded.'" Xxxxxxxxxx xxxxxxxxxx xxxxxxxxx*

15. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case AIR 1964 SC 1419, Titagarh Paper Mills case 1983 SCC (Tax) 131 and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

16. In the instant case, the Act provides complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. vs. State of Haryana, (1985) 3 SCC 267 this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility.

17. In the instant case, neither has the writ petitioner assessee described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case. In light of the same, we are of the considered opinion that the Writ Court ought not to have entertained the Writ Petition filed by the assessee, wherein he has only questioned the correctness or otherwise of the notices issued under Section 148 of the Act, the re-assessment orders passed and the consequential demand notices issued thereon."

15. The decisions referred to by the learned counsel for the petitioners have been discussed by the Apex Court in the decisions of ***Union of India and another vs. Guwahati Carbon Limited, Nivedita Sharma vs. Cellular Operators Association of India and others***

and ***Commissioner of Income Tax and others vs. Chhabil Dass Agarwal****, referred to hereinabove.*

16. The sum and substance of the above discussion is that the writ petitioners-Company have remedies of appeal(s), before approaching the High Court by way of the writ petitions, for the redressal of their grievances. The petitioners ought to have exhausted the remedy of appeal before the Deputy Excise and Taxation Commissioner or Additional Excise and Taxation Commissioner or the Excise Commissioner, as the case may be, and if the petitioners were not successful in those appeal proceedings, another remedy available to them was to challenge the said order(s) by the medium of appeal before the Tribunal, and again, if they were unsuccessful, they could have availed the remedy of revision before the High Court in terms of Section 48 of the HP VAT Act, 2005. Keeping in view the above discussion, read with the fact that the dispute raised in these writ petitions relates to revenue/tax matters, it can safely be concluded that the petitioners have sufficient efficacious remedy(ies) available.

17. It also appears that these writ petitions are aimed at to give a slip to law for the reason that the petitioners have to deposit the tax liability, alongwith interest payable, as assessed, and penalty, if any, imposed, in terms of Section 45(5) of HP VAT Act, 2005, referred to above, which provides that no appeal has to be entertained unless it is accompanied by satisfactory proof of the payment of tax including interest payable alongwith penalty, if any, imposed, subject to exception provided by proviso to sub section (5) of Section 45 of the HP VAT Act, 2005.

18. Having said so, we are of the considered view that the writ petitioners have alternative efficacious remedy available and these writ petitions are not maintainable. Accordingly, the same merit to be dismissed in limine. However, it is made clear that the observations made herein shall not cause any prejudice to the petitioners in case they intend to file appeal(s) before the prescribed Authority and the period spent by the petitioners for prosecuting these writ petitions shall be excluded by the Appellate Authority while computing the period of limitation."

12. *The judgment in* ***M/s Indian Technomac Company Ltd.*** *case (supra), has attained finality, inasmuch as, the same has been upheld by the Hon'ble Supreme Court vide its order dated 22.8.2014 in SLP (C) Nos. 22626-22641 of 2014.*

13. *At this stage, we may also take note of recent decision of the Hon'ble Supreme Court in* ***Union of India and others*** *vs.* ***Major General Shri Kant Sharma and another 2015 AIR SCW 2497,*** *wherein the Hon'ble Supreme Court was confronted with the similar proposition regarding maintainability of writ petition when alternative remedy was available to the aggrieved party under the Armed Forces Tribunal Act and the Hon'ble Supreme Court after making a reference to the judgments as cited in* ***M/s Indian Technomac Company Ltd.*** *case (supra) and in addition thereto after taking into consideration the judgement rendered by it in Kanaiyalal Lalchand and Sachdev and others vs. State of Maharasthra and others (2011) 2 SCC 782, Executive Engineer, Southern Electricity Supply Company of*

Orissa Limited (SOUTHCO) and another vs. Sri Seetaram Rice Mill (2012) 2 SCC 108, Cicily Kallarackal vs. Vehicle Factory 2012 (8) SCC 524 and Union of India vs. Brigadier P.S. Gill (2012) 4 SCC 463 culled out the following principles:

> *"34. ….(i) The power of judicial review vested in the High Court under Article 226 is one of the basic essential features of the Constitution and any legislation including Armed Forces Act, 2007 cannot override or curtail jurisdiction of the High Court under Article 226 of the Constitution of India.(Refer: L. Chandra (AIR 1997 SC 1125) and S.N. Mukherjee) (AIR 1990 SC 1984).*
>
> *(ii) The jurisdiction of the High Court under Article 226 and this Court under Article 32 though cannot be circumscribed by the provisions of any enactment, they will certainly have due regard to the legislative intent evidenced by the provisions of the Acts and would exercise their jurisdiction consistent with the provisions of the Act.(Refer: Mafatlal Industries Ltd.).*
>
> *(iii) When a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation. (Refer: Nivedita Sharma).*
>
> *(iv) The High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance. (Refer: Nivedita Sharma)."*

14. *Thereafter the Hon'ble Supreme Court further took into consideration the provisions of Article 141 of the Constitution of India and held as follows:-*

> *"35. ….Article 141. Law declared by Supreme Court to be binding on all courts.-The law declared by the Supreme Court shall be binding on all courts within the territory of India.*
>
> *36. In Executive Engineer, Southern Electricity Supply Company of Orissa Limited(SOUTHCO) this Court observed that it should only be for the specialized tribunal or the appellate authorities to examine the merits of assessment or even the factual matrix of the case.*
>
> *In Chhabil Dass Agrawal this Court held that when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.*
>
> *In Cicily Kallarackal this Court issued a direction of caution that it will not be a proper exercise of the jurisdiction by the High Court to entertain a writ petition against such orders against which statutory appeal lies before this Court.*
>
> *In view of Article 141(1) the law as laid down by this Court, as referred above, is binding on all courts of India including the High Courts."*

15. *The aforesaid exposition of law makes it abundantly clear that where an effective alternative remedy is available to the aggrieved person, a writ petition should not be entertained.*

16. *Like in* ***M/s Indian Technomac Company Ltd.*** *case (supra), this petition also appears to be aimed at to give a slip to law for the reason that the*

petitioner has to deposit the tax liability alongwith interest payable as assessed and penalty, if any imposed in terms of section 45(5) of the H.P. VAT Act, 2005, which clearly provides that no appeal would be entertained unless it is accompanied by a statutory proof of the payment of tax including interest payable alongwith penalty, if any subject to the exception provided by proviso to sub-section (5) of section 45 of H.P. VAT Act, 2005.

17. *Having said so, we are of the considered view that the writ petitioner has not only an alternative and efficacious, rather a proper remedy under the provisions of H.P. VAT Act, 2005 and therefore, the present petition is not maintainable. Accordingly, the same is dismissed in limine. However, it is made clear that the observations made hereinabove shall not cause any prejudice to the petitioner in case it intends to file an appeal(s) before the prescribed authority and the period spent by the petitioner for prosecuting this petition shall be excluded by the appellate authority while computing the period of limitation."*

8. It would be noticed that not only the aforesaid judgment is a detailed one, touching all relevant aspects of the case, but the same has also attained finality and is, therefore, squarely applicable to the facts of this case. That apart, even the petitioner has not been able to convince us as to how this judgment is not applicable to the facts of the instant case.

Having said so, we find no merit in this petition and the same is accordingly dismissed in limini.

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

National Insurance Company Limited .....Appellant

Versus

Shri Jai Chand & others ...Respondents

FAO No. 141 of 2010
Decided on : 01.04.2016

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence at the time of accident- driver was driving Mahindra pick up, the gross weight of which is 2820 kilograms and falls within the definition of light motor vehicle- driver had a driving licence to drive the light motor vehicle- held, that driver having licence to drive light motor vehicle requires no PSV endorsement- appeal dismissed. (Para-5 to 8)

For the appellant : Mr. Jagdish Thakur, Advocate.

For the respondents: Ms. Shashi Kiran, Advocate vice Mr. Rupinder Singh, Advocate, for respondent No. 1.
Mr. Naveen Bhardwaj, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award, dated 4th January, 2010, made by the Motor Accident Claims Tribunal, Kullu, H.P. (hereinafter referred to as 'the Tribunal') in

Claim Petition No. 58/2007, titled **Shri Jai Chand versus Hari Ram & others**, whereby compensation to the tune of Rs.1,36,614/- with interest @ 7.5% per annum from the date of the filing of the claim petition till its realization, came to be awarded in favour of the claimant-respondent No. 1, herein and the insurer-appellant herein, was saddled with liability (for short, the "impugned award").

2. The claimant, 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 following two counts:

> *"1. The driver was not having the valid and effective driving licence at the time of accident;*
>
> *2. The amount of compensation is excessive.*

4. Admittedly, the driver was driving Mahindra Pick up bearing registration No. HP-34B-0745, the gross weight of which is 2820 kilograms, as per the Registration Certificate, Ext. RW-1/A, is a light motor vehicle.

5. 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."*

6. 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.

7. 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."*

8. 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.

9. The Tribunal has rightly made discussion in para 28 of the impugned award, while returning findings on Issue No. 3, needs no interference.

10. Now, coming to the question of adequacy of compensation, the insurer has no right to question the same. However, I have gone through the entire record. The amount of compensation is meager, but the claimant has not questioned the same.

11. Accordingly, the impugned award is upheld and the appeal is disposed of.

12. The Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts.

13. 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.

FAOs No. 118, 119 & 120 of 2010
Decided on : 01.04.2016

1. **FAO No. 118 of 2010**
Oriental Insurance Company Limited .....Appellant
Versus
Shri Ravi Kant & others .....Respondents

2. **FAO No. 119 of 2010**
Oriental Insurance Company Limited .....Appellant
Versus
Shri Netar Singh & another .....Respondents

3. **FAO No. 120 of 2010**
Oriental Insurance Company Limited .....Appellant
Versus
Ms. Punam Kumari & another .....Respondents

Motor Vehicles Act, 1988- Section 149- Driver was having a learner licence- the offending vehicle was light motor vehicle- held, that person having learners' licence is having a valid and effective driving licence and the Tribunal had rightly held the insurer to be liable. (Para-5 to 10)

Cases referred:
National Insurance Co. Ltd. vs Swaran Singh and others, AIR 2004 Supreme Court 1531
Dinesh Kumar versus Trishla Devi and another, I L R 2015 (V) HP 210

For the appellants : Mr. Deepak Bhasin, Advocate.
For the respondents: Mr. C.N. Singh, Advocate, for respondent No. 4 in FAO No. 118 of 2010 and for respondent No. 2 in FAOs No. 119 & 120 of 2010.
Nemo for the other respondents.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

All the three appeals are outcome of a common award dated 30th November, 2009, passed by the Motor Accident Claims Tribunal (I) Mandi, H.P., hereinafter referred to as

'the Tribunal'), in different claim petitions filed by the claimants for grant of compensation, as per the break-ups given in the respective claim petitions, whereby the compensation came to be granted, for short 'the impugned award'.

3. The insurer has questioned the impugned award only on the ground that the Tribunal has fallen in an error in saddling it with liability. Thus, I deem it proper to determine all these appeals by this common judgment.

4. The only question to be determined in these appeals is-*whether the Tribunal has rightly saddled the insurer with the liability*? The said question revolves around issue No. 3.

5. It was for the insurer to plead and prove that the driver was not having a valid and effective driving licence. The Tribunal has held that the offending vehicle was a 'light motor vehicle', and driver was having a learner's licence to drive the same, was competent to drive the offending vehicle. It is apt to reproduce paras No. 38, 42 & 43 of the impugned award herein:-

> *"38. The breach of the policy condition that the respondent no. 1 was not holding valid and effective driving licence is to be proved by the respondent no. 2, insurer. In the reply of the Insurance Company there is general plea that driver who was driving the vehicle at the time of accident was not having valid and effective licence. The Insurance Company has not taken any specific plea that what was the defect in the licence. It has not been pleaded that any person with effective and valid licence was not instructing the driver who was driving the vehicle at the time of accident. The Rule 3 is as follows:-*
>
> *"The provisions of sub-section (1) of section 3 shall not apply to a person while receiving instructions or gaining experience in driving with the object of presenting himself for a test of competence to drive, so long as:-*
>
> *(a) such person is the holder of an effective learner's licence issued to him in Form 3 to drive the vehicle;*
>
> *(b) such person is accompanied by an instructor holding an effective driving licence to drive the vehicle and such instructor is sitting in such a position to control or stop the vehicle; and*
>
> *(c) there is painted, in the front and the rear of the vehicle or on a plate or card affixed to the front and the rear, the letter "L' in red on a while background.*
>
> *39 to 41. ……*
>
> *42. The Hon'ble High Court of Himachal Pradesh in case rendered FAO (MVA) no. 594 of 2003 titled as National Insurance Company vs. Pyar Singh and others has held that the Insurance Company is liable to pay the compensation to the claimants regarding the accident which has taken place when the vehicle was being driven by the driver having a learner's licence to drive the light motor vehicle transport. The respondent No. 1, as such, was authorized to drive Tata-Sumo no. HP-01-M-3520 light transport vehicle on the date of accident. The amount of compensation on behalf of owner is payable by the insurance company.*
>
> 43. *The testimony of the respondent No. 1 Sh. Lalit Kumar RW-3 and Sh. Devinder Singh RW-4 that the respondent no. 4 who has having a driving licence to drive heavy transport vehicle copy whereof Ext. RC*

is valid during the period 21-10-2005 to 13-03-2008 and was sitting in Tata Sumo No. HP-01-M-3520 with the driver i.e., the respondent no. 1 at the time of accident as such is not material. This issue is decided against the respondent No. 2.

6. The issue as to whether a person, who is holding a learner's licence, is competent to drive light motor vehicle, came up for consideration in a case titled **National Insurance Co. Ltd. versus Swaran Singh and others,** reported in **AIR 2004 Supreme Court 1531,** and it was held that a person having learner's licence is deemed to have been holding a valid and effective driving licence. It apt to reproduce paras 88 to 90 of the said judgment herein:

"88. Motor Vehicles Act, 1988 provides for grant of learner's licence. [See Section 4(3), Section 7(2), Section 10(3) and Section 14]. A learner's licence is, thus, also a licence within the meaning of the provisions of the said Act. It cannot, therefore, be said that a vehicle when being driven by a learner subject to the conditions mentioned in the licence, he would not be a person who is not duly licensed resulting in conferring a right on the insurer to avoid the claim of the third party. It cannot be said that a person holding a learner's licence is not entitled to drive the vehicle. Even if there exists a condition in the contract of insurance that the vehicle cannot be driven by a person holding a learner's licence, the same would run counter to the provision of Section 149 (2) of the said Act.

89. The provisions contained in the said Act provide also for grant of driving licence which is

otherwise a learner's licence. Sections 3(2) and 6 of the Act provide for the restriction in the matter of grant of driving licence, Section 7 deals with such restrictions on granting of learner's licence. Sections 8 and 9 provide for the manner and conditions for grant of driving licence. Section 15 provides for renewal of driving licence. Learner's licences are granted under the rules farmed by the Central Government or the State Governments in exercise of their rule making power. Conditions are attached to the learner's licences granted in terms of the statute. A person holding learner's licence would, thus, also come within the purview of "duly licensed" as such a licence is also granted in terms of the provisions of the Act and the rules farmed thereunder. It is now a well-settled principle of law that rules validly framed become part of the statute. Such rules are, therefore, required to be read as a part of main enactment. It is also well-settled principle of law that for the interpretation of statute an attempt must be made to give effect to all provisions under the rule. No provision should be considered as surplusage.

90. Mandar Madhav Tambe's case (supra), whereupon the learned counsel placed reliance,

has no application to the fact of the matter. There existed an exclusion clause in the insurance policy wherein it was made clear that the Insurance Company, in the event of an accident, would be liable only if the vehicle was being driven by a person holding a valid driving licence or a permanent driving licence "other than a learner's licence". The question as to whether such a clause would be valid or not did not arise

for consideration before the Bench in the said case. The said decision was rendered in the peculiar fact situation obtaining therein. Therein it was stated that "a driving licence" as defined in the Act is different from a learner's licence issued under Rule 16 of the Vehicles Rules, 1939 having regard to the factual matrix involved therein."

7. This Court in **FAO NO. 125 of 2008 titled *Oriental Insurance Company Ltd versus Smt. Amra Devi and others*** decided on 17th April, 2015, ***FAO No. 703 of 2008*** titled as ***Dinesh Kumar versus Trishla Devi and another,*** decided on 4.9.2015 and ***FAO No.322 of 2011*** titled ***IFFCO-TOKIO Gen. Insurance Company Limited Versus Smt. Joginder Kaur & others***, has laid down the same principles of law.

8. Viewed thus, the Tribunal has rightly held that the driver of the offending vehicle was having a valid and effective driving licence.

9. Accordingly, the impugned award is upheld and the appeals are dismissed.

10. The Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts.

11. Send down the records after placing copies of the judgment on all the files of the Tribunal.

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

Oriental Insurance Company Ltd. .....Appellant

Versus

Pawan Kumar and others ..... Respondents

FAO No. 57 of 2010.
Decided on : 01.04.2016

Motor Vehicles Act, 1988- Section 149- It was contended that driver did not have a valid driving licence at the time of accident- however, no evidence was led to establish this fact- owner, on the other hand, deposed that he had engaged the driver after checking the driving licence and satisfying himself that driver was competent to drive the vehicle- hence, Tribunal had rightly held the insurer liable to indemnify the award- appeal dismissed. (Para- 5 and 6)

For the appellant: Mr.G.D. Sharma, Advocate.
For the respondents: Mr.N.S. Chandel, Advocate,
for respondent No.1.
Nemo for respondents No.2 and 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

The appellant-insurer, by the medium of this appeal, has laid challenge to the award, dated 1st October, 2009, passed by the Motor Accident Claims Tribunal,

Hamirpur, H.P., (for short, the Tribunal), in Claim Petition No.67 of 2007, titled Pawan Kumar vs. Oriental Insurance Company Ltd. and others, whereby compensation to the tune of Rs.52,131/-, with interest at the rate of 7.5% per annum, from the date of filing of the claim petition till payment/deposit, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short, the impugned award).

2. The claimant, the owner/insured and the driver have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. Feeling aggrieved, the insurer has challenged the impugned award on the ground that the Tribunal has wrongly fastened the insurer with the liability since the driver of the offending vehicle was not having a valid and effective driving licence, at the time of accident.

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

5. The insurer, in order to prove that the driver of the offending vehicle was not having a valid and effective driving licence to drive the offending vehicle or that the offending vehicle was being plied in contravention to the terms and conditions contained in the insurance policy, has not led any evidence. Instead, owner of the offending vehicle namely respondent No.2 Virender Kumar Chandel appeared in the witness box as RW-1 and deposed that before engaging the driver, he checked the driving licence of driver and only when he was satisfied that the driver namely Brij Lal (original respondent No.3) was competent to drive the vehicle in question, had engaged him as driver. The Tribunal has rightly made the discussion in the impugned award and decided issues No.1A and 3.

6. During the course of hearing, the learned counsel for the appellant/insurer was asked to show from the record whether the insurer has led any evidence to prove that the driver, at the time of accident, was not having a valid and effective driving licence and whether there is any positive evidence on the file to hold that the owner had committed any breach. The learned counsel for the appellant/insurer was not in a position either to show that the driver was not having a valid and effective driving licence or the owner had committed willful breach.

7. Having said so, it is held that 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, alongwith interest, in favour of the claimant through his bank account, after proper identification.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

CWP No. 429 of 2016 a/w CWP No. 4456 of 2015.
Judgment reserved on: 21.03.2016.
Date of Decision : April 01, 2016

1. <u>CWP No. 429 of 2016</u>

Rajesh Kumar and others ...Petitioners

Versus

State of H.P. and another . ...Respondents.

2. CWP No. 4456 of 2015

Chandan Swaroop Sharma and others ...Petitioners

Versus

State of H.P. and another . ...Respondents.

Constitution of India, 1950- Article 226- Petitioners are registered Class-B contractors - they are aggrieved by the issuance of the Enlistment of Contractor Rules- particularly, Rule 8.1 whereby a contractor has been made eligible to tender for his own class and one step below his class- they are further aggrieved by the eligibility criteria which provides that the minimum work condition should be one similar work done of amount not less than 40 % of the cost, without liquidated damages or compensation in the last five years- respondent denied the maintainability of the petition and pleaded that no injustice was caused to the petitioner- the necessity for incorporating Rule 8.1 arose because of the monopoly of Class 'A' and 'B' contractors which was affecting the rights of Class 'C' and 'D' contractors- held, that condition of having executed one similar work of amount not less than 40 % of the estimated cost is neither arbitrary nor irrational- respondents have every right to ensure that a party submitting the tender should have both the capacity and capability of executing the work – Court will interfere in the tender or contractual matters only in case the process adopted or decision made by the authority is mala-fide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached such a decision - rules were changed taking into consideration the changed circumstances in the State- it was done with the sole aim and objective to ensure that the big contractors confine themselves to class 'A' and 'B' and did not barge into the contracts otherwise reserved for class 'C' and 'D'- this will bring about a healthy competition and will ensure that equals may gain sufficient experience of work so that they can be upgraded to higher class to minimize monopoly of 'A' and 'B' class contractors- writ petition dismissed. (Para-4 to 15)

Cases referred:

Tata Cellular versus Union of India (1994) 6 SCC 651

Michigan Rubber (India) Ltd. vs. State of Karnataka and Ors. (2012) 8 SCC 216

For the petitioners :Mr. Rajiv Rai and Ms. Soma Thakur, Advocates, for the petitioners in CWP No. 429 of 2016.
Mr. K.D.Sood, Senior Advocate, with Mr. Sanjeev Sood, Advocate, for the petitioners in CWP No. 4456 of 2015.

For the respondents :Mr. Shrawan Dogra, Advocate General, with Mr. M.A.Khan, Mr.Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioners are registered Class-B contractors and are aggrieved by issuance of the enlistment of the contractor Rules dated 26.5.2015, particularly Rule 8.1 thereof whereby a contractor in a particular class has been made eligible to tender for his own class and one step below his class. The petitioners are further aggrieved by the eligibility criteria, more particularly, as contained in clause 28.2 which provides that the minimum work condition should be one similar work done of amount not less than 40

percent of the cost, without liquidated damages or compensation in the last five years and have filed these writ petitions claiming therein the following substantive reliefs:

> *"(i) That condition No.28 in the Standard Tender Document relating to the eligibility criteria, Annexure P-4, may kindly be quashed.*
>
> *(ii) That the respondents may kindly be directed to reconsider the eligibility criteria and grant one time concession to the contractors who have been enlisted in higher grade before the issuance of the Enlistment Rules dated 26.5.2015, Annexure P-2.*
>
> *(iii) That the petitioners may kindly be permitted to participate in tenders of any category below their registration in the tenders or bids by striking down the eligibility criteria."*

2. In response to the petitions, the respondents have contended that the petitions are neither legally sustainable nor maintainable as no injustice has been caused to the petitioners. It is further averred that clause 28.2.a and 28.2.b of the Standard Bidding Document is not a part of new Enlistment Rules, 2015 and this clause has in fact not been introduced for the first time in Standard Bidding Document under new Rules but the same has been in force since tendering process was made applicable in the respondent Department. It is also averred that this clause has been provided in Standard Bidding Document to keep standard/quality of work and similar nature of work to the extent of 40% are also demanded from the contractors by the various department/agency such as NRRDA/PMGSY, CPWD, MORTH.

3. It is also submitted that in the new Enlistment Rules the necessity for incorporating Rule 8.1 arose because of the monopoly amongst the Class 'A' and 'B' contractors which was affecting the rights of Class 'C' and 'D' contractors. The contractors in 'A' and 'B' class participated not only in the respective classes, but as well as in the lower classes and this had the following adverse effects:

> *"(i) The contractors of A & B class when execute the work of lower class also delay their work of respective class.*
> *(ii) There are numbers of contractors in Class C & D who can execute the work of their respective class but due to participation of class A & B contractors they are not getting the work of their class for which they are eligible. There are number of works in the State which could not even be awarded in time and the Department is receiving single tender in many cases. Hence, Rule 8.1 was added in new Enlistment Rules, 2015 so that the person enlisted in particular class could execute the work of his own class and one step below.*
>
> *(iii) The contractors who are working regularly in the Department and achieving their targets are not affected by the new Enlistment Rules."*

We have heard learned counsel for the parties and have gone through the records of the case carefully and meticulously.

4. Conditions No. 28.2.a and 28.2.b read as under:

> *"**28.2.a: Bidding Capacity:-** Bidders who meet the minimum qualification criteria will be qualified only if their assessed available bid capacity for construction of works is equal to or more than the total bid value.*
>
> ***28.2.b Minimum Work done condition**:- Minimum one similar work done of amount not less than 40% (forty percent) of the estimated cost (without liquidated damage or compensation) in last five years"*

5. At the outset, it may be observed that insofar as the condition No.28.2.a and 28.2.b of the tender is concerned, the same has already been upheld by this Bench in ***CWP No. 9337 of 2013 titled Shri Ashok Thakur*** vs. ***State of Himachal Pradesh and others,*** decided on 6th May, 2014**,** which decision in turn was followed by one of us (Justice Tarlok Singh Chauhan, J) in ***CWP No. 1971 of 2015 titled Inder Singh Chauhan*** vs. ***State of H.P. and others,*** decided on 28th May, 2015**.** Even otherwise, we do not find the condition of having executed one similar work done of amount not less than 40 percent of the estimated cost to be either arbitrary or irrational much less illegal. The respondents have every right to ensure that a party applying for the tender has both the capacity and capability of executing the work.

6. That apart, this Court would interfere in tender or contractual matters in exercise of power of judicial review only in case the process adopted or decision made by the authority is malafide or intended to favour someone or the process adopted or decision made is so arbitrary and irrational that no responsible authority acting reasonably and in accordance with relevant law could have reached and lastly in case the public interest is affected. If the answers to these questions are in the negative, then there should be no interference by this Court in exercise of its powers under Article 226 of the Constitution of India.

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.

8. In ***Tata Cellular*** versus ***Union of India (1994) 6 SCC 651***, the Hon'ble Supreme Court has laid down the following limitations in relation to the scope of judicial review of administrative decisions in exercise of powers awarding contracts:(SCC pp 687-88, para 94)

> *"(1) The modern trend points to judicial restraint in administrative action.*
>
> *(2) The court does not sit as a court of appeal but merely reviews the manner in which the decision was made.*
>
> *(3) The court does not have the expertise to correct the administrative decision. If a review of the administrative decision is permitted it will be substituting its own decision, without the necessary expertise, which itself may be fallible.*
>
> *(4) The terms of the invitation to tender cannot be open to judicial scrutiny because the invitation to tender is in the realm of contract. Normally speaking, the decision to accept the tender or award the contract is reached by process of negotiations through several tiers. More often than not, such decisions are made qualitatively by experts.*
>
> *(5) The Government must have freedom of contract. In other words, a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle (1948) 1 KB 223: (1947) 2 All PR 680 (CA) of reasonableness (including its other facets pointed*

out above) but must be free from arbitrariness, not affected by bias or actuated by mala fides.

(6) Quashing decisions may impose heavy administrative burden on the administration and lead to increased and unbudgeted expenditure."

9. In ***Michigan Rubber (India) Ltd.*** vs. ***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)

10. 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 and CWP No.2929 of 2015 titled ELICO Ltd. vs. State of Himachal Pradesh and others, decided on 31.12.2015.

11. The only ground for assailing Rule 8.1 of the Enlistment Rules is that no such condition was prescribed in these Rules prior to 12.3.1993 or in the standard tendered document and further that this condition is arbitrary, irrational and not enforceable and seeks to put an unreasonable restriction and restraint on the petitioners and similarly situated contractors to participate in the tender or make bid in a tender. By doing so, the petitioners are not able to make an effort for a tender or bid of less than Rs.40 lacs as they cannot put tender less than Rs.40 lacs i.e. one step below entitlement class which they are registered because they only eligible to put the tender above Rs.80 lacs due to 40 percent eligibility criteria in respect of the building works and can only submit tender of road work upto Rs.40 lacs to Rs.1 crore in respect of roads. Likewise, some of the other petitioners cannot make bid or participate in the tender in view of these clauses.

12. We find no merit in the contention of the petitioners rather it is evident from the record that it is after about 50 years that the respondent-department changed the rules for enlistment of contractors which were initially framed as far as back in the year 1967. Obviously, these Rules were changed taking into consideration the changed circumstances in the State. In terms of the Rules for Enlistment of contractors in Himachal Pradesh Public Works Department, 2015 which came into effect from the date of its publication i.e. 26.05.2015 as against 'A' class contractors or 'B' class contractors being eligible to participate in tendering process in any class under 1967 Rules, can now participate only their own class or in one class below their original enlistment class. As a result of this now, 'A' class contractor can file bid in work of more than 2 crore up to unlimited amount and can also participate in the tendering process of a work below 2 crores upto 80 lacs. Similarly, a 'B' class contractor, who is eligible to participate in tendering process of work between 80 lacs to 2 crores can also participate in 'C' class category upto 30 lacs. Similarly, 'C' class contractor, who is eligible to make bid up to the work valuing Rs.80 lacs can participate in 'D' class category works also which are upto 30 lacs.

13. We entertain no doubt in our minds that all this has been done with the sole aim and objective to ensure that the big contractors now confine themselves to 'A' and 'B' class and do not barge into the contracts otherwise reserved for 'C' and 'D' class. This would not only bring about a healthy competition amongst the equals and would also ensure that these equals may also gain sufficient experience of work so that after gaining work done experience, they are also upgraded to higher class to minimize monopoly of 'A' and 'B' class contractors on work done basis.

14. We cannot ignore the fact that the contractors belonging to 'C' and 'D' categories are mostly unemployed educated youth, who are unable to compete with the 'A'

and 'B' contractors. Therefore, the aforesaid provision would atleast ensure that every enlisted category of contractor would only have to face a healthy competition as per his enlisted class thereby not only providing him an opportunity to earn his livelihood but would also provide him an opportunity to upgrade his class.

15. The respondents in their reply to CWP No. 4456 of 2015 have specifically stated that in the old Enlistment Rules, 1967, there was a provision for up-gradation from 'D' class to 'C' class on the basis of performance after a contractor had completed work of Rs.10 lacs in aggregate or three works not less than 1.50 lacs. Similarly, 'C' class contractor after completing work of Rs.30 lacs in aggregate or three works of not less than Rs.7.50 lacs each used to be upgraded to 'B' class and similarly 'B' class contractor used to be upgraded to 'A' class if he had successfully completed without any penalty and liquidated damages of three works of Rs.25 lacs each or combined works in last 5 years amounting to Rs.1.25 crore. Whereas, in the new Enlistment Rules, 2015, this criteria of work done as well as eligibility criteria to participate in the tendering process has been increased. Needless to add that even the petitioners have been enlisted as 'A' and 'B' class contractors only by way of up-gradation.

16. The respondents have further categorically stated and proved on record that even in terms of new criteria, none of the petitioners would be excluded from competing in their respective classes and also in a class which is one step below.

17. In view of the aforesaid discussion, we find no merit in these petitions and the same are accordingly dismissed alongwith pending applications, leaving the parties to bear their costs.

The Registry is directed to place a copy of this judgment on the file of connected matter.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Ramesh Kumar and another ..Petitioners.

VERSUS

State of H.P. and others ...Respondents.

CWP No.3017 of 2015
Reserved on: 28.03.2016
Pronounced on: April 01, 2016

Constitution of India, 1950- Article 226- Petitioners have sought direction to the respondent to prevent the respondent No. 11 from causing any damage to the link road connecting Kandaghat Rest House with National Highway 22- further, direction has been sought to direct the respondent no. 11 to restore the road to its original condition - it was admitted in the reply that damage has been caused to the link road but it was asserted that the link road stands metalled and restored to its original condition and there is no hindrance to the smooth movement of the traffic- penalty was imposed upon respondent no. 11, which has been realized from him – held that respondent No. 11 had raised construction without seeking necessary permission from the concerned authority - action should be taken against the person who has raised unauthorized construction- Chief Secretary directed to

conduct an inquiry and to pinpoint the officers who had not taken action against the respondent No. 11. (Para-6 to 15)

Case referred:
M.I. Builders Pvt. Ltd. vs. Radhey Shyam Sahu and others, reported in (1999) 6 SCC 464

For the petitioners:	Mr.B.C. Negi, Senior Advocate, with Mr.Narender Thakur, Advocate.
For the Respondents:	Mr.Shrawan Dogra, Advocate General, with Mr.Romesh Verma and Mr.M.A. Khan, Addl.A.Gs., and Mr.J.K. Verma, Dy.A.G., for respondents No.1 to 10. Mr.Dilip Sharma, Senior Advocate, with Ms.Nishi Goel, Advocate, for respondent No.11.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.

Petitioners, by the medium of the instant writ petition, have sought directions to the respondent/Authorities to prevent respondent No.11, namely, Ramesh Thakur, from causing any damage to the link road connecting Kandaghat Rest House, owned by the H.P. Public Works Department, and the office of the H.P. State Electricity Board, with National Highway 22, (hereinafter referred to as the link road). In case any damage is caused to the link road, directions are sought to restore the road to its original position and that necessary action, as warranted under the law, be initiated against respondent No.11. The petitioners have further prayed for initiating appropriate disciplinary departmental action against the officers/officials who have not taken appropriate prompt action against respondent No.11, on the grounds taken in the memo of writ petition. Alongwith the writ petition, the petitioners have annexed photographs and other documents, which, prima facie, do disclose that damage has been caused to the link road.

2. All the respondents have filed their respective replies. Respondent No.11, in his reply, has admitted that damage was caused to the link road. The said respondent tried to defend his action on vague grounds.

3. Respondents No.1 and 5, i.e. the Secretary, Public Works Department and the Executive Engineer, B&R Division, Public Works Department, have filed the joint reply, wherein they have admitted that on respondent No.11 having caused damage to the link road by excavation work, the Junior Engineer/Prescribed Authority, in terms of the mandate of the Himachal Pradesh Road Infrastructure Protection Act, 2002, (hereinafter referred to as the Act), has issued notices to the said respondent. It has further been stated in the reply that respondent No.11 has now done the required repair work and has made the road worthy of vehicular movement.

4. In reply, in paragraph 2 of preliminary submissions, respondents No.1 and 5 have further stated that the Confirmatory Authority has reduced the penalty imposed by the Prescribed Authority upon respondent No.11 to Rs.50,458/-. However, while submitting reply on merits, it has been stated in reply to paragraph 2 that the Prescribed Authority imposed the penalty to the tune of Rs.3,02,748/- upon respondent No.11 as restoration cost and asked respondent No.11 to deposit the said amount within three days.

5. Respondents No.2 and 9 have also filed the joint reply, which, on bare reading, appears to be evasive. However, in paragraphs 5 and 8 of the reply, they have stated that damage had been caused to the link road by respondent No.11.

6. Respondents No.3, 4, 7 and 8 have also filed the reply and in paragraph 10, it has been specifically stated that respondent No.11 never obtained prior permission from the Special Area Development Authority (hereinafter referred to as the SADA). It is only after the SADA issued notice to respondent No.11, the said respondent applied for permission before the office of the Member Secretary, SADA, Kandaghat, on 13th July, 2015 and the SADA again issued notice to respondent No.11 upon detecting certain deficiencies and the case of respondent No.11 was still under process.

7. In paragraph 11 of the reply, it has been admitted that though damage was caused to the link road, now it sands metalled and restored to its original position and there is no hindrance to the smooth flow of the traffic.

8. Respondent No.6 i.e. the Member Secretary, SADA, Kandaghat, in paragraph 10 of his reply, has specifically averred that respondent No.11 has not applied for permission till 9th July, 2015. The reply filed by this respondent is quite evasive. Only paragraph 10 of the writ petition stands replied, wherein it has been stated as under:

> *"10:- The contents of this para are accepted to the extent that Respondent No.11 has not applied for permission from this authority till 9.7.2015. In this respect, the site in question was visited by the representative of SADA office on 7.7.2015 and observed that cutting & development has been done at site and 30 nos. Columns have been erected upto plinth level and accordingly a notice under section 39 of HP Town & Country Planning Act, 19077 was served to Sh.Ramesh Chand S/o Sh.Chattar Singh vide this office letter No.SADA/KGT/UAC Case No.179/2015/S.A.-161-163 dated 7.7.2015 (Copy enclosed). A planning permission case for construction of commercial building over Kh.No.681/1, 682/2 & 683/3, Measuring 394 Sqm. At Up-mohal Sirinagar, Tehsil Kandaghat, Distt.Solan (HP) was also received from Sh.Ramesh Chand S/o Sh.Chattar Singh on 9.7.2015 (Dy.No.986 dated 13.7.2015). The case was examined by the authority and the shortcomings have been noticed in the case and accordingly observations were intimated to Respondent No.11 vide letter No.SADA/KGT/Case No.346/KGT/2015-176 dated 16.7.2015 (Copy enclosed)."*

9. Respondent No.10 i.e. National Highway Authority has also filed the reply in which it has been stated that respondent No.11 has raised the RCC structure, without obtaining No Objection Certificate from the National Highway Authority. It is apt to reproduce paragraph 5 of the reply hereunder:

> *"5. That as per the record of Executive Engineer (NH) Division Solan, respondent No.11 till day did not obtain NOC for construction of RCC structure which otherwise is a mandatory condition before approval of map by local bodies/Town & Country Planning Deptt. However, National Highway authorities can maximum initiate action under National Highway Act 1956 and HP Road Infrastructure Protection Act for raising construction on acquired width but as far as construction of controlled width is concerned, for checking this menace, it is the role of Town & Country Planning deptt./S.A.D.A. authority. Accordingly when through repeated oral as well as written directions respondent No.11 failed to stop construction of RCC structure abutting to National Highway without obtaining NOC, left with no option, Executive Engineer (NH) Division Solan filed detailed application/complaint before SDO (Civil) cum Collector Kandaghat Chairman of S.A.D.A. authority i.e. respondent No.6 on 20.08.2015 and sought initiation of action against respondent NO.11. Alongwith this*

application revenue map, revenue record and notices issued to respondent No.11 by prescribed authority under HP Road Infrastructure Protection Act have also been annexed. The copy of same is annexed herewith as Annexure R-1. Now it is for respondent No.6 to initiate action in accordance with Town & Country Planning Act being Chairman of S.A.D.A. authority. Till now respondent No.11 neither has applied for NOC from National Highway authority/Highway administrator nor granted therefore it is for respondents No.6 & 7 to take action as provided under law under Town & Country Planning Act being case of violation of not leaving required front set back of 5 mtr. by respondent No.11."

10. Mr.Shrawan Dogra, learned Advocate General, appearing for respondents No.1 to 10 and Mr.Dilip Sharma, Senior Advocate, appearing for respondent No.11, have argued that respondent No.11 has restored the road to its original condition, after carrying out the required repairs. It has further been argued that since the penalty imposed upon the said respondent stands already deposited, nothing survives in the writ petition and prayed that the same be accordingly disposed of.

11. On the other hand, Mr.B.C. Negi, learned Senior Advocate appearing for the petitioners, argued that respondent No.11 has taken law in his hands by raising unauthorized construction and has caused damage to the public road, which action of respondent No.11 is illegal and not in accordance with the mandate of law.

12. We have heard the learned counsel for the parties and have gone through the material placed on record.

13. As discussed hereinabove, the respondents-Authorities, in their replies, have specifically admitted that respondent No.11, while raising the RCC structure, has caused damage to the link road. The respondents have also admitted that respondent No.11 has raised the construction without seeking necessary permission(s)/NOC from the concerned Authority(ies). It is beyond our comprehension how the said construction has been allowed to be raised. No action was drawn against respondent No.11 by the Authority(ies) concerned till the petitioners approached this Court and notices were issued is suggestive of the fact that the Authority(ies) were in deep slumber. It is again a mystery as to how the penalty of Rs.3,02,748/-, imposed by the Prescribed Authority, came to be reduced to Rs.50,458/-

14. The Apex Court, in a similar case, titled **M.I. Builders Pvt. Ltd. vs. Radhey Shyam Sahu and others,** reported in **(1999) 6 SCC 464,** has held that action should be drawn against the person who had made unauthorized construction and also the officers should also be brought to book, who had not taken action. It is apt to reproduce paragraph 73 of the said judgment hereunder:

"73. The High Court has directed dismantling of the whole project and for restoration of the park to its original condition. This Court in numerous decisions has held that no consideration should be shown to the builder or any other person where construction is unauthorized. This dicta is now almost bordering rule of law. Stress was laid by the appellant and the prospective allottees of the shops to exercise judicial discretion in moulding the relief. Such discretion cannot be exercised which encourages illegality or perpetuates an illegality. Unauthorised construction, if it is illegal and cannot be compounded, has to be demolished. There is no way out. Judicial discretion cannot be guided by expediency. Courts are not free from statutory fetters. Justice is to be rendered in accordance with law. Judges are not entitled to exercise discretion wearing robes of judicial discretion and pass orders based solely on their personal predilections and peculiar dispositions. Judicial discretion wherever it is required to be

exercised has to be in accordance with law and set legal principles. As will be seen in moulding the relief in the present case and allowing one of the blocks meant for parking to stand we have been guided by the obligatory duties of the Mahapalika to construct and maintain parking lots."

15. In view of the above, the Chief Secretary to the Government of Himachal Pradesh is directed to conduct an inquiry and pinpoint the officers who have not drawn action against respondent No.11 within time and also examine under what circumstances the penalty imposed upon respondent No.11 was reduced from Rs.3,02,748/- to Rs.50,458/-. The inquiry be completed within two months and action be drawn, as warranted under the law/ rules, occupying the field.

16. The writ petition stands disposed of accordingly, so also the pending CMPs, if any.

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

Sadh Ram .....Appellant
Versus
Sanjay Rao and others .....Respondents

FAO No. 553 of 2009.
Reserved on: 18.03.2016.
Pronounced on :01.04.2016

Motor Vehicles Act, 1988- Section 166- Claimant pleaded that he remained in hospital for a period of two months and had to spend Rs.50,000/- for medical expenses, special diet, attendant charges and transportation charges- lump sum amount of Rs.50,000/- was awarded which is just- he had sustained 80% disability which has affected his earning capacity – his income is Rs.8,200/- per month as per income tax return- keeping in view the disability, loss of future earning capacity will not be less than 50% or Rs.4,100/- - the age of the claimant was 48 years- multiplier of 12 is applicable- claimant is entitled to Rs.4100 x 12 x 12 = Rs.5,90,400/-, under the head 'loss of future earning capacity'- claimant is also entitled to Rs.49,200/- (Rs.8,200/- x 6) under the head 'loss of income' – amount of Rs.50,000/- each awarded under the head 'pain and sufferings undergone' and 'future pain and sufferings' – Rs.1 lac awarded under the head 'loss of amenities of life'- Rs.50,000/- awarded under the head 'future medical treatment'- thus, total compensation of Rs.9,39,600/- awarded along with interest @ 7.5% per annum from the date of filing of the petition. (Para-10 to 27)

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

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

For the appellant:	Mr.Gaurav Gautam, Advocate.
For the respondents:	Mr.Bimal Gupta, Senior Advocate, with Mr.Vineet Vashista, Advocate, for respondent No.1. Mr.B.M. Chauhan, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this appeal is the award, dated 11th May, 2009, passed by the Motor Accident Claims Tribunal, Solan, H.P., (for short, the Tribunal), in Claim Petition No.21/NL/2 of 2007, titled Sadh Ram Chandel vs. Sanjay Rao and others, whereby compensation to the tune of Rs.5,52,000/-, with interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit, came to be awarded in favour of the claimant and the insurer 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 as it relates to them.

3. Feeling aggrieved and dissatisfied with the impugned award, the claimant/injured has challenged the impugned award by the medium of instant appeal, on the sole ground that the compensation awarded is meager.

4. Thus, the only question needs to be determined in this appeal is whether the amount awarded is adequate or inadequate, meaning thereby that this Court has to return the findings on the point whether the amount of compensation is just in terms of the mandate of Sections 166, read with Section 168 of the Motor Vehicles Act, 1988 (for short, the M.V. Act).

5. Brief facts of the case are that the claimant/injured became victim of vehicular accident, which was caused by Ramesh Kumar, driver, (respondent No.2), while driving tanker bearing No.HP-23-2500 rashly and negligently on 1st February, 2007. The offending vehicle hit the motorcycle, on which the claimant was traveling, near Chaudhari Dhaba, Dattowal, Nalagarh. In regard to the accident, FIR bearing No.38/07, dated 1st February, 2007, was also registered at Police Station Nalagarh under Sections 279, 337 and 338 of the Indian Penal Code. After the accident, the injured was taken to the hospital, Nalagarh, fromwhere was shifted to Command Hospital, Chandi Mandir, remained admitted for two months and suffered permanent disability, which was assessed to the extent of 80%. Thus, the injured claimed compensation to the tune of Rs.15.00 lacs as per the break-ups given in the claim petition, particularly, in paragraphs 13, 21 and 22.

6. The claim petition was resisted by the respondents, by filing replies.

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

"1. Whether the petitioner has suffered injuries on account of rash/negligent driving of the vehicle by respondent No.2? 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 accident has taken place due to negligence of the petitioner himself? OPR-1&2

4. Whether the respondent No.2 did not possess a valid and effective driving licence and proper documents? OPR-3

5. Relief."

8. The findings returned on issues No.1, 3 and 4 are not in dispute. Accordingly, the same are upheld. It is also not in dispute as to who is liable to pay the compensation, since the Tribunal has saddled the insurer with the liability and the insurer has not questioned the same, thus, it has to satisfy the award. Accordingly, the findings returned on issue No.2 to that extent are upheld.

9. Now what remains to be determined in the instant appeal is - to what amount of compensation the claimant is entitled to?

10. The claimant has specifically pleaded in the Claim Petition that he remained admitted in the hospital for a period of two months and had to spend Rs.50,000/- for medical expenses, special diet, attendant charges and transportation charges. The Tribunal, after scanning the evidence, granted Rs.50,000/- under the said heads in lump sum. No doubt, the claimant has placed on record various medical bills and other documents to show that he was entitled to more than Rs.50,000/- under the said heads, but the said bills were never proved by the claimant. Thus, I also deem it proper to hold that Rs.50,000/- can be said to be just amount under the said heads.

11. Claimant has sustained 80% disability, which is permanent in nature and which has affected his earning capacity. In order to prove the factum of disability, the claimant has examined PW-3 Dr.Asheesh Sharma, who was the member of the Medical Board constituted for assessing the percentage of disability earned by the claimant. PW-3 Dr.Asheesh Sharma has clearly stated that the claimant had suffered 80% permanent disability, qua which disability certificate Ext.PW-3/A was issued by the Medical Board. after examining all the documents and the physical condition of the injured. The question is whether the disability suffered by the claimant has affected the earning capacity of the injured in future and if so, to what extent.

12. PW-3 Dr.Asheesh Sharma has only proved the disability certificate and has not given the details of what is the effect of the disability. However, the medical summary was placed on record which does disclose that the injured remained admitted in the hospital for about two months, also sustained injuries on hip region and grafting was also done, meaning thereby that the accident had definitely shattered the physical frame of the claimant.

13. The claimant has specifically averred in the claim petition that he was contractor by profession and the injury/disability has affected his earning capacity. The claimant has pleaded and proved that his income, per month, was Rs.20,000/-. But the Tribunal, taking into account the income tax return filed by the injured, inferred the monthly income of the claimant to be not more than Rs.8,200/- or Rs.98,400/- per annum. The claimant has placed no other material on record in order to prove that he was earning Rs.20,000/- per month, as pleaded in the claim petition. Therefore, I am of the view that the Tribunal has rightly taken the monthly income of the injured as Rs.8,200/-. Accordingly, it is held that the monthly income of the claimant/injured was Rs.8,200/-.

14. Coming to the disability earned by the petitioner as a result of the accident, it has been established by the claimant/injured, by leading evidence, that he suffered 80%

permanent disability in respect of lower limb. After the disability, the claimant would not be in a position to perform the job of contractor as he would have been performing prior to the accident. He may also have been rendered incapacitated for doing heavy work consequent to the disability suffered by him. The claimant was 48 years of age at the time of accident, meaning thereby that he may be at the peak of his profession, which would have suffered a lot after the disability incurred by the claimant.

15. Therefore, in my opinion, the Tribunal has fallen in error in holding that the disability has affected the future earning capacity of the claimant/injured to the extent of only 40%. On the contrary, keeping in view the profession of the claimant and the discussion made hereinabove, it can safely be inferred that the loss of future earning capacity was not less than 50%, if not 80% or 100%.

16. Having said so, it is held that loss of future monthly income to the claimant was 50% of his monthly income i.e. 50% of Rs.8,200/- i.e. Rs.4,100/-.

17. The age of the claimant/injured was 48 years. The Tribunal has also fallen in error in applying the multiplier of 10, instead, in view the dictum 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) 3120,** read with Schedule-II attached to the M.V.Act, multiplier 12 was applicable. Accordingly, multiplier 12 is applied.

18. Thus, the claimant/injured is held entitled to Rs.4100 x 12 x 12 = Rs.5,90,400/-, under the head 'loss of future earning capacity'.

19. In the instant case, the claimant has proved on record that he remained admitted in the hospital for a period of about two months. After the discharge from the hospital, the claimant would also have remained confined to the bed and he might have not returned to his job immediately on the discharge from the hospital. Such period of confinement to the bed, by exercising guess work, can be said to be not less than six months and during this period, the claimant can be said to have not earned a single penny. Accordingly, he is also held entitled to Rs.8,200/- x 6 = Rs.49,200/- under the head 'loss of income during the said period.

20. The Tribunal has also awarded Rs.40,000/- under the head 'pain and suffering' and Rs.20,000/- under the head 'loss of amenities of life', which, in my view, is on the lower side.

21. The Apex Court in **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, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

22. The claimant/injured, as discussed hereinabove, remained admitted in the hospital and thereafter, was confined to the bed for a considerable long period. The claimant suffered 80% permanent disability and became handicapped for whole life. The accident has also shattered the physical frame of the claimant. Thus, the claimant suffered a lot and has to suffer throughout his life.

23. Accordingly, I am of the opinion, that the claimant is also entitled to Rs.50,000/- under the head ' pain and sufferings undergone' and Rs.50,000/- under the head 'future pain and sufferings'.

24. The claimant, at the time of accident, was 48 years of age and because of the permanent disability suffered by him to the extent of 80%, he would face hardships throughout his life, which may also result in frustration and mental stress. Therefore, the claimant is also entitled to Rs.1.00 lac under the head 'loss of amenities of life'.

25. Keeping in view the nature of injuries sustained by the claimant, which has resulted into 80% permanent disability, the claimant may have to undergo medical check-ups/treatment, at intervals, throughout his life. Thus, hypothetically, I deem it proper to award Rs.50,000/- under the head 'future medical treatment'.

26. Having glance of the above discussion, the claimant is awarded Rs.9,39,600/-, under different heads as under:

i) Loss of future earning capacity : Rs.5,90,400/-

ii) Loss of income during the period of hospitalization and confinement to bed : Rs.49,200/-

iii) Medical expenses, special diet, attendant charges and transportation charges: Rs.50,000/-

iv) Future medical treatment : Rs.50,000/-

v) Pain and sufferings undergone: Rs.50,000/-

vi) Future pain and sufferings : Rs.50,000/-

vii) Loss of amenities of life: Rs.1,00,000/-.

27. As far as interest is concerned, the amount awarded under the heads 'loss of future earning capacity', 'future medical treatment', 'future pain and suffering' and 'loss of amenities of life', shall carry interest at the rate of 7.5% per annum from the date of passing of the impugned award i.e. 11th May, 2009, till deposit, while the amount awarded under the remaining three heads i.e. 'pain and suffering undergone', 'loss of income during the period of hospitalization and confinement to bed' and 'medical expenses, special diet, attendant charges and transportation charges' shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit.

28. In view of the above discussion, the appeal is allowed and the amount of compensation is enhanced. 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 entire amount, alongwith interest, in favour of the claimant, after proper identification.

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

FAO No.11 of 2010 with FAO No.87 of 2010.
Decided on : 01.04.2016

1. FAO No.11 of 2010

Satish Kumar and another .....Appellants

Versus

Tarun Jain and another .....Respondents

2. FAO No.87 of 2010

Tarun Jain and another .....Appellants

Versus

Satish Kumar and another ..... Respondents

Motor Vehicles Act, 1988- Section 166- It was contended that no accident had taken place- evidence was led before the Tribunal to prove this fact- it was also held by the District Consumer Disputes Redressal Forum, Shimla that respondent No. 2 was driving the vehicle and had caused the accident- the findings were assailed before the State Consumer Disputes Redressal Commission and the Commission upheld those findings- hence, findings recorded by the Tribunal are correct- appeal dismissed. (Para-7 to 9)

Presence for the parties:

Mr.Anuj Gupta and Mr.Rohit Sharma, Advocates, for appellants in FAO No.87 of 2010 and for respondents No.1 and 2 in FAO No.11 of 2010.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Both these appeals are taken up together for final disposal as the same arise out of common award, dated 20th November, 2009, passed by the Motor Accident Claims Tribunal, Fast Track Court, Shimla, H.P., (for short, the Tribunal), in Claim Petition No.30-S/2 of 2007, titled Satish Kumar and another vs. Tarun Jain and others, whereby compensation to the tune of Rs.1,61,000/-, with interest at the rate of 9% per annum, from the date of filing of the claim petition till realization, came to be awarded in favour of the claimants and the owner and the driver came to be saddled with the liability, (for short, the impugned award).

2. Feeling aggrieved, the claimants have challenged the impugned award by way of FAO No.11 of 2010 and sought enhancement of compensation. The driver and the owner have also assailed the impugned award by the medium of FAO No.87 of 2010 and prayed for the dismissal of the claim petition.

3. Since both the appeals arise out of the common award, therefore, the same are taken up together and are being disposed of by this common judgment.

4. Claimants 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.20.00 lacs, as per the break-ups given in the claim petition.

5. Respondents resisted the claim petition by filing replies. On the pleadings of the parties, the following issues were settled by the Tribunal:

"1. Whether Sh.Manish Sood died because of the rash and negligent driving of Maruti Car No.DL-5C-0089 by the respondent No.2 as alleged? OPP

2. If issue No.1 is proved in affirmative, whether the petitioners are 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 petitioners have a cause of action? OPP

5. Whether the petitioners have not come to the Court with clean hands? OPR

6. Whether the petitioners are estopped from filing the petition by their act and conduct? OPR

7. Relief."

6. Claimants to prove their case have examined PW-1 HC Tulsi Dass and PW-3 Pawan Sharma, while claimant Satish Kumar appeared in the witness box as PW-2. On the other hand, only the driver of the offending vehicle appeared in the witness box as RW-1.

7. The Tribunal, on scanning the evidence led by the parties, held that the driver of the offending vehicle, namely, Neeraj Jain, had driven the offending vehicle rashly and negligently on the fateful day and had caused the accident. While coming to the said conclusion, the Tribunal has also discussed the findings recorded by the District Consumer Disputes Redressal Forum, Shimla, proved on record as Ext.PW-2/G, wherein it was held that Neeraj Jain (respondent No.2) was driving the vehicle at the relevant point of time and had caused the accident. The said findings recorded by the Forum were assailed before the State Consumer Disputes Rederssal Commission and the Commission also upheld the said findings, which have attained finality.

8. Having said so, there is clinching evidence on the file to hold that the said Neeraj Jain had driven the offending vehicle and had caused the accident.

9. Viewed thus, it does not lie in the mouth of the owner and the driver to argue that no accident had taken place. Accordingly, I hold that there is no merit in FAO No.87 of 2010 and the same is dismissed.

10. Coming to FAO No.11 of 2010, the Tribunal has rightly assessed the compensation and has rightly come to the conclusion that the claimants were entitled to Rs.1,61,000/-, as per the discussion made in paragraphs 17 to 19 of the impugned award. I have gone through the findings recorded by the Tribunal. The compensation awarded by the Tribunal, in no way, can be said to be inadequate, rather the same is just and appropriate.

11. Having said so, there is no merit in FAO No.11 of 2010 and the same is also dismissed.

12. Accordingly, the impugned award is upheld. The Registry is directed to release the amount in favour of the claimants forthwith strictly in terms of the impugned award, after proper identification.

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

State of Himachal Pradesh ...Appellant.

Versus

Kunju Ram ...Respondent.

Cr. Appeal No.: 499 of 2011
Reserved on: 04.3.2016
Date of Decision: 1st April, 2016

Indian Penal Code, 1860- Section 409, 420, 467, 468, 471 of the IPC - **Prevention of Corruption Act, 1988-** Section 13(2)- Accused was posted as Naib Tehsildar- there were extensive rains and snow fall due to which houses of several persons were damaged and there was heavy loss of property and crop – Rs. 15 lac was sent by cheque for disbursement – Rs. 5 lakh was sent by cash- a complaint was received regarding the misuse of the amount- it was found on investigation that accused had misappropriated amount of Rs. 61,000/- and had prepared forged/false document regarding the disbursement of this amount- accused was tried and acquitted by the trial Court- held, in appeal that there was no comparison of signature or thumb impression of the accused with the disputed thumb impression and signature- hence, it cannot be inferred that accused had forged document- PW-25 and 29 admitted their signatures on the receipt but denied the receipt of the money- once signatures are admitted, the person putting his signatures cannot deny the contents of the same in view of Sections 91 and 92 of Indian Evidence Act- testimonies of other witnesses were not satisfactory-_trial Court had rightly acquitted the accused-appeal dismissed. (Para-5 to 10)

For the Appellant: Mr. Ramesh Thakur, Dy. Advocate General.
For the respondent: Mr. Rakesh Dogra, Advocate.

Following judgment of the Court was delivered:

Per Sureshwar Thakur, Judge

This appeal stands directed against the judgement rendered on 20.08.2011 by the learned Special Judge, Chamba Division, Chamba, Himachal Pradesh in Corruption Case No.6 of 2009, whereby the accused-respondent stands acquitted for the commission of offences punishable under Section 409, 420, 467, 468, 471 of the Indian Penal Code and Section 13(2) of the Prevention of Corruption Act.

2. The prosecution story, in brief, is that accused Kunju Ram remained posted as Naib Tehsildar, Bharmour from 1994 to 2001. In January/February, 1998 there were extensive rains and snow fall in Sub Division Bharmour due to which houses of several persons were damaged and there was heavy loss of property and crop etc. Due to this, the Deputy Commissioner, Chamba vide letter Ext.PW-1/A asked the Government to sanction an amount of Rs.20 lac from Chief Minister Relief Fund for providing relief to the affected families and the same was sanctioned. Thereafter the Deputy Commissioner, Chamba vide letter Ext.PW-1/D sent an amount of Rs.15 lac to Sub Divisional Officer (Civil), Bharmour vide cheque Ext.PW.3/A, while an amount of Rs. 5 lac was sent by cash. Out of the aforesaid amount, Rs.3 lac was handed over to the accused by the Sub Divisional Magistrate, Bharmour on 13.4.1998 for disbursement to the eligible persons. Thereafter a complaint dated 17.8.1999 was received in Police Station, Chamba from one Tulsi Ram Sharma with the allegations that the relief amount was misused by the officials in village Sachuien, Tehsil Bharmour, District Chamba, upon which an inquiry was conducted by Sh. Pritam Chand, Incharge, SV and ACB, Chamba and found the allegations in the complaint to be true and submitted his report Ext.PW-10/C to S.P. Vigilance. On that inquiry report, FIR Ext.PW.10/B was recorded. The investigation in the case was conducted by PW-10 Sh. Pritam Chand and PW-37 Sh. Parkash Chand and as per their investigation, they found that out of the amount of Rs.3 lac which was given to the accused for disbursement as relief to the people, the accused had embezzled an amount of Rs.61,000/- and prepared forged/false documents and receipts by showing the said amount of Rs.61,000/-to have been paid to various persons namely Machlu Ram, Govind, Bishnu, Ghimo, Kour, Balbir

and Rana. The accused was arrested by the police on 28.12.2006. He was produced by the police before the Naib Tehsildar, Palampur for obtaining his specimen handwriting and signatures, where his specimen henadwriting and signatures Ext.PW-19/A.1 to PW-19/A.7 were taken. The police also took into possession some letters written by the accused to SDM, Bharmour as admitted signatures and handwriting of the accused. The police also took the thumb, fingers and hand impressions and handwriting etc. of Sh. Machlu Ram etc. It also took into possession various receipts Exts.PW-14/A.6 to PW-14/A.12. The said specimen signatures and handwritings of the accused and other persons along with documents were sent by the police to the State Forensic Science Laboratory and Fingers Print Bureau for comparison and as per report of expert Ext.PW-39/A, said receipts and letters contained the signatures of one and the same person. Thereafter the police requested the Divisional Commissioner, Kangra for sanction to prosecute the accused and accordingly sanction Ext.PW-38/A was granted on 18/6/2009.

3. On completion of investigations into the offences allegedly committed by the accused a report under Section 173 Cr.P.C. stood prepared and filed in the competent Court.

4. The accused-respondent herein stood charged by the learned trial Court for committing offences punishable under Sections 409, 420, 467, 468, 471 of the Indian Penal Code and under Section 13(2) of the Prevention of Corruption Act. The accused-respondent pleaded not guilty and claimed trial.

5. In order to prove its case, the prosecution examined 40 witnesses. On closure of prosecution evidence, the statement of the accused under Section 313 of the Code of Criminal Procedure, stood recorded wherein he pleaded innocence and claimed false implication. In defence he chose to not lead any evidence.

6. The evidence projected before the learned trial Court by the prosecution witnesses forthrightly displays the factum of the accused standing entrusted with a sum of Rs. 3,00,000/-. From the sum aforesaid, the accused is alleged to have embezzled an amount of Rs. 61,000/-. The misappropriation of the sum aforesaid by the accused stands anvilled upon the accused preparing receipts Exts.PW-14/A.6 to PW-14/A.12 purportedly respectively signed/thumb marked by the beneficiaries thereof in portrayal of the sums constituted therein standing disbursed to them by the accused. The fictitiousness of the thumb impressions of the beneficiaries on receipts Exts.PW-14/A.6, PW-14/A.8 and PW-14/A.12 stands established by PW-40, deposing of the beneficiaries thereof on his comparing the disputed thumb impressions on receipts Exts.PW-14/A.6, PW-14/A.8 and PW-14/A.12 with their standard admitted thumb impressions comprised in Ext.PW-4/A.1 to PW-4/A.21 sequelling an opinion from him of the thumb impressions existing on receipts Exts.PW-14/A.6, PW-14/A.8 and PW-14/A.12 not tallying with their standard admitted thumb impressions comprised in Ext.PW-4/A.1 to PW-4/A.21, hence constraining him to conclude of the thumb impressions of the beneficiaries of the amounts constituted in receipts comprised in Exts.PW-14/A.6, PW-14/A.8 and PW-14/A.12 standing not thumb marked by them. Besides the fictitiousness of the signatures existing on receipts Ext.PW-14/A.7, PW-14/A.9, PW-14/A.10 and PW-14/A.12 stands established by the handwriting expert opining therein of the standard admitted signatures of the beneficiaries existing in Exts.PW-4/A.31 to PW-4/A.46 and PW-4/A.63 to PW-4/A.78 on comparison with the disputed signatures existing thereon unfolding the factum of theirs not standing signed by them. However, reliance if any upon the aforesaid report of the handwriting expert comprised in Ext.PW-39/B qua the factum aforesaid stands belittled by; (a) there existing on record no document in portrayal of the Investigating Officer collecting at the instance of the accused before the competent officer the disputed signatures made before it by him for

facilitating the handwriting expert concerned to render an apposite opinion on his tallying the disputed signatures on receipts Exts.PW-14/A.7, PW-14/A.9, PW-14/A.10 and PW-14/A.12 with the signatures in compatibility thereof made by the accused before the competent officer. Absence thereof not only deterred the handwriting expert concerned to tally the disputed signatures with the signatures in compatibility thereof made by the accused before the competent officer, but also deterred him to record an apposite opinion for enabling this Court to conclude with firmness of the disputed signatures of the beneficiaries borne on receipts Exts.PW-14/A.7, PW-14/A.9, PW-14/A.10 and PW-14/A.12 standing authored by the accused. In sequel, it cannot be said with any firmness of accused Kunju Ram forging on receipts Exts.PW-14/A.7, PW-14/A.9, PW-14/A.10 and PW-14/A.12 the signatures of the beneficiaries thereunder; (b) the fingerprints expert in his report has opined therein of the thumb impressions of the beneficiaries borne on receipts Exts.PW-14/A.6, PW-14/A.8 and PW-14/A.12 not belonging to them. However, in the absence of the Investigating Officer collecting before the competent officer the thumb impressions of accused Kunju Ram for enabling the fingerprints expert to render with aplomb and conclusivity an opinion of on his comparing the disputed thumb impressions borne thereon with the thumb impressions made by the accused before the competent officer, of accused subscribing his thumb impressions on receipts Exts.PW-14/A.6, PW-14/A.8 and PW-14/A.12, cannot clinch any conclusion of accused Kunju Ram thumb marking receipts Exts.PW-14/A.6, PW-14/A.8 and PW-14/A.12.

7. With lack of conclusivity hence not ingraining the report of the handwriting/fingerprints expert comprised in Exts.PW-39/A, PW-39/B, PW-40/B and PW-40/C, respectively qua the accused hence subscribing his thumb impressions besides his signatures on receipts Ext. PW-14/A.6 to PW-14/A.12 dethrones the prosecution case of the accused either thumb marking receipts Exts.PW-14/A.6, PW-14/A.8 and PW-14/A.12 or signaturing receipts Exts.PW-14/A.7, PW-14/A.9, PW-14/A.10 and PW-14/A.12.

8. Significantly, it is also imperative to advert to the testimony of PW-25 Rana Singh. He in his deposition on oath admits his signatures on receipt Ext.14/A.9, yet he denies the factum of his receiving the entire sum of Rs. 25,000/- as embodied therein. With his admitting his signatures on Ext.PW-14/A.9 which records the factum of his thereunder receiving a sum of Rs. 25,000/- ousts the probative worth of his oral testimony in variance or in contradiction thereto in the wake of a statutory bar or estopple constituted in Sections 91 and 92 of the Indian Evidence Act against receipt of evidence in derogation to the recitals recorded in Ext.PW-14/A.9 proved to be signatured by him. In face thereof, it has to be concluded of his testimony of his not receiving therunder the sums of money as constituted therein being bereft of creditworthiness. Even though he deposes of his signatures standing obtained on blank papers for facilitating him to escape the rigour of the statutory bar constituted in Sections 91 and 92 of the Indian Evidence Act to depose at variance and in contradiction to the recitals of Ext.PW-14/A.9 proven to be signatured by him, nonetheless he cannot whittle down the rigour of the bar aforesaid constituted in the aforereferred provision of the Indian Evidence Act against his deposing in gross detraction to the recorded recitals of Ext.PW-14/A.9, especially when he deposes the factum of his signing blank Ext.PW-14/A.9 only while testifying in Court whereas his omitting to do so in his previous statement recorded in writing renders hence his deposition on oath to be acquiring the taint of an improvement or an embellishment. Likewise, the statement of PW-29 Dinna Nath who has admitted his signatures on Ext.PW-14/A.9 yet has too, to evade besides escape the rigour of the embargo constituted in Sections 91 and 92 of the Indian Evidence Act against his deposing in variance or in contradiction thereto deposed qua his signing blank papers, is also bereft of creditworthiness for a like reason. PW-26 has not corroborated the story of the prosecution. He has identified his signatures on Ext.PW-14/A.11 hence absolving the guilt,

if any, attributed to the accused by the prosecution of his forging his signatures thereon. PW-27 Ghimo Ram though denies his signatures on Ext.PW-14/A-12, yet his denial does not for the reasons previously referred carry any tenacity or vigour for concluding of the accused forging his signatures on Ext. PW-14/A.12, besides given the factum that he has in his deposition admitted the payment of the sums of money constituted in Ext.PW-14/A.12 in the presence of Pennu Ram, enjoins this Court to allude to the deposition of the aforesaid Pennu Ram who has deposed as PW-30. With PW-30 underscoring in his deposition of PW-27 standing disbursed in his presence by the competent authority a sum of money constituted in Ext.PW-14/A-12 renders bereft of tenacity the deposition of PW-27 of his not signaturing Ext.PW-14/A.12. Even though PW-28 Balbir Singh admitted his signatures on Ext. PW-14/A.10. However, he has denied the factum of the entire amount constituted therein standing disbursed in his favour. However, with PW-28 deposing in his concluding part of his cross-examination of accused Kunju Ram probably disbursing Rs.10,000/- in his favour renders contradictory his previous version recorded in his examination-in-chief of his not receiving the entire sum of money constituted in Ext. PW-14/A.10 whereupon an inference arises of his testimony occurring in his examination-in-chief qua the entire amount constituted in Ext. PW-14/A.10 standing not disbursed in his favour loosing its truthfulness.

9. 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.

10. 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.

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

Union of India and others .....Appellant.

Versus

Smt. Radha Verma & others .....Respondents

FAO (MVA) No. 102 of 2010

Date of decision: 1st April,2016

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs. 14,600/- per month- after making deductions of 1/3rd ,claimants have lost source of dependency of Rs. 9,733/- per month- deceased was aged 37 years- multiplier of '15' is applicable- claimants are entitled to Rs. 17,51,940/- (Rs. 9733x12x15) – Tribunal had fallen in an error in awarding Rs. 1,00,000/- under the head "love and affection" and Rs. 50,000/- under the head "loss of consortium"- claimants are entitled to Rs. 10,000/- each under the heads of 'Loss of love and affection', 'loss of estate', 'funeral expenses' and 'loss of consortium'- thus, total amount of Rs. 17,51,940+Rs. 40,000/-=Rs. 17,91,940/- awarded in favour of claimants along with interest @ 7.5% per annum. (Para-9 to 13)

Cases referred:
Sarla Verma and others versus Delhi Transport Corporation and another AIR 2009 SC 3104
Reshma Kumari and others versus Madan Mohan and another, 2013 AIR SCW 3120

For the appellant: Mr. Ashok Sharma, ASGI with Mr. Ajay Chauhan, Advocate.
For the respondents: Mr. Adarsh Vashhisht, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

This appeal is directed against the judgment and award dated 27.10.2009, made by the Motor Accident Claims Tribunal-II Solan, H.P. in MAC Petition No. 18-S of 2008, titled *Smt. Radha Verma and others versus Directorate of Field Publicity Office and another*, for short "the Tribunal", whereby compensation to the tune of Rs.20,28,800/- alongwith interest @ 12% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. The claimants, driver and owner have not questioned the impugned award on any ground. Thus, it has attained finality so far as it relates to them.

3. The appellant has questioned the impugned award on the grounds taken in the memo of appeal.

4. Claimants had sought compensation by filing claim petition before the Tribunal, as per the breaks-ups given in the claim petition, which was resisted and contested by the respondents and following issues came to be framed.

(i) Whether the death of Nirmal Singh was caused on account t of rash and negligent driving by the driver of the respondent No.1 and 2 as alleged? OPP.

(ii) If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so the amount thereof and by whom to be paid? OPP

(iii) Whether the petition is not maintainable since exgratia payment has already been made by the respondents as alleged? OPR

(iv) Relief.

5. Parties have led the evidence.

6. Claimant No. 1 Radha Verma stepped into witness-box as PW1 and respondent appellant herein examined G.D. Pandey as RW1.

7. The claimants have also placed on record documents, i.e., copy of FIR, post-mortem certificate, death certificate, copy of legal heirs certificate and affidavit of Radha Verma.

8. I have examined the pleadings and the evidence on record. I am of the considered view that Nirmal Singh, husband of the claimant Radha Verma lost his life in a vehicular accident. The said findings, virtually are not in dispute. The dispute projected in the memo of appeal and in the argument is that the amount awarded is excessive, which relates to issues No. 2 and 5.

9. The Tribunal has assessed the age of the deceased as 37 years which is correct as per the averments and documents on the file. Keeping in view the 2nd Schedule of 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***, multiplier of "15" is applicable and is accordingly applied in this case and not "16" as applied by the Tribunal.

10. Mr. G.D. Pandey RW 1 stated that the deceased was earning Rs.14,600/- per month as salary, and after making deductions of 1/3rd held that the claimants have lost source of dependency to the tune of Rs.9733/- per month which is correct findings. Accordingly, the claimants are held entitled to Rs.9733x12x15. Total Rs.17,51,940/-.The Tribunal has however, fallen in an error in awarding Rs.1,00,000/- under the head "love and affection" and Rs.50,000/- under the head "loss of consortium".

11. I hold that the claimants are 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/-
(iv)	Loss of consortium	:	Rs.10,000/-
			Total Rs.40,000/-

12. Accordingly, the total amount of compensation is awarded in favour of the claimants to the tune of Rs.17,51,940+Rs.40,000/-=Rs.17,91,940/-.

13. Thus, the impugned award merits to be modified by providing that the claimants are entitled to compensation to the tune of Rs.17,91,940/-, with interest at the rate of 7.5% per annum from the date of claim petition till its realization.

14. Having said so, the impugned award is modified as indicated hereinabove. The Registry is directed to release the amount in favour of the claimants through payees' cheque account or by depositing the same in their bank accounts, strictly in terms of the conditions contained in the impugned award and excess amount, if any be refunded to the appellant through payee's cheque account.

15. The appeal stands disposed of accordingly.

16. Send down the record forthwith, after placing a copy of this judgment.

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

Vinod & others .....Appellants

Versus

Smt. Champa Thakur & others .....Respondents

FAO No. 165 of 2010
Decided on : 01.04.2016

Motor Vehicles Act, 1988- Section 166- Deceased was 50 years at the time of accident- Tribunal had applied multiplier of '8', whereas multiplier of '9' is applicable- claimants are entitled to Rs. 3,56,400/- (3300/- x 12 x 9) under the head 'loss of dependency'- they are also entitled to Rs.10,000/- each under the heads of 'Loss of love and affection', 'Loss of consortium', 'Loss of estate' and 'Funeral expenses' along with interest @ 7.5% per annum.

(Para-4 to 7)

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 appellants :	Mr. Anup Rattan, Advocate.
For the respondents:	Mr. Gaurav Gautam, Advocate vice Ms. Archana Dutt, Advocate, for respondents No. 1 & 2.
	Mr. Ratish 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 8th December, 2008, made by the Motor Accident Claims Tribunal (I), Kangra at Dharamshala, (hereinafter referred to as 'the Tribunal') in MAC Petition No. 15-N/II-2007, titled **Vinod Kumar & others versus Smt. Champa Thakur & others,** whereby compensation to the tune of Rs.3,16,800/- with interest @ 9% per annum from the date of the award till its realization, came to be awarded in favour of the claimants-appellants, herein and the insurer-respondent No. 3 herein, was saddled with liability (for short, the "impugned award").

2. The 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. The only question to be determined in this appeal is-*whether the compensation amount is inadequate or otherwise*? The answer is in the affirmative for the following reasons.

4. Admittedly, the age of the deceased was 50 years at the time of accident. The Tribunal has fallen in an error in applying the multiplier of '8'. The multiplier of '9' was applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **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.**

5. In view of the ratio laid down by the apex Court in the cases, *supra,* the claimants are held entitled to the tune of Rs.3300/- x 12 = Rs.39,600 x 9 = Rs.3,56,400/- under the head 'loss of dependency'.

6. The Tribunal has also fallen in an error in not awarding the compensation under the four heads, i.e. 'loss of love and affection', 'loss of consortium', '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 aforesaid heads to the claimants.

7. The Tribunal has awarded interest @ 9% per annum from the date of filing of the claim petition, is on the higher side. The interest at the rate of 7.5% per annum is awarded from the date of filing of the claim petition till its realization.

8. Having said so, it is held that the claimants are entitled to compensation to the tune of Rs.3,56,000/- + Rs.40,000/- total amounting to Rs.3,96,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

9. The amount of compensation is enhanced and the impugned award is modified, as indicated above. The appeal is accordingly disposed of.

10. The insurer 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 entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts.

11. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Hem Raj ...Appellant.

Versus

State of Himachal Pradesh ...Respondent.

Criminal Appeal No.280 of 2014
Reserved on : 15.3.2016
Date of Decision : April 4, 2016

N.D.P.S. Act, 1985- Section 20- Accused tried to flee away on seeing the police- he was apprehended on suspicion- his search was conducted during which 1.6 kg. of charas was recovered- accused was tried and convicted by the trial Court- held, in appeal that testimony of police official cannot be discarded only on the ground that he is a police official and interested in the success of the case- police officials consistently stated that no independent witness was available at the spot- their testimonies corroborated each other regarding the recovery - they have withstood the test of cross-examination- contradictions regarding association of the Pradhan and Members of the Gram Panchayat are not material to make the prosecution case doubtful- police had no reason to falsely implicate the accused- mere non-association of the witness is not fatal – link evidence is complete and there is no discrepancy regarding the weight of the contraband substance, number of seals, NCB form and that the Charas was recovered- prosecution had succeeded in proving its case beyond reasonable doubt- accused was rightly convicted by the trial Court- appeal dismissed.

(Para-6 to 34)

Cases referred:

Govindaraju alias Govinda v. State by Srirampuram Police Station and another, (2012) 4 SCC 722

Tika Ram v. State of Madhya Pradesh, (2007) 15 SCC 760
Girja Prasad v. State of M.P., (2007) 7 SCC 625
Aher Raja Khima v. State of Saurashtra, AIR 1956
Tahir v. State (Delhi), (1996) 3 SCC 338
Dharampal Singh v. State of Punjab, (2010) 9 SCC 608
Madan Lal and another vs. State of H.P., 2003 (7) SCC 465
Dehal Singh v. State of Himachal Pradesh, (2010) 3 SCC (Cri) 1139
State of Punjab v. Partap Singh, 2004 Drugs Cases (Narcotics) 104

For the Appellant : Mr. Parveen Chandel, Advocate.
For the Respondent : Mr. V.S. Chauhan, Additional Advocate General, Mr. Kush Sharma, Deputy Advocate General and Mr. J.S. Guleria, Assistant Advocate General.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

Appellant-convict Hem Raj, hereinafter referred to as the accused, has assailed the judgment dated 17.4.2014, passed by Special Judge, Mandi, Himachal Pradesh, in Sessions Trial No.19/2011, titled as *State of Himachal Pradesh v. Hem Raj,* whereby he stands convicted of the offence punishable under the provisions of Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act) and sentenced to undergo rigorous imprisonment for a period of ten years and pay fine of Rs.1,00,000/- and in default thereof to further undergo imprisonment for one year.

2. It is the case of prosecution that on 22.1.2011, a police party, comprising of HC Jaswant Singh (PW-9), Constables Dhameshwar Singh (PW-8), Kashmir Singh and Narpat Ram, headed by ASI Ram Lal (PW-10), was on patrol duty. At 5 p.m., they had laid a *Naaka* at a place known as Kotla Nallah, NH-21. At about 5.30 p.m., accused, who was coming on foot, from the Aut side, seeing the police party tried to flee away. On suspicion, he was apprehended. On suspicion that he might be carrying some contraband substance, after informing him of his statutory right and obtaining his consent (Ex.PW-9/A), he was searched. From the knee caps worn by the accused on his legs, contraband substance in the shape of sticks, which appeared to be Charas, was recovered, which upon weighment was found to be 1.600 kgs. Contraband substance alongwith knee caps was sealed with 12 seals of seal impression 'R' and taken into possession vide Memo (Ex.PW-9/B). NCB form (Ex. PW-10/A) was filled up on the spot. Rukka (Ex.PW-8/C), so carried by Constable Dhameshwar Singh, led to registration of FIR No.23, dated 22.1.2011 (Ex.PW-7/A) by SI Durga Dass at Police Station, Sadar (Mandi), Himachal Pradesh. With the file being taken to the spot, accused was arrested vide Memo (Ex.PW-9/C) and further proceedings completed. Contraband substance was produced before Inspector Surinder Pal, who resealed the same with six seals of seal impression 'S' and deposited it with MHC Thakur Singh (PW-3). The sealed parcel was sent for chemical analysis, through Constable Parma Nand and the same alongwith the report was brought back by Constable Sukh Ram (PW-5). Special Report (Ex.PW-1/A) was also sent to the Superior Officer. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

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 11 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure was also recorded, in which he took plea of innocence and false implication.

5. Based on the testimonies of witnesses and the material on record, trial Court convicted the accused of the charged offence and sentenced him, as aforesaid. Hence, the present appeal by the accused.

6. Assailing the judgment, learned counsel for the accused has made the following submissions: (a) non-association of independent witnesses has resulted into violation of the mandatory provisions of Section 100 of the Code of Criminal Procedure, (b) contradiction in the testimony of police officials Constable Dhameshwar Singh and ASI Ram Lal, on the question of association of independent witnesses has rendered the testimonies of the police officials to be unbelievable and the witnesses unworthy of credence, (c) factum of recovery of contraband substance from the knee caps, allegedly worn, by the accused, on his legs, stands belied, (d) absence of reference of knee caps in the report of the Chemical Analyst (Ex. PW-10/D) leads to further inference that the case property sent for analysis was other than the one which was actually recovered by the police, (e) inaction on the part of the Investigating Officer, in taking action against the persons, who refused to be associated as witnesses, has further rendered the prosecution case to be doubtful.

7. On the other hand Mr. V.S. Chauhan, learned Additional Advocate General, has supported the judgment for the reasons set out therein. He has minutely taken us through the testimonies of the witnesses and other incriminating material on record.

8. Undoubtedly, no independent witness has been associated by the police, in carrying out the search and seizure operations. The issue as to whether in every case, and under the all circumstances, police must associate independent witnesses, while carrying out search and seizure operations, is no longer res integra.

9. It is also a settled proposition of law that sole testimony of police official, which if otherwise is reliable, trustworthy, cogent and duly corroborated by other admissible evidence, cannot be discarded only on the ground that he is a police official and may be interested in the success of the case. It cannot be stated as a rule that a police officer can or cannot be a sole eye-witness in a criminal case. It will always depend upon the facts of a given case. If the testimony of such a witness is reliable, trustworthy, cogent and if required duly corroborated by other witnesses or admissible evidences, then the statement of such witness cannot be discarded only on the ground that he is a police officer and may have some interest in the success of the case. It is only when his interest in the success of the case is motivated by overzealousness to an extent of his involving innocent people, in that event, no credibility can be attached to the statement of such witness.

10. It is not the law that Police witnesses should not be relied upon and their evidence cannot be accepted unless it is corroborated in material particulars by other independent evidence. The presumption applies as much in favour of a police officer as any other person. There is also no rule of law which lays down that no conviction can be recorded on the testimony of a police officer even if such evidence is otherwise reliable and trustworthy. Rule of prudence may require more careful scrutiny of their evidence. If such a presumption is raised against the police officers without exception, it will be an attitude which could neither do credit to the magistracy nor good to the public, it can only bring down the prestige of police administration.

11. Wherever, evidence of a police officer, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and

absence of some independent witness of the locality does not in any way affect the creditworthiness of the prosecution case. No infirmity attaches to the testimony of the police officers merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. Such reliable and trustworthy statement can form the basis of conviction. [See: *Govindaraju alias Govinda v. State by Srirampuram Police Station and another,* (2012) 4 SCC 722; *Tika Ram v. State of Madhya Pradesh,* (2007) 15 SCC 760; *Girja Prasad v. State of M.P.,* (2007) 7 SCC 625); and *Aher Raja Khima v. State of Saurashtra,* AIR 1956].

12. Apex Court in *Tahir v. State (Delhi)*, (1996) 3 SCC 338, dealing with a similar question, held as under:-

> "6. ... .In our opinion no infirmity attaches to the testimony of the police officials, merely because they belong to the police force and there is no rule of law or evidence which lays down that conviction cannot be recorded on the evidence of the police officials, if found reliable, unless corroborated by some independent evidence. The Rule of Prudence, however, only requires a more careful scrutiny of their evidence, since they can be said to be interested in the result of the case projected by them. Where the evidence of the police officials, after careful scrutiny, inspires confidence and is found to be trustworthy and reliable, it can form basis of conviction and the absence of some independent witness of the locality to lend corroboration to their evidence, does not in any way affect the creditworthiness of the prosecution case."

13. In view of the aforesaid statement of law, we shall now examine the testimony of police officials.

14. That the police party, headed by ASI Ram Lal, had left Police Post, Pandoh, falling within the jurisdiction of Police Station, Sadar (Mandi), on a routine patrol duty, stands evidently established not only through the testimony of Constable Dhameshwar Singh, Constable Jaswant Singh and ASI Ram Lal, but also Om Prakash (Pw-6), who made entry vide Rapt No.18, dated 22.1.2011, so proved as Ex.PW-6/A. Presence of the police party in the area, where the *Naaka* was set up, thus, stands established beyond reasonable doubt.

15. ASI Ram Lal categorically states that at about 5 p.m., police party had set up a *Naaka* on NH-21, at a place known as Koti Nallah. Such version stands corroborated, both by Constables Dhameshwar and Jaswant Singh. Significantly, from the line of cross-examination, it is apparent that the accused has not disputed such fact. It has also come on record through the testimony of ASI Ram Lal that Koti Nallah is at a distance of 40 kms from Aut, nearest inhabited area. Police officials further deposed that the place where the *Naaka* was set up, there is no habitation. They have, in one voice, deposed that no independent witnesses were available on the spot.

16. ASI Ram Lal further states that at about 5.15 p.m., police party saw the accused coming on foot from Aut side. Seeing the police party, accused got frightened and hastily turned back and on suspicion was apprehended. He was searched in the presence of police officials. Prior thereto, he was informed of his statutory rights vide Memo (Ex.PW-9/A). Vide Consent Memo (Ex.PW-9/A) accused consented to be searched by the police officials present on the spot. During search, from the knee caps worn by the accused on his both legs, contraband substance, which appeared to be Charas, in the shape of sticks, was recovered. Three packets each from each of the knee caps were recovered and upon

weighment found to be 1.6 kgs. All the six packets, alongwith knee caps, were wrapped and sealed with seal impression 'R' at 12 places. NCB form (Ex.PW-10/A), in triplicate, was filled up. Rukka (Ex.PW-8/C) sent through Constable Dhameshwar Singh, led to registration of FIR No.23, dated 22.1.2011 (Ex.PW-7/A). Contraband substance was taken into possession vide Memo (Ex.PW-9/B). Accused was arrested vide Memo (Ex.PW-9/C) and information thereof, furnished to his brother. With the case file being brought to the spot by Constable Dhameshwar Singh, further proceedings were completed. Whereafter, the case property was entrusted to Inspector Surinder Pal, who resealed the same vide Memo (Ex.PW-10/C). Special Report (Ex.PW-1/A) was sent to the Superintendent of Police, Mandi. With the receipt of report of the Chemical Analyst (Ex.PW-10/D), challan was presented in Court by Inspector Surinder Pal.

17. On material facts, testimony of this witness stands corroborated by Constables Dhameshwar Singh and Jaswant Singh. Also, the witnesses have withstood the test of cross-examination. Their testimonies are worthy of credence and witnesses trustworthy and reliable.

18. Yes, there is a contradiction in the statements of ASI Ram Lal, and Constables Dhameshwar Singh and Jaswant Singh, which is with regard to association of the Pradhan and Members of the Gram Panchayat. Whereas ASI Ram Lal wants the Court to believe that his request to the Pradhan and the Members of the local Panchayat for joining investigation was turned down. Dhameshwar Singh states that no request was made. Significantly, Constable Jaswant Singh is silent on this aspect. Now, the contradiction, in our considered view, is not material, rendering the genesis of the prosecution story of having recovered the contraband substance from the conscious possession of the accused to be doubtful. Significantly, accused is a resident of Nurpur, District Kangra, a far off place from Aut, District Mandi. Both places are at the farthest end of the Districts. In his statement recorded under the provisions of Section 313 of the Code of Criminal Procedure, accused admits his presence on the spot, which fact is also not disputed, as is evident from the line of cross-examination of prosecution witnesses. Judicial notice can be taken of the fact that Aut, which is on the boundary of Mandi and Kullu Districts, is prone to trafficking of drugs. What was the accused doing on the spot, remains unexplained on record. His defence of false implication cannot be said to have been probablized on record. Simply because police did not take any action against the persons, who expressed their reservation, would also not render the testimonies of police officials to be doubtful. On the question of recovery of the contraband substance, there is no doubt. On such fact their version is clear, cogent and consistent.

19. There was no reason for the police to have falsely implicated the accused. It is not the case of the accused that police harboured any animosity resulting into false implication. He claims to be a resident of Nurpur, District Kangra, a far off place. His presence on the spot remained unexplained by him.

20. It is true that the accused is only to probablize his defence and not prove his case beyond reasonable doubt. But then, in the instant case, there is nothing on record to such effect.

21. In *Dharampal Singh v. State of Punjab,* (2010) 9 SCC 608, the Hon'ble Supreme Court of India, held that the initial burden of proof of possession lies on the prosecution and once it is discharged legal burden would shift on to the accused. Standard of proof expected from the prosecution is to prove possession beyond all reasonable doubt but what is required to prove innocence by the accused would be preponderance of

probability. Once the plea of the accused is found probable, discharge of initial burden by the prosecution will not nail him with offence.

22. Offences under the Act, being more serious in nature higher degree of proof is required to convict an accused. It needs no emphasis that the expression "possession" is not capable of precise and completely logical definition of universal application in context of all the statutes. "Possession" is a polymorphous word and cannot be uniformly applied, it assumes different colour in different context. In the context of Section 18/20 of the Act once possession is established, the accused who claims that it was not a conscious possession has to establish it because it is within his special knowledge. Section 54 of the Act raises presumption of possession of illicit articles.

23. Act creates legal fiction and presumes the person in possession of illicit articles to have committed the offence in case he fails to account for the possession satisfactorily. Possession is a mental state and Section 35 of the Act gives statutory recognition to culpable mental state. It includes knowledge of fact. The possession, therefore, has to be understood in the context thereof and when tested on this anvil, we find that the accused has not been able to account for satisfactorily the possession of Charas. Once possession is established, the Court can presume that the accused had culpable mental state and had committed the offence.

24. In somewhat similar facts, the Hon'ble Supreme Court of India, had the occasion to consider this question in *Madan Lal and another vs. State of H.P.*, 2003 (7) SCC 465, wherein it has been held that once possession is established, the person who claims that it was not a conscious possession has to establish it, because how he came to be in possession is within his special knowledge. Section 35 of the Act gives a statutory recognition of this position because of the presumption available in law. Similar is the position in terms of Section 54 where also presumption is available to be drawn from possession of illicit articles. (See also: *Dehal Singh v. State of Himachal Pradesh,* (2010) 3 SCC (Cri) 1139).

25. In the present case, not only possession but conscious possession has been established. It has not been shown by the accused that the possession was not conscious in the logical legal backdrop of Sections 35 and 54 of the Act.

26. It is a settled position of law that mere non-association of independent witnesses, ipso facto, would not render the prosecution case to be fatal. Compliance of Section 100 of the Code of Criminal Procedure is not mandatory, as is urged by the learned counsel for the accused. Police had no reason to falsely implicate the accused. The accused was found to have concealed packets of Charas in the knee caps worn by him.

27. Now coming to the recovery of the contraband substance, we find that the same was recovered and sealed on the spot. It was resealed with seal impression 'S' at the Police Station by the concerned SHO. Testimonies of ASI Ram Lal and Inspector Surinder Pal are clear to such effect. Both filled up the respective columns of NCB form (Ex.PW-10/A), bearing seal impressions 'R' and 'S'. The specimen seal impression, memo of sealing and resealing were entered in the Register (Ex.PW-3/A) at Serial No.1107. MHC Thakur Singh (PW-3) has clarified that so long as the case property remained with him it was intact. Further, he handed over the case property to Constable Parma Nand (PW-4), who vide Road Certificate (Ex.PW-3/B) took the same and deposited it in the Laboratory. He has also testified that the parcel bore 12 seals of seal impression 'R' and six seals of impression 'S'. He also deposed that so long as the property remained with him, it remained intact. Seals on the parcel examined in the Laboratory, as is evident from report (Ex.PW-10/D), tallies

with the number of seals. Case property was brought back from the Laboratory and re-deposited with the MHC by Sukh Ram (PW-5). Hence, the case property produced in the Court stands duly proved to be the one which was recovered on the spot, as is also evident from the testimony of Inspector Surinder Pal. Significantly, the case property, as produced in Court, was opened, in which four knee caps (Ex.P-3 to P-6) were there. No doubt, in the report of the Laboratory, there is no reference of knee caps, but then the very same parcel, which was handed over by the Laboratory to the police, was produced in Court.

28. It be also observed that there is reference in the Rukka (Ex. PW-8/C) as also the recovery memo (Ex.PW9/B) of the contraband substance recovered from the knee caps worn by the accused. Hence, mere non-mentioning of the knee caps in the documents, would not render the prosecution case to be fatal.

29. Significantly, there is no discrepancy with regard to the weight of the contraband substance, number of seals, NCB form and the contraband substance/Charas recovered.

30. Thus, by way of link evidence, the case property recovered by the police, so produced in Court, stands established to be the one which was actually examined by the Chemical Analyst.

31. Reliance on a decision rendered by Hon'ble the Supreme Court of India, in *State of Punjab v. Partap Singh,* 2004 Drugs Cases (Narcotics) 104, is misconceived, for the apex Court was dealing with a case where the Courts below concurrently held the prosecution to have violated Section 50 of the Act and non-association of independent witnesses, despite availability in the vicinity, was an additional fact, which weighed with the Bench in not interfering with the view taken by the Courts.

32. From the material placed on record, it stands established by the prosecution witnesses that the accused is guilty of having committed the offence charged for. There is sufficient, convincing, cogent and reliable evidence on record to this effect. The circumstances stand conclusively proved by unbroken chain of unimpeachable testimony of the prosecution witnesses. The guilt of the accused stands proved beyond reasonable doubt to the hilt. The chain of events stand conclusively established and lead only to one conclusion, i.e. guilt of the accused. Circumstances when cumulatively considered fully establish completion of chain of events, indicating the guilt of the accused and no other hypothesis other than the same. It cannot be said that accused is innocent or not guilty or that he has been falsely implicated or that his defence is probable or that the evidence led by the prosecution is inconsistent, unreliable, untrustworthy and unbelievable. It cannot be said that the version narrated by the witnesses in Court is in a parrot-like manner and hence is to be disbelieved.

33. In our considered view, prosecution has been able to establish the guilt of the accused, beyond reasonable doubt, by leading clear, cogent, convincing and reliable piece of evidence, that the accused was found in conscious and exclusive possession of Charas.

34. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence placed on record by the parties. There is no illegality, irregularity, perversity in correct and/or in complete appreciation of the material so placed on record by the parties. Hence, the appeal is dismissed. Appeal stands disposed of, so also pending application(s), if any.

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

Secretary, Rural Development Department and others. ...Appellants.

Versus

Jethi Devi. ...Respondent.

FAO No. 149 of 2016
Decided on: 4.4.2016

Workmen Compensation Act, 1923- Section 5- workman was employed as labourer in MGNREGA- heavy stone and debris fell upon her- she sustained injuries in her left leg and other parts of the body- she spent Rs. 70,000/- for her treatment- state denied the claim pleading that she was already paid a sum of Rs. 35,444/- for medicine and MGNREGA scheme only provides for 100 days guaranteed wages employment- workman was not entitled to any compensation- Workmen Commissioner awarded compensation of Rs. 4,02,613.2 along with interest @ 12% per annum- held, that workman had sustained 40% disability- she was an employee as she was engaged in the construction/maintenance/ repair of the road- provisions of MGNREGA did not debar the workman from filing the claim petition before the Workmen Compensation Commissioner- the income of the respondent was rightly assessed and correct factor was applied while awarding compensation – petition dismissed. (Para-11 to 13)

For the Appellants : Mr. Parmod Thakur, Addl. A.G. with Mr. Neeraj Sharma, Dy. A.G.
For the Respondent: Nemo.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge (oral):

This appeal is directed against the judgment dated 17.1.2015 rendered by the Commissioner for Employees Compensation, Chachiot at Gohar, District Mandi in E.C. No. 8 of 2013.

2. "Key facts" necessary for the adjudication of this appeal are that respondent-workman (hereinafter referred to as the "workman") was employed as labourer in the MGNREGA in the Gram Panchayat, Bahwa, Tehsil Chachiot, District Mandi by the appellants. On 12.6.2009 at about 3.00 P.M. at village Kalai, Tehsil Chachiot, District Mandi, respondent was working as a labourer on the road. It was being constructed by the appellants. All of a sudden, heavy stone and debris fell down upon the respondent. She sustained injuries in her left leg and other parts of the body. She was taken to CHC, Gohar, Tehsil Chachiot, District Mandi. She was given medical aid and thereafter was referred to Zonal Hospital, Mandi. She remained under treatment in Zonal Hospital, Mandi for about 16 days. Thereafter, she was referred to PGI, Chandigarh. She remained under treatment in PGI, Chandigarh for 28 days. She was operated upon. She was again admitted in the Zonal Hospital, Mandi and remained under treatment for about three months. Iron plates were inserted in the left leg of the respondent and she was also advised for periodical check up for her injuries. She has spent Rs. 70,000/- for her treatment. She used to get Rs. 3,000/- per month as wages from the appellants. She was 55 years old at the time of accident. Notice was served upon the appellants. However, the matter was not settled. It is in these circumstances petition was filed seeking compensation of Rs. ten lakhs.

3. The petition was contested by the appellants. According to them, MGNREGA scheme only provides for 100 days guarantee wages employment. She was not entitled to any compensation. She has already been paid a sum of Rs. 35,444/- for medicine.

4. Issues were framed by the Commissioner for Employees Compensation on 15.11.2011. He awarded compensation of Rs. 4,02,613.2 alongwith interest @ 12% per annum from the date it fell due till its realization. Hence, the present petition.

5. Mr. Parmod Thakur, learned Additional Advocate General, on the basis of the substantial questions of law framed, has vehemently argued that the petition was not maintainable before the Commissioner for Employees Compensation in view of various provisions of MGNREGA scheme, more particularly, notification dated 9.11.2010. The Commissioner for Employees Compensation has misread oral as well as documentary evidence. She was only entitled to compensation for medical expenses.

6. I have heard Mr. Parmod Thakur, learned Addl. A.G. and have gone through the judgment carefully.

7. PW-1 Thakri Devi has testified that she was posted as Secretary in Gram Panchayat Bahwa since July, 2012. According to the record, respondent was working as labourer in MGNREGA on 12.6.2009. She has worked for half day on 13.6.2009 and on 14.6.2009 and 15.6.2009 as well. She was being paid Rs. 110/- as wages per day.

8. PW-2 Ghaneshru Devi has deposed that she and Jethi were working in the MGNREGA at Kalai for the construction of road. When they were doing work on the spot, one stone fell down which struck with the left leg of Jethi Devi. She sustained injuries. They used to get Rs. 100/- per day as wages. She has admitted that Jethi had received Rs. 35,444/- on behalf of the Department.

9. Respondent Jethi Devi appeared as PW-3. She led her evidence by filing affidavit Ex.PW-3/A. She has supported the averments made in the claim petition. She has admitted that Rs. 35,444/- was received by her.

10. PW-4 Dr. Parveen Thakur has deposed that he was one of the members of the Medical Board formed for the issuance of disability certificate in favour of the respondent. According to him, respondent has sustained 40% permanent disability. The disability certificate is Ex.PW-4/A.

11. DW-1 Ravinder Kumar has led his evidence by filing affidavit Ex.DW-1/A. In his cross-examination, he has admitted that respondent was working as a labourer under their Department. Volunteered that she was working in MGNREGA. He has also admitted that after accident, respondent remained admitted in the hospital. Volunteered that the Department has paid the bills of the medicine produced by her. He also admitted that no compensation was paid to the respondent. As per notification of the Central Government, if MGNREGA worker sustains injuries while working, in that case, expenses of medicines was to be paid by the Government and in case of death of person, Rs. 25,000/- was to be paid. The notification dated 9.11.2010 did not debar the workman to file claim petition under the Employees' Compensation Act, 1923.

12. It is not in dispute that respondent has received injury on her leg while working with the appellants. The disability was assessed at 40%. The respondent was an employee as per Schedule 2 of the Employees' Compensation Act, 1923. The respondent was employee since she was engaged in the construction/maintenance/ repair of the road. She was working on 12.6.2009 for the construction of road in village Kalai. The respondent has the necessary *locus standi* to file the petition before the Commissioner for Employees

Compensation as per the provisions of the Employees Compensation Act, 1923. The provisions of MGNREGA did not debar the respondent to file claim petition before the Commissioner for Employees Compensation. She has only been paid ex-gratia payment of Rs. 35,444/- for buying medicine. Fact of the matter is that she has received injury and has become 40% permanent disable. Medical certificate Ex.PW-4/A has duly been proved by PW-4 Dr. Parveen Thakur. Monthly income of the respondent has rightly been assessed and correct factor has been applied while awarding a sum of Rs. 4,02,613.2 as compensation to the respondent. The Commissioner for Employees Compensation has correctly appreciated the oral as well as documentary evidence and there is no need to interfere with the well reasoned judgment rendered by him.

13. Accordingly, in view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed.

CMP No. 2429/2016

14. In view of the dismissal of FAO No.149/2016, this application is also dismissed.

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

State of Himachal Pradesh ...Appellant.
Versus
Kishori Lal ...Respondent.

Criminal Appeal No.213 of 2012
Reserved on : 14.3.2016
Date of Decision: April 4, 2016

Indian Penal Code, 1860- Section 376, 342, 498 and 323- Prosecutrix, wife of the complainant was raped by the accused- prosecutrix was suffering from mental retardation to the extent of 42%- accused was tried and acquitted by the trial Court- held, in appeal that Medical Officer had clarified that a person suffering from seizure is abnormal only during the period of attack – she was examined in the year 2008 and not after the incident- there is no evidence that prosecutrix suffered from any epileptic attack prior to the incident- her husband had not stated that prosecutrix was suffering from mental retardation/ailment- no injuries were found on her person - clothes were also not found to be torn- prosecutrix did not resist the action of the accused- the place where the incident had taken place was not visible from the place where complainant is stated to have peeped in- according to prosecutrix one more person was present but his identity was not revealed- he was not examined- she admitted that her husband and the accused had argument which probablizes the defence of the false implication- there was delay in reporting the matter to the police- in these circumstances, acquittal of the accused was justified- appeal dismissed.

(Para-12 to 44)

Cases referred:

Prandas v. The State, AIR 1954 SC 36
Rajesh Patel Versus State of Jharkhand, (2013) 3 SCC 791
State of Rajasthan Versus Babu Meena, (2013) 4 SCC 206
Tukaram & Anr. v. The State of Maharashtra, (1979) 2 SCC 143
Uday v. State of Karnataka, (2003) 4 SCC 46

Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the Appellant	:	Mr. V.S. Chauhan, Additional Advocate General, Mr. Kush Sharma, Deputy Advocate, and Mr. J.S. Guleria, Assistant Advocate General.
For the Respondent	:	Mr. Ajay Kumar Sood, Senior Advocate, with Mr. Dheeraj Kumar Vashista, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

State appeals against the judgment dated 3.12.2011, passed by the learned Additional Sessions Judge, Ghumarwin, District Bilaspur, Himachal Pradesh, in Sessions Trial No.21-7 of 2010, titled as *State of Himachal Pradesh v. Kishori Lal*, challenging the acquittal of respondent Kishori Lal (hereinafter referred to as the accused), who stands charged for having committed offences, punishable under the provisions of Sections 376, 342, 498 and 323 of the Indian Penal Code.

2. It is the case of prosecution that accused was running a tailoring shop at Padyalag Chowk in District Bilaspur, Himachal Pradesh. Complainant Madan Lal (PW-1), who was employed with him as a tailor, was suffering from physical disability of the legs and as such could walk only with the support of crutches. On 23.7.2009, accused came to the house of Madan Lal, where both of them had drinks. At about 10.30 p.m., when Madan Lal went out to urinate, accused forcibly took the prosecutrix (PW-2) to his shop where he subjected her to rape. Finding neither the accused nor his wife (prosecutrix) to be home, Madan Lal searched for them at different places. Eventually, he went to shop of the accused and by peeping in saw both the accused and the prosecutrix in a naked condition. Complainant then went to the shop of Prakash Chand (PW-3) and asked him to come. Noticing Madan Lal to be on the spot, accused came out and gave beatings with the crutches. Thereafter, Madan Lal telephonically reported the matter to the police. Vijay Kumar (PW-5) prepared a report, and the police party reached the spot, where ASI Anant Ram (PW-15) recorded statement (Ex.PW-1/A) of Madan Lal, which led to registration of case FIR No.103, dated 24.6.2009, for commission of offences, punishable under the provisions of Sections 376,342 & 323 of the Indian Penal Code, at Police Station, Bharari, District Bilaspur, Himachal Pradesh. Prosecutrix as also Madan Lal were got medically examined from Dr. Bharti Ranout (PW-9) and Dr. Bhanu Kanwar (PW-12), respectively.

3. During the course of investigation, clothes worn by the prosecutrix were taken into possession and alongwith the vaginal swab sent for chemical analysis to the Forensic Science Laboratory. Report of the Laboratory (Ex.PW-9/C) was taken on record.

4. Investigation revealed that prosecutrix was suffering from 40% mental disability. Record of her treatment/examination was also taken on record.

5. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

6. Accused was charged for having committed offences, punishable under the provisions of Sections 376, 342, 498 and 323 of the Indian Penal Code, to which he did not plead guilty and claimed trial.

7. In order to establish its case, prosecution examined as many as 21 witnesses and statement of the accused, under the provisions of Section 313 of the Code of Criminal Procedure, was also recorded, in which he took plea of innocence and false implication.

8. Based on the testimonies of the witnesses and the material on record, trial Court acquitted the accused of the charged offences. Hence, the present appeal by the State.

9. We have heard Mr. V.S. Chauhan, learned Additional Advocate General, Mr. Kush Sharma, learned Deputy Advocate General and Mr. J.S. Guleria, learned Assistant Advocate General, on behalf of the State as also Mr. Ajay Kumar Sood, Senior Advocate, duly assistant by Mr. Dheeraj Vashista, Advocate, on behalf of the accused. We have also minutely examined the testimonies of the witnesses and other documentary evidence so placed on record by the prosecution. Having done so, we are of the considered view that no case for interference is made out at all. We find that the judgment rendered by the trial Court is based on complete, correct and proper appreciation of evidence (documentary and ocular) so placed on record. There is neither any illegality/infirmity nor any perversity with the same, resulting into miscarriage of justice.

10. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish essential ingredients so required to constitute the charged offence.

11. In *Prandas v. The State*, AIR 1954 SC 36, Constitution Bench of the apex Court, has held as under:

> "(6) It must be observed at the very outset that we cannot support the view which has been expressed in several cases that the High Court has no power under S. 417, Criminal P.c., to reverse a judgment of acquittal, unless the judgment is perverse or the subordinate Court has in some way or other misdirected itself so as to produce a miscarriage of justice. In our opinion, the true position in regard to the jurisdiction of the High Court under S. 417, Criminal P.c. in an appeal from an order of acquittal has been stated in – 'Sheo Swarup v. Emperor', AIR 1934 PC 227 (2) at pp.229, 230 (A), in these words:
>
> > "Sections 417, 418 and 423 of the Code give to the High Court full power to review at large the evidence upon which the order of acquittal was founded, and to reach the conclusion that upon that evidence the order of acquittal should be reversed. No limitation should be placed upon that power, unless it be found expressly stated in the Code. But in exercising the power conferred by the Code and before reaching its conclusions upon fact, the High Court should and will always give proper weight and consideration to such matters as (1) the views of the trial Judge as to the credibility of the witnesses, (2) the presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (3) the right of the accused to the benefit of any doubt, and (4) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge who had the advantage of seeing the witnesses. To state this, however, is only to say that the High Court in its conduct of the appeal should and will act in accordance

with rules and principles well known and recognized in the administration of justice." "

12. Prosecution has to prove its case beyond reasonable doubt and cannot take support from the weakness of the case of defence. There must be proper legal evidence and material on record to record the conviction of the accused. Conviction can be based on sole testimony of the prosecutrix provided it lends assurance to her testimony. However, in case the court has reason not to accept the version of prosecutrix on its face value, it may look for corroboration. In case the evidence is read in its totality and the story projected by the prosecutrix is found to be improbable, the prosecution case becomes liable to be rejected.

13. It is a settled principle of law that testimony of prosecutrix is sufficient enough to convict the accused if it inspires confidence. (See: *Rajesh Patel Versus State of Jharkhand,* (2013) 3 SCC 791 and *State of Rajasthan Versus Babu Meena,* (2013) 4 SCC 206).

14. The Courts while trying an accused on the charge of rape, must deal with the case with utmost sensitivity, examining the broader probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the evidence of witnesses which are not of a substantial character.

15. However, even in a case of rape, the onus is always on the prosecution to prove, affirmatively each ingredient of the offence it seeks to establish and such onus never shifts. It is no part of the duty of the defence to explain as to how and why in a rape case the victim and other witness have falsely implicated the accused. Prosecution case has to stand on its own legs and cannot take support from the weakness of the case of defence. However great the suspicion against the accused and however strong the moral belief and conviction of the court, unless the offence of the accused is established beyond reasonable doubt on the basis of legal evidence and material on the record, he cannot be convicted for an offence. There is an initial presumption of innocence of the accused and the prosecution has to bring home the offence against the accused by reliable evidence. The accused is entitled to the benefit of every reasonable doubt. (Vide: *Tukaram & Anr. v. The State of Maharashtra,* (1979) 2 SCC 143; and *Uday v. State of Karnataka*, (2003) 4 SCC 46.

16. It stands established on record that Madan Lal is suffering from physical disability. He could walk only with the help of crutches. Disability is in the lower part of his body. It is also not in dispute that Madan Lal was married to the prosecutrix who were residing in village Dhangot, Tehsil Barsar, District Hamirpur, Himachal Pradesh. That Madan Lal was working for the accused and doing the work of tailoring is also not in dispute. That the accused was having a tailoring shop at Padyalag Chowk is also not in dispute.

17. It is contended that at the time of occurrence of the incident, prosecutrix was suffering from mental ailment to the extent of 42% and that by taking advantage thereof, accused committed the heinous crime. At the threshold, we must clarify the prosecution not to have established the factum of disabled mental state of the prosecutrix.

18. Prosecution has placed on record disability certificate (Ex.PW-19/A), which reveals that prosecutrix was suffering from mental retardation to the extent of 42%. The cause being seizure disorder. Such certificate was prepared on an application moved by Madan Lal for availing social security benefits. Dr. S.K. Soni (PW-19) and Dr. Subhash Sharma, as Members of the Medical Board issued the certificate. In Court, they have clarified that the patient, i.e. the prosecutrix, was examined on 3.4.2008. Also that a patient suffering from seizure is abnormal only during the period of seizure attack, otherwise he

leads a normal life and is in a position to understand his welfare. Significantly, prosecutrix was never treated by these witnesses, either prior to the issuance of the certificate or thereafter.

19. It has come on record that prosecutrix was taking treatment for her mental ailment, from Dr. Vijay Kumar (PW-16) since November, 2007. However, from the testimony of this witness, it cannot be ascertained as to whether immediately prior or subsequent to 23.7.2009, i.e. the date of the incident in question, prosecutrix was suffering from such mental disorder or for that matter on 23.7.2009, she suffered any epileptic attack or not. Crucially, this witness admits that he was treating the prosecutrix only on the basis of past history, so narrated to him and further while under his treatment, she never suffered any attack of seizure(s). He clarified that the treatment given to the prosecutrix, as per OPD slips (Ex. PW-16/B to 16/J), was based only on previous medical history.

20. Investigating Officer (PW-15) also admits that in the early part of investigation, neither the complainant nor the prosecutrix, revealed anything about mental ailment. When we peruse the testimony of Dr. Bharti Ranout, the doctor who medically examined the prosecutrix on 24.7.2009, we find such fact not to have been disclosed to her. In fact MLC (Ex.PW-9/B) does not reveal the factum of the mental ailment of the prosecutrix to have been recorded therein.

21. From the testimony of prosecutrix as also her husband, it is clear that she has studied upto middle standard and later given up higher studies only for the reason that she could not clear her exam in the subject of mathematics. Crucially, Madan Lal admits his wife to be wise. Though he states that she is suffering from mental ailment since childhood but even he did not take her to the hospital for treatment of any epileptic attack. He further clarifies that such attacks occur only during sleep for a certain duration, and soon the position normalizes.

22. Significantly, even from the statement of the prosecutrix or her husband, it cannot be inferred, even remotely, that as on the date of the incident, she was suffering from any such epileptic attack.

23. Thus, it stands established on record that as on the date of occurrence of the incident, prosecutrix cannot be said to be under any mental retardness or ailment, for having suffered any epileptic attack. She was normal, during her work of daily routine and cooked food for all.

24. Dr. Bharti Ranout, on an application (Ex.PW-9/A) moved by the police, examined the prosecutrix and issued MLC (Ex. PW-9/B), which stands proven on record. As per the opinion of the doctor, as has also come in her deposition, prosecutrix may have had sex with the accused. But then, this was prior to the incident in question. Also, with reference to the incident, no marks of injury, struggle, contusion or abrasions were found on any part of the body of the prosecutrix. Significantly, the alleged incident took place late in the night of 23.7.2009 and she was immediately examined on 24.7.2009 at 4.30 a.m. As per report of the Chemical Analyst (Ex.PW-9/C), no semen was found on the slides of the vaginal swab. The doctor opined there were no signs of recent penetration. The doctor found no signs of struggle or marks of violence on the body of the prosecutrix. The doctor gave her opinion dated 15.9.2009 (Ex.PW-9/D) only on the basis of past medical record. The clothes, which the prosecutrix was wearing at the time of occurrence of the incident, were taken into possession by the police and no tear or telltale signs found thereupon. Corroborative evidence does not support the prosecution case.

25. We now proceed to discuss the other ocular evidence.

26. Complainant Madan Lal states that on 23.7.2009, at about 10.30 p.m., accused came carrying liquor, which they consumed in his house. He went out to urinate. On return, found neither the accused nor his wife. Thinking that his wife might have gone out (where, he does not does not state), he waited for some time. Only when she did not return, he went to the shop of the accused. Though the shop was closed but from the shutter, he could peep in and see the accused and his wife in a compromising position. They were naked. He knocked at the shutter and called for his wife, but none came out. After waiting from some time, he again repeatedly knocked at the shutter, but without any response. Soon he went to the shop of Prakash Chand and woke him. However, on his asking returned to the spot. Then the accused opened the shutter, snatched his crutches and gave beatings, by which time Prakash Chand also came and rescued him. On his request, Prakash Chand telephonically reported the incident at Police Station, Bharari but before the police could arrive, accused ran away. He got his statement (Ex.PW-1/A) recorded. He also learnt from his wife that the accused, after gagging her mouth, had forcibly taken her away from his house. Subsequently, in the hospital, relatives of the accused got signed certain papers, both from him and his wife for which purpose, he was also taken to the Tehsil Office. Well, this is all what he says in his examination-in-chief.

27. But, when we examine the cross-examination part of his testimony, we find his version to be highly unbelievable, improbable and apart from self contradictory, to have been contradicted by Prakash Chand, who, in any case, has not supported the prosecution. In no uncertain terms, this witness states that "*it is correct that I cannot say that my wife had gone voluntarily with the accused. Self stated that my wife had disclosed to me that she had been taken by force by the accused*". Now, the place where he had gone to urinate is just 10 feet from his house. His wife never struggled or raised voice. She is a healthy lady. She did not resist the alleged overt actinos. His version of having banged the shutter of the shop of the accused and loudly called for his wife and the accused, for more than 3-4 hours is uninspiring in confidence, for it has come in his testimony that there are 40-50 shops at village Padyalag and none responded to his calls. Significantly, even as per his version, he did not disclose to Prakash Chand that the accused had subjected his wife to forcible sexual assault or that he had seen them in a compromising position. He promptly called Prakash Chand. What for? he does not state. All that he states is that he went to call Prakash Chand.

28. Further, he categorically admits that "*Parkash Chand had come to save me when we had quarreled. When Parkash Chand had come to the spot the time might be 2.30-2.45 a.m. because I cannot tell the exact time as I was not having watch at that time. I have rang up police at 2.45 a.m. Self stated that Parkash Chand also rang up the police. Thereafter, when he saw accused beating me*". Thus, it appears that there was a quarrel between the accused and Madan Lal, cause of which was certainly not the prosecutrix. What was the exact cause, prosecution has not been able to decipher. In fact, police admits presence of a third person on the spot. This was at the time of quarrel. Who was that third person, prosecution has not been able to explain. The Investigating Officer records presence of such person, but feigns ignorance about his name and as has come in the testimony of the prosecutrix, this third person had also consumed alcohol.

29. Further, the version of Madan Lal of having peeped in through the shutter does not appear to be correct. He wants the Court to believe that though the shutter was down but from the space between the shutter and the edge of the floor, he was able to see the accused and the prosecutrix in a compromising position. But then the spot map clearly belies such version, for it is apparent that in the front portion of the shop, there were sewing material and machines were lying. According to the police, the alleged offence took place in

the rear portion of the shop, which could not have been visible from the place where the accused peeped in. Further none has established that at the time of occurrence of the incident, the light of the shop was on. Though the witness wants the Court to believe such fact, but such version, in view of his contradictory statement is not believable. His wife remained inside the shop for more than three-four hours. He did not wake up any neighbour. He did not call the police. It is not the case of this witness that all the while, accused had gagged the mouth or tied her hands. He only states that the accused gagged her mouth at the time she was forcibly taken away from the house. Medical evidence belies such fact. The witness did not report the matter to the local residents. Why so? remains unclear. Prosecution story of having recorded the statement of this witness on the spot stands contradicted. He states that "*Our statements were recorded in the police station at 6.00 a.m.*". He admits to have been first taken to the police station at 3.30 a.m. and then to the hospital at 3.45 a.m. Only on his return did the police record his statement. Thus, he contradicts his version of having informed the police or got his statement recorded on the spot. He admits that while he was shouting and raising hue and cry, his wife did not respond. Also his wife did not intervene when the accused was giving beatings to him.

30. The Court is still duty bound to examine the testimony of the prosecutrix and if her version is found to be trustworthy, inspiring in confidence, and the witness to be reliable, the Court would not hesitate to convict the accused, for the charged offences. This can be done solely on the strength of such version.

31. In Court, prosecutrix states that on 23rd day, which was a Thursday, accused came to their house with a bottle of liquor. While she was cooking food, both her husband and the accused consumed liquor. When her husband went out to urinate, accused caught her by the arm and took her to his shop, where, after closing the shutter from inside, by switching on the light, forcibly removed her clothes and made her lie on the floor. After closing her mouth, accused raped her thrice. Her husband came and called for her. After some time, accused opened the shutter of the shop and by snatching the supports (crutches) of her husband, gave him beatings. Prakash Chand, who arrived on the spot, rescued him. When enquired, she narrated the incident to her husband, who called the police from the cell phone of Prakash Chand. With the arrival of police on the spot, she was taken to the hospital and got medically examined. She handed over clothes worn by her to the doctor. After few days, relatives of the accused approached her and offered `12,000/- for not giving any statement. Also, under pressure, she agreed to sign certain papers.

32. However, in the cross-examination part of her testimony, she admits that "*One more person was accompanying Kishori Lal and my husband and Kishori Lal and the third person had consumed liquor together*" ..... "*It is correct that they had consumed liquor for about half an hour*". Now, who is this third person? Whether he was present at the time when Madan Lal had gone to urinate or at the time accused forcibly took her? remains unexplained. None has come forward to explain the same. He was the best person to have deposed the events which transpired on the spot. Her version of not raising any alarm, for being gagged from the mouth, is uninspiring in confidence. It is not that the accused had threatened her. Her husband was urinating just at a distance of 10 feet from her house. She did not resist any overt acts of the accused. No marks of injury, on account of gagging, or struggle were found on her mouth or body. It is not that her hands were tied. She could have resisted the acts of the accused, which she did not do so. She admits not to have raised any alarm all along the way, right upto the shop of the accused. Even thereafter, no attempt was made to leave, for the accused had to open the shutter of the shop with both his hands. She had ample time and opportunity to raise alarm or escape which she without any justifiable reason failed to do so.

33. But crucially what belies her version of the accused having forcibly taken her away is her admission to the effect that "*It is correct that all the three persons consumed liquor and were not able to walk*".

34. She admits her husband having an argument with the accused. All this was while she was in her house. Now, this totally probablizes the defence of false implication and the subsequent story being cooked up, which fact finds strength from the deposition of Vijay Kumar (PW-5), who states, "*a telephone was received in the police station that a quarrel had taken place in Padyalag chowk, therefore, police party headed by ASI Anant Ram had gone to the spot and reached there at 3.00 a.m.*".

35. This also takes us to the question as to why the incident of rape was not reported to the police at the first instance.

36. Further, prosecutrix admits that "*I did not sustain any injury on my persons. My clothes were not torn. The floor of the shop was kacha. There was no semen on my clothes. I came to the shop of the accused on foot. During this period I did not quarrel. I visited the shop of accused on that day*" and what totally knocks down the prosecution case of sexual assault is her admission to that "*I never slept with the accused Kishori. It is incorrect that I disclosed to the doctor that I had already slept with the accused before this incident. It is correct that my husband saw me with the accused inside the shop that is why I disclosed all facts*".

37. Further, the witness admits that "*After the quarrel my husband became unconscious as he was under the influence of liquor. On the next day he regained senses. We did not talk with each other as my husband was unconscious*". Now, all this has rendered the testimony of the witness to be unbelievable, self-contradictory, improbable and inconsistent.

38. She wants the Court to believe that on account of drunkenness, none of the three persons could walk and her husband passed out as a result thereof. She wants the Court to believe that the accused forcibly took her and raped her thrice and all this happened within half an hour. She also wants the Court to believe that the accused gave beatings to her husband with the crutches. Which version of hers is to be believed has become difficult.

39. Further, the delay in not immediately reporting the matter to the police and her statement not being recorded on the spot, but only after medical examination, has rendered her version to be doubtful, inconsistent and improbable. The witness cannot be said to be reliable.

40. She admits not to have known the relatives of the accused or the accused having offered any money to her. Thus on what basis did she states that the relatives of the accused pressurized her to take money and sign papers. Where are those papers? Why no complaint was lodged with the police or action taken by them against such of those persons who were trying to influence the course of investigation, remains unanswered on record.

41. Now, when we examine the testimony of Prakash Chand, we find him not to have supported the prosecution. He was extensively cross-examined, yet nothing fruitful could be elicited by the Public Prosecutor. Prosecution, through his testimony, wants the version of Madan Lal and the Prosecutrix to be corroborated, which versions we have found to be unbelievable. When we examine the testimony of this witness, we find that some quarrel took place between the accused and Madan Lal, who were under the influence of liquor. He nowhere records presence of the prosecutrix on the spot, but records presence of his son who incidentally has not been examined in Court.

42. We find that testimony of the prosecutrix (Ex. PW-18/A) was also recorded before the Judicial Magistrate, but then even this does not help the prosecution, for such statement alone, recording of which is proved by Shri Ranjit Singh, Judicial Magistrate 1st Class, Ghumarwin (PW-18), ipso facto, would not establish the prosecution case to have been proven on record. In any event, it was recorded on 28.5.2010, more than 10 months after the occurrence of the incident. Why it was not so done promptly, remains unexplained on record. Possibility of the witness (the prosecutrix) being tutored, cannot be ruled out and the initial version disclosed by Madan Lal, in terms of his statement (Ex. PW-1/A), is not corroborated by Vijay Kumar (PW-5).

43. Hence, it cannot be said that prosecution has been able to prove its case, by leading clear, cogent, convincing and reliable piece of evidence so as to prove that the accused committed rape on the prosecutrix without her consent and against her will, after wrongfully confining her in his shop, knowing that she is the wife of complainant Madan Lal, and also caused simple hurt to Madan Lal.

44. For all the aforesaid reasons, we find no reason to interfere with the judgment passed by the trial Court. The Court has fully appreciated the evidence so placed on record by the parties.

45. The accused has had the advantage of having been acquitted by the Court below. Keeping in view the ratio of law laid down by the Apex Court in *Mohammed Ankoos and others versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94*, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

Appeal stands disposed of, so also pending application(s), if any.

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

State of Himachal Pradesh .....Appellant.
Versus
Pano Devi & ors. .....Respondents.

Cr. Appeal No. 279 of 2012
Reserved on: April 01, 2016.
Decided on: April 04, 2016.

Indian Penal Code, 1860- Section 341, 323, 325, 307 and 504 read with Section 34- S and her niece G were bringing pieces of wood for stacking hay- accused asked S as to why she wanted to raise haystack at that place- complainant replied that she had been stacking hay at the same place every year since long being the owner- accused gave beatings to S- incident was narrated to police on which FIR was registered- accused were tried and acquitted by the trial Court- held, in appeal that PW-12 had admitted in his cross-examination that place where the dispute arose was owned by the State of Himachal Pradesh—there were discrepancies regarding the prosecution version- PW-3 had not

supported the same- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. (Para-16 and 17)

For the appellant:	Mr. Ramesh Thakur, Dy. Advocate General.
For the respondents:	Mr. Mukul Sood, Advocate, for the applicant/victim. Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vashisht, Advocate for the respondents.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 28.10.2011, rendered by the learned Sessions Judge, Hamirpur, H.P. in Sessions Trial No. 32/2010, whereby the respondents-accused (hereinafter referred to as accused), who were charged with and tried for offence punishable under Sections 341, 323, 325, 307 and 504 IPC read with Section 34 IPC, have been acquitted.

2. The case of the prosecution, in a nut shell, is that on 10.11.2009 at 12:30 PM, Smt. Shakuntla Devi and her niece Gyatri Devi were bringing pieces of wood for stacking haystack. When they reached near the place of proposed haystack, they were accosted by the accused persons. The accused asked Shakuntla Devi as to why they intended to raise haystack at that place. Complainant Shakuntla Devi replied that they had been stacking haystack at the same place every year since long being the owners. The accused persons started beating Shakuntla Devi with fist and kick blows, whereas accused Ravinder Kumar and Surinder Kumar gave beatings to her with dandas. Bir Singh, nephew of Shakuntla Devi raised hue and cry. He was also beaten up by the accused persons. In the meantime, Gyatri Devi and Karmi Devi etc. rescued Shakuntla Devi and Bir Singh from the accused. Bir Singh informed the police on telephone. HC Ranjit Singh, and Const. Suresh Kumar visited the spot at village Chabutra. HC Ranjit Singh recorded the statement of Shakuntla Devi under Section 154 Cr.P.C and sent the same to Police Station, Sujanpur. On the basis of this statement, FIR was recorded. Shakuntla Devi and Bir Singh were got medically examined. 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 13 witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Ramesh Thakur, Dy. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved the case against the accused persons. On the other hand, Mr. Bimal Gupta, learned Sr. Advocate has supported the judgment of the trial Court dated 28.10.2011.

5. We have heard learned counsel appearing for both the sides and have also gone through the judgment and records of the case carefully.

6. PW-2 Dr. Sanjeev Sharma testified that on 1.1.2009, he was posted as Radiologist in Regional Hospital, Hamirpur. Shakuntla Devi was referred to him by Dr. Parveen Kumar for C.T.Scan of the head. C.T.Scan was done under his supervision. C.T.Scan film is Ext. PW-2/A. He issued report Ext. PW-2/B. As per the report, there was a fracture of left high parietal region extending laterally towards parietal prominence. There

was adjoining soft tissue swelling in left parietal region. There was a fracture of left parietal bone with adjoining shaft tissue swelling. The injury was grievous in nature.

7. PW-3 Lokha Ram deposed that police had called him to PS Sujanpur on 16.12.2009 when a danda was sealed in a cloth parcel in his presence. The danda was taken into possession vide memo Ext. PW-3/A. In his cross-examination, he admitted that accused Pano Devi is his real Aunt (Chachi).

8. PW-7 Dr. Praveen Kumar has examined Shakuntla Devi on 10.11.2009 and observed the following injuries:

"1. Laceration scalp on top of head 4 cm long, red in colour, bleeding on touch.

2. Laceration on scalp, occipital region, 3.5 cm in size, red in colour, bleeding on touch.

3. Abrasion on left forearm 3 mm x 7 cm on medial aspect, red in colour.

4. Tenderness over left upper back near neck, overlying skin is normal. No clinical evidence of bony injury."

She was referred to Regional Hospital, Hamirpur, for C.T. Scan. He observed that injuries No. 1 and 2 were grievous in nature because of fracture of left parietal bone. Thus, these were dangerous to life. He issued MLC Ext. PW-7/B. The duration of injuries was six hours. These injuries were possible by giving blows with dandas Ext. P-1 and P-2. He also examined Bir Singh and observed following injuries.

"1. Laceration scalp on top of head, 3 cm in size, bleeding on touch.

2. Swelling left hand on dorsal side. Tender to touch, overlying skin is normal.

3. Tenderness over left amputated thigh stump. Overlying skin is normal.

4. Bruise on left upper back, over an area of 3 x 5 cm, red in colour."

He advised x-ray for injury No. 2. According to the Radiologist's opinion, there was fracture of 4th metacarpal of left hand. This injury was grievous in nature. Rest of the injuries were simple. The duration of injuries caused was within six hours. He issued MLC Ext. PW-7/C. In his cross-examination, he admitted that all the four injuries as detailed in the MLC Ext. PW-7/B were possible by giving a single blow with danda Ext. P-1. He also admitted that the injuries detailed in Ext. PW-7/C were also possible by giving single blow with danda Ext. P-1.

9. PW-8 Shakuntla Devi testified that she along with Gyatri Devi had gone to bring some wood from their fields situated in village Chabutra. While they were on the way to the field, they met accused Ravinder Kumar, Surinder Kumar and Smt. Pano Devi. The accused persons intercepted them on the path and started hurling abuses to them. She asked them as to why they were abusing them. The accused persons replied that they should not stack grass in their land. They had been stacking grass over that land since they were owners. Thereafter, accused Pano Devi and her daughter-in-law Kamlesh Kumari started beating them by giving fist and kick blows. Accused Ravinder Kumar and Surinder Kumar took dandas and they started beating them with the same. The accused persons inflicted injuries by danda blows on her head and back. Accused Surinder Kumar also inflicted danda blows on the person of Bir Singh. Accused Pano Devi and Kamlesh Kumari gave beatings to them by giving fist and kick blows. Karmi Devi, Gyatri Devi and Lokha Ram

reached the spot and they rescued them from the accused. Her nephew Bir Singh informed the police on telephone about the occurrence and police came on the spot and recorded her statement Ext. PW-8/A. They were taken to hospital for medical examination. In her cross-examination, she admitted that they intended to stack grass adjoining to the house of accused Pano Devi. Volunteered that they are owners of that place. She did not know the khasra number of the land where the incident took place. They were stacking the grass on the land which was about 2-3 feet from the house of accused Pano Devi.

10. PW-9 Bir Singh deposed that on 10.11.2009, he alongwith Shakuntla Devi started stacking grass on pieces of wood in the village. It was 12:30 PM at that time. They were placing wood for stacking the grass. Kamlesh Kumari, Pano Devi, Ravinder Kumar and Surinder Kumar intercepted Shakuntla Devi on the path and they started hurling abuses to her. They were saying that the land belonged to them. The accused started beating PW-8 Shakuntla Devi with fist and kick blows. Accused Ravinder Kumar & Surinder Kumar started beating PW-8 Shakuntla Devi with dandas on her head. When he raised hue and cry, accused Ravinder Kumar gave beatings to him with danda. The other accused were giving beatings to Shakuntla Devi. He admitted in his cross-examination that PW-8 Shakuntla Devi intended to stack grass just adjoining to the house of Pano Devi.

11. PW-10 Karmi Devi deposed that Shakuntla used to stack grass in her land since long. On 10.11.2009 at about 12:30 PM, she was on her way to fields. She heard noise of quarrel from the place of occurrence and she went on to the spot. Shakuntla and Bir Singh were placing pieces of wood on the land in order to stack grass thereon and Gyatri Devi was handing over the pieces of wood to Shakuntla and Bir Singh. The accused Ravinder Kumar, Surinder Kumar, Kamlesh Kumari and Pano Devi started hurling abuses to Shakuntla Devi and Bir Singh. Ravinder Kumar and Surinder Kumar took the pieces of wood from the spot and started beating Shakuntla Devi and Bir Singh. Pano Devi and Kamlesh Kumari started beating Shakuntla Devi and Bir Singh with fist and kick blows. He and Gyatri Devi intervened and rescued Shakuntla Devi and Bir Singh from the accused. In the meantime, Lokha Ram also came on the spot. In her cross-examination, PW-10 Karmi Devi admitted that Shakuntla Devi is her Devrani (sister-in-law).

12. PW-12 HC Ranjit Singh deposed that he reached the spot and recorded the statement of PW-8 Shakuntla Devi under Section 154 Cr.P.C. vide Ext. PW-8/A. He prepared the spot map vide Ext. PW-12/A. Two dandas were also recovered vide memo Ext. PW-11/A. In his cross-examination, he admitted that the place where the dispute arose between the parties about stacking of grass was owned by the State of Himachal Pradesh.

13. PW-13 ASI Shamsher Singh deposed that the case was investigated by HC Ranjit Singh and ASI Sukh Lal. The weapon of offence i.e. one danda was received back from SFSL, Junga with an objection that the same was not sent in a sealed parcel. After receiving the same, he packed it and sealed in a parcel with 6 seal impressions of seal "K". He prepared memo Ext. PW-3/A about the sealing in the presence of witnesses Lokha Ram and Banku Ram.

14. DW-1 Amar Singh deposed that he went to the house of Pano Devi at 11:30 AM and remained there till 1:00 PM. Shakuntla Devi started stacking grass in the land coming in possession of Pano Devi, which was government land.

15. PW-8 Shakuntla Devi deposed that she along with Gyatri Devi had gone to bring some wood from their fields situated in village Chabutra. While they were on way to the field, they met Ravinder Kumar, Surinder Kumar and Smt. Pano Devi. The accused persons intercepted them on the path and started hurling abuses to them. However, PW-9

Bir Singh deposed that on 10.11.2009, he alongwith Shakuntla Devi started stacking grass on pieces of wood in the village. PW-10 Karmi Devi deposed that Shakuntla used to stack grass in her land since long. On 10.11.2009 at about 12:30 PM, she was on her way to fields. She heard noise of quarrel from the place of occurrence and she went on to the spot. Shakuntla and Bir Singh were placing pieces of wood on the land in order to stack grass thereon and Gyatri Devi was handing over the pieces of wood to Shakuntla and Bir Singh. Thus, there is variance in the statements of PW-8 Shakuntla Devi, PW-9 Bir Singh and PW-10 Karmi Devi. PW-8 Shakuntla Devi deposed that she was on her way when she was intercepted but PW-9 Bir Singh and PW-10 Karmi Devi deposed that they had started stacking grass on pieces of wood in the village. According to the facts stated in the FIR the accused persons intercepted Shakuntla Devi and Bir Singh, when they were on their way to stack the grass, however, as per PW-9 Bir Singh and PW-10 Karmi Devi, Shakuntla Devi and Bir Singh were already stacking grass in haystack.

16. The case of the prosecution was that the land was owned by PW-8 Shakuntla Devi. We have already noticed that PW-12 HC Ranjit Singh in his cross-examination has deposed that the place where the dispute arose between the parties about stacking of grass was owned by the State of Himachal Pradesh.

17. PW-8 Shakuntla Devi deposed that Bir Singh was given danda blows by Surinder Kumar. However, Bir Singh while appearing as PW-9 has deposed that he was given danda blows by Ravinder Kumar. According to PW-3 Lokha Ram, the land where grass was to be stacked was in possession of accused Pano Devi. DW-1 Amar Singh deposed that he went to the house of Pano Devi at 11:30 AM and remained there till 1:00 PM. Shakuntla Devi started stacking grass in the land coming in possession of Pano Devi, which was government land. Thus, it is duly proved that the haystack was to be stacked on disputed piece of land. It has come on record that the grass was being stacked on the land which is adjacent to the house of accused Pano Devi. According to PW-8 Shakuntla Devi when the accused were beating them, witnesses, Karmi Devi, Gyatri Devi and Lokha Ram came to the spot and they rescued the complainant Shakuntla Devi and Bir Singh from the clutches of accused persons. However, Lokha Ram while appearing as PW-3 did not support the prosecution story that the accused were seen by him beating Shakuntla Devi and Bir Singh with dandas Exts. P-1 and P-2.

18. The prosecution has failed to prove the case against the accused. Thus, there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 28.10.2011.

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

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

State of Himachal Pradesh ...Appellant
Versus
Pawan Kumar and others ...Respondents

Cr. Appeal No. 355/2012
Reserved on: April 1, 2016
Decided on: April 4, 2016

Indian Penal Code, 1860- Section 498-A and 306 read with Section 34- R was married to accused P- accused started torturing, harassing, giving beatings and not providing proper meals to R- R committed suicide by hanging herself- accused was tried and acquitted by the trial Court – held, in appeal that PW-2 had admitted that R had not made any complaint after her marriage- PW-4 brother of R also admitted that he had not filed any complaint against the accused before Panchayat- PW-6 also admitted that he had not lodged any complaint against the accused during the life time of R- PW-11, mother of R had not narrated any specific incident of torture by accused- R used to reside with her husband at Ludhiana – no investigation was made as to what had happened at Ludhiana – in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed.

(Para-14 to 17)

For the Appellant : Mr. M.A. Khan, Additional Advocate General.
For the Respondents : None

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

State has appealed against judgment dated 14.3.2012 rendered by learned Sessions Judge, Fast Track Court, Kangra at Dharamshala, in S.T. No. 3/12, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for commission of offence under Sections 498A/306/34 IPC, have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 24.11.2006, Dalip Chand lodged a case against the accused persons with the allegations that his daughter Rajani Devi was married to accused Pawan Kumar on 3.8.2006, as per Hindu rites and customs. It is further alleged that after 15 days of marriage, accused Pawan Kumar alongwith his mother Kesari Devi, brother Kuldeep Kumar and Bhabhi Anu Kumari, brother-in-law Sanjay and sister Champa Devi started torturing, harassing, giving beatings and not providing proper meals to Rajani Devi for bringing insufficient dowry. It is alleged that he was told by his daughter in this regard through telephone and he asked his daughter that he will talk with the accused persons and make them able to understand the matter. He went to the matrimonial home of his daughter and asked the accused persons not to torture and harass his daughter but, even then, they did not stop torturing and harassing his daughter. His daughter, on 11.11.2006, came to his house from Ludhiana alongwith her husband. She appeared unhappy and was saying that she will not go to her matrimonial home but he was able to make her go to her matrimonial home. On 24.11.2006 at about 6.45 PM, he came to know through Vivek Sharma that Rajani Devi has committed suicide by hanging. It is alleged that his daughter committed suicide as she was harassed by the accused persons. He alongwith his family members went to the matrimonial home of his daughter. Inquest report was prepared and post-mortem was got conducted. Matter was investigated and challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 18 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. Accused denied the case of the prosecution. Accused were acquitted. Hence, this appeal.

4. Mr. M.A. Khan, Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused persons.

5. We have heard the learned counsel for the appellant and gone through the judgment and record very carefully.

6. PW-1 Dr. Jitendra Saxena, deposed that on 25.11.2006, police moved an application Ext. PW-1/A alongwith inquest papers Ext. PW-1/B for conducting post mortem of Rajani Devi. He conducted post mortem. He found 30 cm long brown coloured ligature mark of varying width seen around neck extending from back of neck downward and forward through front of neck and then upward toward left side along the line of mandible. Ligature mark was present over the thyroid cartilage between the larynx and chin. The maximum width of ligature was present on right side of neck measuring 3 cm and minimum width was 1 cm in rest of ligature mark. In his opinion, the deceased died due to ante mortem hanging causing asphyxia and cardio respiratory arrest. Post mortem report is Ext. PW-1/C and final opinion is Ext. PW-1/D.

7. PW-2 Ashwani Kumar deposed that on 24.11.2006 at about 5.30 PM, Kesari Devi told him through telephone that her daughter-in-law was ill and asked him to send a doctor. He alongwith doctor Rajesh Kumar went to the house of Kesari Devi and when doctor checked her, she was found dead. In his cross-examination, he has admitted that Rajani Devi and her family were related to them and he and his wife had arranged marriage of Rajani Devi and Pawan Kumar. He also deposed that after marriage of Rajani, no complaint was made to them by her parents. He also admitted that he informed parents of Rajani Devi about her death.

8. PW-3 Rajesh Kumar deposed that on 24.11.2006, at about 5.30 PM, Ashwani Kumar came to him and asked to go to the house of Des Raj as his daughter-in-law was ill. He alongwith Ashwani went to the house of Des Raj and on checking, found daughter-in-law of Des Raj dead.

9. PW-4 Rajan Sharma deposed that deceased was his sister. At the time of marriage, articles were given as per their capacity. After marriage Pawan and Rajani went to Ludhiana where he used to do private job. From Ludhiana, telephone came to his father in the house of neighbour and Rajani told that accused used to torture her, on which his father replied that matter would be solved at home. When Rajani came to the house of her in-laws, then his father visited there and asked them to understand the things. He also went to the house of in-laws of Rajani Devi and he was also tortured by accused persons. Rajani told him that she was pregnant and if she gave birth to female child then accused would kill her. They used to harass her for bringing insufficient dowry. In his cross-examination, he has admitted that after marriage, accused immediately took Rajani with him to Ludhiana. He could not tell the date and month when his father went to the in-laws of Rajani. He never made any complaint against accused persons in the Panchayat.

10. PW-6 Dalip Chand Sharma is the father of the deceased. According to him, after 15 days of marriage, accused started giving beatings to her for bringing insufficient dowry. She was not provided meals by the accused. His daughter told about the behaviour of accused towards her when she came to his house. Thereafter she was made to go to her matrimonial home with the assurance that he would talk to the accused persons. His daughter visited him on 11.11.2006 and again made complaint against accused persons and he again asked her to go to her matrimonial home. She was not happy. On 24.11.2006, he received telephonic message from his brother-in-law that Rajani has committed suicide by hanging. He went to the house of Rajani and noticed marks of hanging. His daughter had committed suicide as she was tortured for bringing insufficient dowry. His statement was recorded under Section 154 CrPC which is Ext. PW-6/A. In his cross-examination, he has admitted that on 16.8.2006, Pawan took Rajani with him to Ludhiana. He also admitted that

on the day of *Diwali* i.e. on 21.10.2006, Rajani and Pawan came to his house. He has not lodged any complaint against accused persons with the Panchayat during the lifetime of his daughter.

11. PW-7 Krishan Kumar deposed that Rajani was the daughter of his real brother, Dalip Chand. Rajani used to tell that accused persons harassed her for bringing insufficient dowry. In his cross-examination, he has admitted that on the day of *Diwali*, Pawan and Rajani were at the house of Rajani's father and had stayed for night and next morning they left for Ludhiana.

12. PW-8 Gulshan Kumar deposed that Rajani was his cousin. He alongwith his sister went to the matrimonial home. Accused abused Rajani in his presence. In his cross-examination, he has admitted that he went to the matrimonial home of Rajani in 2006. He could not tell the day and date.

13. PW-9 Vivek Sharma deposed that deceased Rajani was his niece. On 24.11.2006, information was received from someone that Rajani has committed suicide.

14. PW-11 Kanta Devi is the mother of the deceased. According to her, after 15 days of marriage, accused started giving beatings and torturing Rajani and did not provide meals to her daughter for bringing insufficient dowry. Her daughter committed suicide as she was tortured by giving beatings and she was maltreated. In her cross-examination, she has admitted that Pawan was working at Ludhiana and after 15 days of marriage, Rajani went to Ludhiana. Rajani came back from Ludhiana two days prior to *Diwali*. On the night of *Diwali*, Rajani and Pawan stayed at their house and next morning both left for Ludhiana. She admitted that her daughter's mother-in-law, *Jeth* and *Jethani* used to reside at village Churhu and *Nanad* and *Nandoi*, resided at village Muhn.

15. PW-16 Inspector Surinder Thakur recorded statement of Dalip Chand under Section 154 CrPC which is Ext. PW-6/A. He prepared inquest papers. Body was sent to the Civil Hospital, Dehra for post-mortem. Case property was sent for chemical examination. Reports of the chemical examiner are Exts. PA and PB. In his cross-examination, he has admitted that prior to the incident, no complaint was lodged against accused persons by the parents or any other person. He also admitted that no complaint was lodged with the Panchayat also. He also admitted that accused Pawan was working at Ludhiana. He had come on 15 days leave for marriage and on 16th day he went to Ludhiana along with his wife. He also inquired from Pradhan and other people of the area about the accused but no complaint was found against the accused persons.

16. PW-2 Ashwani Kumar, in his cross-examination has categorically admitted that after marriage of Rajani, no complaint was made to them by her parents. PW-4 Rajan Sharma, brother of the deceased, in his cross-examination has admitted that after marriage, accused immediately took Rajani to Ludhiana with him. He has never filed any complaint against accused persons before the Panchayat. PW-6 Dalip Chand, also admitted in his cross-examination that he has not lodged any complaint against accused persons, during the life time of his daughter. He also admitted that on the day of *Diwali*, Rajani and Pawan, both, came to his house i.e. on 21.10.2006. PW-7 Krishan Kumar also admitted in his cross-examination that on the day of *Diwali*, Pawan and Rajani were at the house of Rajani's father. PW-11 Kanta Devi is a material witness being mother of the deceased. In her cross-examination, she admitted that Pawan was working at Ludhiana and after 15 days of marriage, Rajani went to Ludhiana alongwith Pawan. Rajani came back two days prior to *Diwali*. Rajani and accused Pawan stayed at their house and next morning left for Ludhiana. She also admitted that her daughter's mother-in-law, *Jeth*, *Jethani* used to reside in village

Churhu and *Nanad* and *Nandoi* used to reside at village Muhn. There are no specific instances of any torture by the accused to the deceased. Deceased has remained for most of the period with her husband at Ludhiana. No complaint has ever been lodged with the police or with the Panchayat. PW-16 Surinder Thakur has also made inquiries from the Pradhan and other people of the area. However, no complaint was found against accused persons. He also admitted in his cross-examination, as noticed above, that prior to the incident, no complaint was lodged against accused persons by the parents of the deceased or any other person. Accused Pawan Kumar had come for 15 days leave for marriage and on the 16th day, he went back to Ludhiana with his wife. Deceased and Pawan Kumar were at the house of PW-6 Dalip Chand.

17. Case of the prosecution is that the accused persons started harassing Rajani after 15 days of marriage. However, fact of the matter is that accused Pawan Kumar had come to his native place on 15 days leave and he left for Ludhiana on 16.8.2010. Accused persons were residing at different places. PW-16 Surinder Thakur has not made any investigation as to what happened at Ludhiana. Allegations levelled are general in nature. There is no categorical evidence to prove that accused persons have abetted deceased to commit suicide. Prosecution has failed to prove case against accused persons under Sections 498A/306/34 IPC.

18. Thus, there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court. The appeal fails and is accordingly dismissed. All pending applications are also disposed of.

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

Alam Chand and another .....Appellants
Versus
Yaad Singh and others .....Respondents

RSA No. 401/2004
Reserved on March 31, 2016
Decided on April 5, 2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit pleading that suit land was previously owned by S who had mortgaged the suit land in favour of C, father of plaintiff-defendants failed to redeem the mortgage and plaintiff has become owner by efflux of time – defendants pleaded that suit land was inherited by K, after the death of S- K had sold the land in favour of the defendants- defendants are bona-fide purchaser for consideration- suit was dismissed by the trial court- appeal was preferred which was allowed- held, in second appeal that C was shown as mortgagee in the revenue record- thus plea of the defendants that they were not aware of the status of C cannot be accepted- mortgage was oral but was duly recorded in the revenue record- area falls in Kullu, where provisions of Section 59 of Transfer of Property Act were not applicable- mortgagor had failed to redeem the mortgage- thus, plaintiff has become owner by efflux of time- appeal dismissed. (Para-16 to 25)

Cases referred:
Purusottam Das v. Desouza, reported in AIR 1950 Orissa 213
Sukra Oraon v. Jagat Mohan reported in AIR 1957 Patna 245
Rupa Nonia v. Ram Brich reported in AIR 1959 Patna 164

Siri Chand v. Nathi reported in AIR 1983 Punjab & Haryana 171

For the Appellants	:	Mr. Neeraj Gupta, Advocate.
For the Respondents	:	Mr. Bimal Gupta, Senior Advocate with Mr. Vineet Vashishta, Advocate, for respondent No. 1. None for the remaining respondents.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge

This Regular Second Appeal is directed against judgment and decree dated 7.6.2004, rendered by District Judge, Kullu, HP in Civil Appeal No. 24-2004.

2. "Key facts" necessary for the adjudication of the present appeal are that the respondent No.1-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake) filed a suit for declaration against the appellant No.2, Amar Jolly and respondents No. 3 to 6, who were defendants before the learned trial Court (hereinafter referred to as 'defendants' for convenience sake), to the effect that the plaintiff has become owner of the land comprised in Khata Khatauni No. 100/113, Khasra No. 2383/2344 measuring 2-3-0 bighas, Khata Khatauni No. 101/113/1 Khasra No. 2390/646 measuring 2-5-0 Bigha out of the land comprised in Khata Khatauni No. 102/114 Khasra No. 2388/699 measuring 1-17-0 Bigha, total land measuring 4-13-0 Bigha situate in Phati Bihar, Kothi Chehni, Tehsil Banjar, District Kullu, HP, on the failure of the defendants to redeem the mortgage within the period of limitation. Suit land was previously owned by Sangat Ram, who on 11.6.1969, mortgaged the suit land in favour of Chaine Ram, father of the plaintiff, for a sum of Rs.2500/- as mortgage debt/money. Possession of the suit land was delivered in favour of Chaine Ram on 11.6.1969 by Sangat Ram. Chaine Ram came in possession of the suit land as mortgagee under Sangat Ram till his death. Chaine Ram died on 6.1.1996. He bequeathed his property in favour of the plaintiff through a registered Will dated 12.6.1979. He came in possession of the suit land as mortgagee. Shri Gian Chand and Tek Chand acquired ownership to the extent of 108/125 shares measuring 1-12-0 bighas in the land comprised in Khata Khatauni No. 102/114 measuring 1-17-0 Bigha and redeemed the same. However, defendants and their predecessor-in-interest failed to redeem the suit land within limitation. Thus, the plaintiff had become the owner of the suit land on 11.6.1999.

3. Suit was contested by the defendants. Defendant No. 2 namely Umesh Kumar was proceeded ex parte. Written statement was filed by defendants No. 1 and 3 to 5, namely Amar Jolly, Jeet Ram, Ritam Chand and Jai Singh. It is admitted on merits that the suit land was owned and possessed by Sangat Ram, however, factum of mortgage was disputed. It is pleaded that Chaine Ram never remained in possession of the suit land. Possession of the suit land remained with Sangat Ram. After his death, suit land was inherited by Kewali Ram who remained in possession of the suit land. Defendants purchased the suit land from Kewali Ram. They were in possession of the suit land as owners. It is further pleaded that at the time of the execution of the sale deed in the revenue record, no entry regarding mortgage was existing and as such defendants are bona fide purchasers for consideration and entries showing the plaintiff as mortgagee are wrong and illegal.

4. Replication was filed. Issues were framed by the learned Civil Judge (Senior Division) Lahul & Spiti at Kullu on 19.5.2000. He dismissed the suit on 24.2.2004. Plaintiff

filed an appeal before the District Judge, Kullu. The learned District Judge, Kullu allowed the appeal on 7.6.2004. Hence, this Regular Second Appeal.

5. The Regular Second Appeal was admitted on 29.3.2005 on various substantial questions of law as detailed in the grounds of appeal. It would be pertinent to observe at this stage that vide Order dated 29.3.2005, in CMP No. 798/2004, Shri Alam Chand was permitted to assail the impugned judgment and decree dated 7.6.2004, since he had stepped into the shoes of defendant No. 1, Amar Jolly during the pendency of he suit by virtue of civil suit decreed on 23.8.1999, filed by Amar Chand against Amar Jolly. Similarly, Amar Jolly was allowed to be transposed as appellant No.2 alongwith Alam Chand by way of CMP No. 997/2004.

6. Mr. Neeraj Gupta, Advocate, on the basis of substantial questions of law framed, has vehemently argued that no evidence has been led by the plaintiff to prove the factum of creation of mortgage deed dated 11.6.1969 orally. Creation of mortgage could not be presumed merely on the basis of mutation and revenue entries.

7. Mr. Bimal Gupta, learned Senior Advocate has supported the judgment and decree dated 7.6.2004.

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

9. Since all the substantial questions of law are interconnected, as such were taken up together for discussion to avoid repetition of evidence.

10. PW-1 Yaad Singh deposed that Sangat Ram mortgaged the suit land on 11.6.1969 in favour of his father, Chaine Ram for `2500/- as mortgage debt/money and possession of the suit land was delivered on the same day. Mutation was entered and sanctioned in favour of his father. Suit land was mortgaged 31 years back hence, the rights of the defendants over the suit land stood extinguished and he had become owner of the suit land because suit land was not redeemed within the period of limitation by the defendants. He refuted that after the death of Sangat Ram, Kewali Ram came in possession of suit land and thereafter, defendants purchased suit land from Kewali Ram.

11. It is not in dispute that Sangat Ram was the owner-in-possession of the suit land. Plaintiff is the legal heir of Chaine Ram.

12. In Column No. 13 of the mutation Ext. P2 dated 24.9.1969, possession of the suit land was delivered under oral mortgage in favour of Chaine Ram on 11.6.1969 for Rs.2500/-. Mutation was duly sanctioned and attested in the presence of Sangat Ram, the then owner of the suit land. It was attested by the Assistant Collector 2nd Grade. In sequel to mutation dated 24.9.1969, necessary entries were made in the Jamabandi for the year 1969-70, Ext. A-1, Jamabandi for the year 1974-75, Ext. A-2, Jamabandi for the year 1979-80, Ext. A-3, Jamabandi for the year 1984-85, Ext. A-4 and Jamabandi for the year 1989-90, Ext. A-5 and also in Ext. P-1 i.e. Jamabandi for the year 1994-95. In all these Jamabandis, Chaine Ram remained recorded as mortgagee in possession of the suit land and after his death, plaintiff became mortgagee in possession of the suit land.

13. Mr. Neeraj Gupta, Advocate has also vehemently argued that the legal heirs of Sangat Ram were not arrayed as respondents. The Court is of the considered view that the legal heirs of Sangat Ram were not necessary party for full, final and effective adjudication of the suit. Plaintiff has always remained in possession of the suit land. Oral mortgage is dated 11.6.1969 for a consideration of Rs.2500/-.

14. In view of overwhelming revenue record it can not be presumed that the defendants were not aware of the status of Chaine Ram and after his death, of plaintiff, as mortgagee. In view of the mutation attested vide Ext. P-2 dated 24.9.1969, and subsequent Jamabandis, it was not necessary for the plaintiff to prove payment of mortgage money to Sangat Ram. Similarly, in the presence of Jamabandis Ext. P-1 and mutation Ext. P-2, Khasra Girdwari was not necessarily required to be produced. Presumption of truth is attached to the Jamabandis, though rebuttable. However, defendants have not led any evidence to rebut the revenue entries. Exts. A-1 to A-5 were proved by moving application under Order 41 Rule 27 CPC. These were not objected to. More particularly, the defendants have not produced the copy of Jamabandi, on the basis of which sale deed was executed. They could produce documents to prove that Chaine Ram or the plaintiff was not recorded as mortgagee in possession of the suit land. Defendants have not redeemed the suit land within the period of limitation, thus their rights stood extinguished and the plaintiff has become owner of the suit land.

15. Mr. Neeraj Gupta, Advocate has also argued that since the suit land earlier fell in the State of Punjab, mortgage was required to be registered.

16. Mr. Bimal Gupta, learned Senior Advocate has vehemently argued that the mortgage was not required to be registered under Section 59 of the Transfer of Property Act. Section 59 of the Transfer of Property Act reads as under:

> "59. Mortgage when to be by assurance :- Where the principal money secured is one hundred rupees or upwards, a mortgage other than a mortgage by deposit of title deeds can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses. Where the principal money secured is less than one hundred rupees, a mortgage may be effected either by a registered instrument signed and attested as aforesaid, or (except in the case of a simple mortgage) by delivery of the property.

17. It would be apt at this stage to refer to Section 5 of the Punjab Reorganization Act, 1955, whereby areas of Shimla, Kangra, Kullu and Lahul & Spiti, were merged in Himachal Pradesh with effect from 1.11.1966.

18. The Central Government had exempted retrospectively with effect from 1st January, 1950 the operation of paragraphs 2 and 3 of S. 54 and Ss. 59,107 and 123 from all the territories in the State of Himachal Pradesh except (i) an area within the limits of a municipality, and (ii) a notified area as declared and notified under Sec. 241 of the Punjab Municipal Act, 1911, as applied to Himachal Pradesh. Section 59 was extended to whole of the Punjab with effect from 10.6.1968. The sub para 5 of para 8.1 of 'Record of Rights', contained in the Himachal Pradesh Land Record Manual, reads as under:

> "5. Some times the patwaris do not enter mutations based upon oral transactions referred to in sub para (3) above. Even if the mutations are entered, the Revenue Officers generally refuse to attest such mutations on the plea that the registration was not done, which was compulsory under Registration Act. This is an incorrect interpretation of law. Mutations either based upon oral transaction or registered deed must conform to the provisions of section 38 of the HP Land Revenue Act subject to the provisions of Deputy Secretary Revenue to the H.P. Govt. letter No. 17-13/66, Rev. I Dated 6.1.1971, Section 118 of the H.P. Tenancy and Land Reforms Act, 1972 and Section 3 of H.P. Transfer of Land Regulation Act, 1968 read with paras 18.24, 18.25, 18.26 and 18.29 infra. Revenue Officers are not

competent to refuse mutations based upon oral transactions under the law, if the acquisitions conform to the provisions of Section 38 ibid but subject to the exceptions mentioned above.

It was held in Gulab singh another V Smt. Dilbag and others (ILR Himachal Series), 1987 pages 536 to 542) by the H.P. High Court that oral exchange was valid because all the provisions of the Transfer of Property Act were not applicable in Tehsil Kullu which was then State of Punjab in 1963. By virtue of Notification No. 1605 R/C55-69) 5.5.54 (sale) S. 107 (Lease) and S. 123 (gift) were made applicable in the State of Punjab.

An oral exchange was thus permissible in Tehsil Kullu because section 118 of the Transfer of Property Act was not made applicable to the State of Punjab – an exchange could be effected between the parties and it was not necessary to effect the same by a registered document only."

19. Thus, when the area of Punjab was merged in the union territory of H.P., Section 59 was not applicable to areas falling in District Kullu. Provisions of Section 59 have been made applicable to the State of Punjab only with effect from 10.6.1968. In this case, suit land fell in District Kullu which became an integral part of the territory of Himachal Pradesh with effect from 1.11.1966. Thus, the oral mortgage was permissible because of the fact that operation of paras 2, 3 of Sections 54 and 59 to the territories in the State of Himachal Pradesh was exempted retrospectively.

20. A Division Bench of the Orissa High Court in **Purusottam Das v. Desouza**, reported in AIR 1950 Orissa 213, have held that an invalid (unregistered) mortgage deed can be referred to for ascertaining the nature and character of possession and for determining the quantum of interest for which the defendant prescribed under the invalid mortgage. The Division Bench have held as under:

"[11] The question, however, further remains whether and to what extent the invalid mortgages themselves can be used in evidence to gather the terms of the mortgage, the right to which in the defendant has become ultimately perfected by adverse possession and precaution. On that question, there has been difference of opinion as disclosed in Appamma v. Channavadu,1924 11 AIR(Mad) 292. In that case one of the learned Judges, Spencer J. was inclined to the view that

> "a plaintiff who sues For redemption on the strength of an unregistered mortgage-deed can never succeed because for obtaining a decree to redeem it is necessary to prove what the terms of the mortgage were and they cannot be proved by any other evidence than the document itself. This is the effect of Sections 17 and 49 , Registration Act, read with Section 91 , Evidence Act."

The other two learned Judges, however, namely, Venkatasubba Rao and Ramesam JJ. came to a differs it conclusion. It was pointed out by them that in view of the Privy Council decision in Vorada Pillai v. Jeevarathnammal,1919 6 AIR(PC) 44 the invalid mortgage-deed could be referred to for ascertaining the nature and character of possession, (a proposition which was not disputed even by Spencer J.) and that accordingly it may be referred to for determining the quantum of interest for which the defendant prescribed. To determine the character of the possession, the quantum of the interest under which possession is purported to have been taken, has to be ascertained by a reference to the document itself. That quantum is necessarily defined and limited by the terms of the document

and does not offend against Sections 17 and 49 , Registration Act or Section 91 , Evidence Act. The attempt to use the document to prove the quantum of the interest and the character of possession thereunder is not the use of the document for the purpose of enforcing the mortgage itself under the document. The document is not used as the source of the mortgagee's title--the title itself having been acquired by adverse possession and prescription. I would therefore respectfully follow and adopt this view of the majority in Appamma v. Chinnavadu,1924 11 AIR(Mad) 292."

21. A Division Bench of the Patna High Court in **Sukra Oraon v. Jagat Mohan** reported in AIR 1957 Patna 245 have held that even where the mortgage is not a valid transaction, because of non-compliance with S.59, T.P. Act, still the defendants who are inducted on the property as mortgagees acquire the character of mortgagees of that property because of prescription when it is proved that they were holding the said property in that character during the period of prescription. The Division Bench has held as under:

"[2] The main argument On behalf of the heirs of defendant No. 3, who have preferred this appeal, is that the zarpeshgi deed dated 23-1-1932, was not a registered document and, therefore, the plaintiffs had no title to redeem. In support of this argument learned Counsel relied upon a decision of the High Court, Bishun Singh v. Sheodhari Das (AIR 1947 Pat 110 (A) , and another decision of the High Court, Bhukhan Mian v. Radhika Kurmi Debi 19 Pat LT 489: (AIR 1938 Pat 479) (B). It was argued that the requirements of Section 59, Transfer of Property Act, had not been complied with and the entry in the record. of rights that the mortgagees were in possession in that capacity was not sufficient to establish the transaction of mortgage and the suit for redemption could not be entertained. It is necessary for us to state that the question with regard to the invalidity of the zarpeshgi had not been raised in the lower Courts and there is no finding of the lower Courts on this point. The only question debated before the lower appellate Court was whether Sato or defendants Nos. 3 to 3 (b) had acquired the status of an occupancy raiyat with regard to the disputed plots and on that question the lower appellate Court has discussed the evidence elaborately and has come to the finding that Sato was not in possession as a raiyat and that defendant No. 3, who was the purchaser from Sato, was also not in possession of the land as raiyat. On the contrary, the finding of the lower appellate Court is that Sato was cultivating the suit land on behalf of the zarpeshgidars and that defendants 3 to 3 (b) also were in possession of the land in the same capacity. It is true in this case that the survey record-of-rights has an entry to the effect that the zarpeshgi was effected by an unregistered document. It may be that the requirements of Section 59, T. P, Act, had not been complied with and that the zarpeshgi of 23-1-1932, is not legally valid. But the point raised by Mr. Mukherji on behalf of the respondents is that even if the mortgage was invalid, both Sato and his transferees were in possession of the land in the character of mortgagees from the year 1932 to the year 1949, for a period of more than twelve years. The suit was brought on 27-1-1949, and the argument on behalf of the respondents is that the defendant-appellants were mortgagees by prescription and a decree for redemption has been rightly passed in favour of the plaintiffs by the lower appellate Court. In our opinion, this argument is well-founded. On the findings recorded by the lower appellate Court, it is clear that the mortgage was effected on 23-1-1932, and, according to the entry in the record-of-rights, the document of

zarpeshgi was not a registered document. It has also been found by the lower appellate Court that the mortgagees entered into possession and Sato was in possession of the disputed land not in the character of a teanant but in the character of a mortgagee. The lower appellate Court rejected the claim of the defendants that they were occupying the land as occupancy tenants. It is, therefore, clear that upon the finding of the lower appellate Court Khatia Grain and Manga Grain and Sato were in possession as mortgagees and, later on defendants 3 to 3 (b) , who were transferees from Sato, were also in possession of the land in the status of mortgagees, till the year 1949 when the present suit was brought. Upon these facts it must be held that in spite of the invalidity of the mortgage of 23-1-1932, the defendants had acquired the status of mortgagees by the doctrine of prescription. On behalf of the appellants reference was made to 19 Pat LT 489: (AIR 1938 Pat 479) (B) , where there is an observation of Wort, J. that the rights of a mortgagee cannot be acquired by prescription. Manqhar Lall, J. also agreed with Wort, J. though he said in the course of his judgment that it was not necessary to consider whether the defendant can ever be held in law to be able to prescribe against a true owner his rights as a mortgagee. Indeed, this question was not necessary to be decided in that case, because the entry in the record-of-rights was of the year 1921 and the period of twelve years from that starting point had not expired when the suit was instituted in 1933. Any observation made by either Wort, J. or Manohar Lall, J. on this question is, therefore, in the nature of obiter and not in the nature of ratio decidendi. It is necessary, however, to "record our opinion that the view taken by their Lordships is not correct. If has been pointed out by Jagannadha Das, J. in Pursottam Das v. S. M. Desouza AIR 1950 Orissa 213 (C) , that in 19 Pat LT 489: (AIR 1938 Pat 479) (B) both the learned Judges have failed to notice that the possession of a mortgagee under a void mortgage was permissive so far as the absolute title was concerned, and adverse only in so far as the limited interest was concerned, and the learned Judges have further failed to bear in mind that the mortgagee's interest was an interest was an interest in immoveable property and not merely a contractual security for a loan, and that adverse possession and prescription was as much a root of title to interest in immoveable property as a contractual document satisfying the requirements of the Transfer of Property Act, At page 216 Jagannadhada's J. has stated as follows : in Bhukhan Mian v. Radhika Kumari Debi, AIR 1938 Pat 479: 176 Ind Cas 35 (B) , the learned Judges, however, held that a person cannot prescribe for a limited interest like a tenancy or a mortgage. With great respect, I am unable to persuade myself that that proposition is correct. On the facts of that case, the question itself did not arise for a direct decision as pointed out by Manohar Lall, J. at page 482, fight-hand column, where the learned Judge stated as follows:"if as was argued, the defendant must be taken to have prescribed his rights as a mortgagee from the date of this entry, it is enough to state that the period of 12 years from that starting point had not expired when the suit was instituted in 1933'. The dictum of the learned Judge was, therefore, obiter; but in view of the fact that both the learned Judges discussed the question on principle and were inclined to give their assent to the proposition as above stated, weight and respect is due to that statement. On a close examination, however, of the reasoning of the learned Judges in support of the proposition, it is found that the same is based on two assumptions (1) that the position of the mortgagee under the

void mortgage is adverse in the sense that it is entirely in derogation of the owner's full title; (2) that a mortgage interest can be created only by a contract as prescribed in the Transfer of Property Act. The learned Judges have failed to notice that the possession of the mortgagee under a void mortgage is permissive so far as the absolute title is concerned and adverse only in so far as the limited interest is concerned. They have further failed to bear in mind that a mortgagee's interest is an interest in immoveable property and not merely a contractual security for a loan and that adverse possession and prescription is as much a root of title to interest in immovable property as a contractual document satisfying the requirements of the Trans'fer of Property Act. That Section 28, Limitation Act, is operative not only to extinguish the title of the rightful owner, but to transfer the title to the wrongful possessor is now well settled. Bee Gossain Dass v. Issur Chunder Nath ILR 3 Cal 224 (D) , Akhauri Haliwant v. Deo Narain, AIR 1941 Pat 181: ILR 19 Pat 852 (E) and Fakirappa Jotappa v. Ningappa Shidlingappa, AIR 1943 Born 265: 209 Ind Cas 251 (F). I am, therefore, unable with all due respect to follow the decision in AIR 1938 Pat 479 : 176 Ind Cas 35 (B) and I am definitely of the view that such a limited interest can be acquired by adverse possession". 'this view of the law has been accepted as correct by a Division Bench of this High Court in Dukhu v. Nand Lal, ILR 30 Pat 997: (AIR 1952 Pat 239) (G) and Phekua Mahton v. Padu Mahton, 1955 BLJR 29 (H). Applying the principle laid down in this line of authorities, we hold that even if the mortgage of 23/1/1932, was not a valid transaction because of non-compliance of Section 59, T. P. Act, still the defendants acquired the character of mortgagees of the disputed land because of prescription, and therefore, the plaintiffs have been rightly granted a decree for redemption by the lower appellate Court. We therefore affirm the decree of the lower appellate Court and dismiss the appeal with costs."

22. Another Division Bench of the Patna High Court while relying upon the judgment cited above, in **Rupa Nonia v. Ram Brich** reported in AIR 1959 Patna 164, have held as under:

"[3] A point was, however, raised in the course of the argument as to whether and to what extent the invalid mortgage document itself can be used in evidence' to gather the terms of the mortgage. On that question there is a Full Bench decision of the Madras High Court in Appanna Nadapena v. Saripilli Venkatasami, ILR 47 Mad 203: (AIR 1924 Mad 292) in which it was held by a majority of the learned Judges that an invalid mortgage document could be referred to for ascertaining the nature and the character of the possession and that accordingly it may be referred to for determining the Quantum of interest for which the defendant prescribed. It is obvious that in determining the character of the possession the quantum of the interest under which possession is purported to have been taken has to be ascertained by reference to the document itself. That quantum of interest is necessarily defined and limited by the terms of the document itself. I think that an attempt to use that document for the purpose does not offend against Section 17 and 49 of the Registration Act or Section 91 of the Evidence Act. The attempt to use the document to prove the quantum of the interest prescribed for and the character of possession is not the use of the document for the purpose of enforcing the mortgage itself under the

document. The document is not used as a source of the mortgagee's title--the title itself having been acquired by adverse possession and by prescription. On this point I would respectfully adopt the view of the learned Judges in ILR 47 Mad 203: (AIR 1924 Mad 292)."

23. The Division Bench have held that where a person enters possession of immovable property not on the assertion of any absolute title but on the basis of an unregistered rehan bond in his favour and remains in possession for more than twelve years, he acquires the status of a mortgagee by the doctrine of prescription and so even though the rehan bond is not a valid transaction for want of registration, the mortgagor is entitled to redeem the property.

24. A Division Bench of the Punjab & Haryana High Court in **Siri Chand v. Nathi** reported in AIR 1983 Punjab & Haryana 171, have held that a mortgage having been entered before S. 59 was made applicable to the State of Haryana, is valid and limitation for redemption of such mortgaged is 30 years. The Division bench have held as under:

"[12] In the present case, admittedly the oral mortgage had been made on June 14, 1948. At that time the relevant provisions of the Transfer of Property Act had not been made applicable to the area. The said transaction at that time was, therefore, valid and legally enforceable one and the fact whether the mortgage was registered or not, was wholly irrelevant with regard to the issue of its validity. Consequently, the terminus for limitation for redemption has to run from the aforesaid date of June 14, 1948. The application for bringing the legal representatives, having been admittedly brought after the period of 30 years therefrom, namely, on Aug. 16, 1978 was thus beyond the period prescribed. This application, therefore, must be held to be barred by time. This Civil Revision has, therefore,, to be allowed and the application for bringing the legal representatives is hereby dismissed on the ground of limitation and the impugned order of the trial Court is hereby set aside."

25. In the instant case also, relevant provisions of the Transfer of Property Act were not made applicable to the area i.e. Kullu. Thus, the transaction made on 11.6.1969 was valid and enforceable, whether the mortgage was registered or not, was wholly irrelevant.

26. The substantial questions of law are answered accordingly.

27. In view of the discussion and analysis made hereinabove, there is no merit in the appeal and the same is dismissed. Pending application(s), if any, also stand disposed of. No costs.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Shri Gian Chand ...Appellant

Versus

Shri Om Parkash ...Respondent.

RSA No.29 of 2005
Reserved on : March 3, 2016
Date of Decision : April 5, 2016

Specific Relief Act, 1963- Section 34- **Indian Succession Act, 1925-** Section 63- Plaintiff challenged the Will executed by 'P' in favour of the defendant and claimed ownership on the basis of subsequent will executed in his favour by 'P'- trial Court held that Will propounded by defendant was cancelled by subsequent will executed in favour of the plaintiff- defendant was found to be in possession, hence, suit was dismissed on the ground that suit for declaration and injunction is not maintainable- appeal was preferred which was allowed and the judgment of trial Court was reversed – it was held by the Appellate Court that plaintiff is co-owner of the land in question and Will was validly executed in favour of the plaintiff- held, that plaintiff is co-sharer and defendant had nowhere pleaded that he was in possession of the share of the plaintiff- land was never partitioned- possession of any co-owner is the possession of all and plaintiff will be deemed to be in possession- relief of possession is not required to be sought by the plaintiff- appeal dismissed. (Para-2 to 20)

Cases referred:

Union of India Versus Ibrahim Uddin and another, (2012) 8 SCC 148
Deo Kuer and another v. Sheo Prasad Singh and others, AIR 1966, SC 359
Sadasivam versus K. Doraisamy, (1996) 8 SCC 624
Karbalai Begum v. Mohd. Sayeed and another, (1980) 4 SCC 396
MD. Mohammad Ali (dead) By LRs. V. Jagadish Kalita and others, (2004) 1 SCC 271
Govindammal v. R. Perumal Chettiar and others, (2006) 11 SCC 600
P.T. Munichikkanna Reddy and others v. Revamma and others, (2007) 6 SCC 59
Annakili v. A. Vedanayagam and others, (2007) 14 SCC 308

For the Appellant	:Mr. Ramakant Sharma, Senior Advocate with Ms. Soma Thakur, Advocate.
For the Respondent	Mr. Ashwani K. Sharma, Senior Advocate with Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Sanjay Karol, Judge

This Regular Second Appeal, under the provisions of Section 100 of the Code of Civil Procedure, filed by the defendant, stands admitted on the following substantial questions of law:-

1. Whether a simplicitor suit for declaration and permanent injunction without asking for possession even if the Khata of the parties is joint is maintainable?
2. Whether a prayer not made in the plaint can be granted particularly when it is held that the plaintiff is not in possession of any portion of the land in suit?

2. Sant Ram had three sons namely Laxmi Chand, Kesho Ram and Paras Ram. Plaintiff Om Parkash is the son of Laxmi Chand and defendant Gian Chand is the son of Kesho Ram. Undisputedly, Paras Ram died issueless. The dispute is with regard to the share of deceased Paras Ram in the joint land, of which, plaintiff Om Parkash and defendant Gian Chand are co-owners.

3. On the basis of registered Will dated 25.8.1976 (Ex.D-1), executed by Paras Ram in favour of Gian Chand, entries of mutation stood effected in the revenue record. The

efficacy of the Will and such entry of revenue came to be assailed, by way of a civil suit so filed by Om Parkash, claiming ownership on the basis of subsequent unregistered Will dated 5.2.1989 (Ex.PW2/A), executed in his favour by Paras Ram.

4. Resistance on the part of the defendant led the trial Court frame the following issues:-

"(1) Whether the deceased Paras Ram executed a legal and valid Will in favour of the plaintiff on 5.2.1989, as alleged? OPP

(2) Whether the earlier Will dated 25.8.1976 in favour of the defendant, as well as the mutation attested on the basis of that Will, is a result of undue influence and fraud and not binding on the plaintiff, as alleged? OPP

(3) Whether the order dated 29.2.1996 of Collector, Nurpur and order dated 12.5.1999 of the Divisional Commissioner, Kangra are illegal void etc. as alleged? OPP

(4) Whether the plaintiff is entitled to the relief of permanent injunction, as prayed for? OPP

(5) Whether the suit is not maintainable in the present form? OPD

(6) Whether the suit is barred by limitation? OPD

(7) Whether the plaintiff has no cause of action to file the present suit? OPD

(8) Whether the plaintiff is estopped from filing of the present suit? OPD

(9) Whether the defendant is entitled to special compensatory cost, as prayed for? OPD

(10) Whether the Will dated 5.2.89 is a forged and fraudulent document, as alleged? OPD

(11) Relief."

5. The trial Court found the Will dated 25.8.1976 propounded by defendant Gian Chand to have been cancelled vide subsequent Will dated 5.2.1989 in favour of Om Parkash. However since the defendant was found to be in possession, trial Court dismissed the suit as plaintiff's suit was simplicitor for declaration and permanent injunction, which was not maintainable. Thus, the issues came to be answered accordingly.

6. Such findings of fact, judgment and decree dated 22.4.2003, passed by Sub Judge 1st Class (1), Nurpur, District Kangra, H.P., in Civil Suit No.150/99, titled as Om Parkash vs. Gian Chand, so assailed by the plaintiff, stands reversed vide impugned judgment and decree dated 1.1.2005, passed by District Judge, Kangra at Dharamshala (HP), in Civil Appeal No.58-N/XIII/2003, titled as Shri Om Parkash vs. Shri Gian Chand.

7. Significantly, lower appellate Court found: (1) the plaintiff to be co-owner of the land in question alongwith Paras Ram, as per record of rights. (2) The last Will to have been validly executed in favour of the plaintiff.

8. This Court has not gone into the question of correctness of the findings of Will dated 5.2.1989 (Ex.PW2/A), validly executed by Paras Ram in favour of the plaintiff, whereby earlier Will dated 25.8.1976 (Ex.D-1) stood cancelled.

9. Perusal of entries of record of rights (Ex.P-1 and Ex.P-2) clearly reflect the parties, including plaintiff Om Parkash to be co-owner. He has an independent right. Khata

of the entire land continued to be joint and the land never came to be partitioned amongst the co-sharers. It is a settled principle of law that possession of one co-owner holds good qua all the co-owners.

10. Perusal of the plaint reveals that plaintiff had sought declaration to the effect that he is owner in possession, by way of succession to the entire estate of Paras Ram situated in Village Tikka Palahari, Mauja Kot Palhari, Tehsil Nurpur, District Kangra. Also, declaration was sought, restraining the defendant from claiming ownership, qua the estate of Paras Ram, on the basis of Will dated 5.2.1989.

11. Undisputedly, Paras Ram had 1/6th share in the entire joint land. Significantly, in the written statement, defendant no where pleaded to have been put in exclusive possession of share of Paras Ram. The land was never partitioned. Mutation No.53 dated 17.4.1992 sanctioned by revenue officer (A.C. 2nd grade, Nurpur, Kangra), in favour of defendant, also did not record the defendant to be in exclusive possession of the land falling to the share of Paras Ram.

12. Section 34 of the Specific Relief Act, 1963 reads as under:-

> "Discretion of Court as to declaration of status or right. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so."

13. Plaintiff never sought partition of either his share or the share of Paras Ram. On the strength of Will (Ex.PW2/A), plaintiff only sought declaration of title of the share in the land of which he himself was co-owner being jointly owned and possessed by all, including the parties to the lis. Hence, proviso to Section 34 of the Specific Relief Act, in the instant case, cannot be pressed in the given facts and circumstances.

14. Assuming hypothetically that plaintiff was not in possession of the suit land, even then it is a settled principle of law that possession of any co-owner holds good qua all the owners, unless of course the intent is otherwise, which is not the factual position here. In the absence of the suit property having been partitioned and the parties being put in possession of their respective portions, plaintiff continues to be in possession of the suit property and as such was not required to seek relief of possession.

15. While contending that the suit as framed by the plaintiff was hit by Section 34 of the Specific Relief Act, 1963, and as such, ought to have been dismissed, Mr. Ramakant Sharma, learned Senior counsel, seeks reliance upon the decision rendered in *Union of India Versus Ibrahim Uddin and another,* (2012) 8 SCC 148, wherein following observations were made by the apex Court:-

> "55. The section provides that courts have discretion as to declaration of status or right, however, it carves out an exception that a court shall not make any such declaration of status or right where the complainant, being able to seek further relief than a mere declaration of title, omits to do so.
>
> 56. In *Ram Saran and another v. Smt. Ganga Devi,* (1973) 2 SCC 60, this Court had categorically held that the suit seeking for declaration of title of

> ownership but where possession is not sought, is hit by the proviso of Section 34 of the Specific Relief Act, 1963 (hereinafter called "the Specific Relief Act") and, thus, not maintainable. In *Vinay Krishna v. Keshav Chandra and another,* 1993 Supp (3) SCC 129, this Court dealt with a similar issue where the plaintiff was not in exclusive possession of property and had filed a suit seeking declaration of title of ownership. Similar view has been reiterated observing that the suit was not maintainable, if barred by the proviso to Section 34 of the Specific Relief Act. (See also *Gian Kaur v. Raghubir Singh,* (2011) 4 SCC 567.
>
> 57. In view of the above, the law becomes crystal clear that it is not permissible to claim the relief of declaration without seeking consequential relief.
>
> 58. In the instant case, the suit for declaration of title of ownership had been filed, though Respondent 1-plaintiff was admittedly not in possession of the suit property. Thus, the suit was barred by the provisions of Section 34 of the Specific Relief Act and, therefore, ought to have been dismissed solely on this ground. The High Court though framed a substantial question on this point but for unknown reasons did not consider it proper to decide the same."

16. The decision rendered by two Judge Bench of the apex Court is squarely inapplicable in the given facts and circumstances, more so, in the light of earlier decision rendered by three Judge Bench of the apex Court in *Deo Kuer and another v. Sheo Prasad Singh and others,* AIR 1966, SC 359, wherein it is held that where the property is held as *custodia legis*, plaintiff's suit, seeking declaration of title and not claiming possession thereof, cannot be said to be hit by proviso contained under Section 42 of the Specific Relief Act (para materia with the present Section 34 of the Specific Relief Act).

17. The apex Court in *Ibrahim Uddin* (supra) was not dealing with the case where the defendant as a co-sharer was in possession of the suit property.

18. In any event, it has been held by the apex Court in *Sadasivam versus K. Doraisamy*, (1996) 8 SCC 624 that a co-sharer is expected to possess the land not partitioned between the parties. Exclusive possession of a co-sharer does not amount to adverse possession against other co-sharers unless such possession was exercised by ousting the other co-sharers.

19. The apex court in *Karbalai Begum v. Mohd. Sayeed and another,* (1980) 4 SCC 396, has held that a co-sharer in possession is in the capacity of a constructive trustee of the other co-sharers, in the following terms:

> "7. Another obvious fact which emerges from the admitted position is that if Mohd. Bashir and Mohd. Rasheed were co-bhumidars with the plaintiff in the khewat and had also sirdari tenants under them, how could the sirdari tenants occupy the land of one of the co-sharers leaving the defendants alone so that the blots were re-allotted to them. It is well settled that mere non-participation in the rent and profits of the land of a cosharer does not amount to an ouster so as to give title by adverse possession to the other co-sharer in possession. Indeed even if this fact be admitted, then the legal position would be that Mohd. Bashir and Mohd. Rashid, being co-sharers of the plaintiff, would become constructive trustees on behalf of the plaintiff and the right of the plaintiff would be deemed to be protected by the trustees. The learned counsel appearing for the respondent was unable to

contest this position of law. In the present case, it is therefore manifest that the possession of the defendants, apart from being in the nature of constructive trustees, would be in law the possession of the plaintiff."

(followed in *MD. Mohammad Ali (dead) By LRs. V. Jagadish Kalita and others,* (2004) 1 SCC 271; *Govindammal v. R. Perumal Chettiar and others,* (2006) 11 SCC 600; *P.T. Munichikkanna Reddy and others v. Revamma and others,* (2007) 6 SCC 59; and *Annakili v. A. Vedanayagam and others,* (2007) 14 SCC 308).

20. Hence, in my considered view, there is no merit in the present appeal and the same is accordingly dismissed. It cannot be said that the judgment passed by the lower appellate Court is based on incorrect and incomplete appreciation of facts and material placed on record by the parties or that the same is perverse which has resulted into miscarriage of justice. Substantial questions of law are answered accordingly.

Pending applications, if any, also stand disposed of accordingly.

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

India Bulls Housing Finance Ltd ...Petitioner

Versus

Rakesh Kumar Banta and another ...Respondents.

CMPMO No. 158 of 2015.
Date of decision: 5.04.2016.

Code of Civil Procedure, 1908- Order 7 Rule 11- Loan was taken from defendant No. 1 by defendant no. 2 who mortgaged the property in favour of defendant no. 1- suit was instituted for restraining defendant No. 1 from dispossessing the plaintiff from rented premises- defendant No. 1 filed an application seeking rejection of the plaint on the ground that Civil Court does not have jurisdiction in view of Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- application was dismissed by trial court - held, that plaintiff is in occupation of the mortgaged property as tenant and his rights are protected under Rent Control Act- Civil suit to protect the rights of the tenant is fully maintainable- application was rightly dismissed by the trial Court- petition dismissed. (Para-2 to 4)

For the petitioner: Mr. B.C.Negi, Sr. Advocate with Mr. Pranay Pratap Singh, counsel.

For the respondents: Mr. Ajay Kumar Sr. Advocate with Mr. Dheeraj K. Vashisht, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Sureshwar Thakur, J. (oral)

As apparent on a reading of Annexure P-4, the petitioner herein defendant No.1 before the learned trial Court, stands constituted therein as a Financial Institution for the purpose of availing the provisions of Securitisation and Reconstruction of Financial

Assets and Enforcement of Security Interest Act, 2002 (54 of 2002) hereinafter referred to in short as the Act of 2002. The defendant No.2 borrowed from the petitioner herein defendant No.1 before the learned trial Court, a loan under a loan agreement comprised in Annexure C. A portion of the property purveyed as security by him for servicing the loan obtained from the petitioner herein stands comprised in Khasra No. 369 and 370 Upmohal Sanjauli Bazar, Shimla, stands occupied by respondent No.1 herein as a tenant. The plaintiff before the learned trial Court and respondent No.1 herein instituted a suit for permanent prohibitory injunction for restraining the defendant No.1 a Financial Institution from forcibly and unlawfully dispossessing him from the rented premises. However, on the learned trial Court effectuating service of a notice of the plaint upon defendant No.1/petitioner herein, the latter instituted an application under Order 7 Rule 11 of the Civil Procedure Code before it, for rejection of the suit in face of the specific statutory bar constituted under Sections 34 and 35 of the Act of 2002, which stands extracted hereinafter, against a Civil Court holding any jurisdiction to try a civil suit encapsulating a subject matter falling within the ambit or scope of the jurisdiction vested in the Debts Recovery Tribunal which solitarily stands statutorily empowered therein to recover/realize from the principal borrower the debt/loan advanced by it to him preeminently from his mortgaged corporeal assets comprised in Khasra Numbers aforesaid located at Sanjauli Bazar, Shimla, even when a portion thereof stands occupied by respondent No.1 as a tenant.

> 34. Civil Court not to have jurisdiction No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993).
>
> 35. The provisions of this Act to override other laws. The provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law.

The application stood dismissed. Hence, the instant petition stands laid before this Court for impugning the order of the learned trial Court whereby the application preferred before the learned trial Court by the petitioner herein under Order 7 Rule 11 stood dismissed by it.

2. The learned counsel for the petitioner submits with great vigour of the statutory bar constituted, in the afore referred sections of the Act of 2002 against any civil court entertaining any proceedings in respect of a subject matter, jurisdiction whereof stands conferred under the aforesaid Act upon the Debt Recovery Tribunal for enforcing its coercive provisions for enabling the Financial Institution concerned to realize the debt advanced to the principal borrower by it especially when it stands as manifested by Annexure P-4 empowered to seek availment of the provisions of Sections 34 and 35 of the Act of 2002 for hence excluding, given the specific statutory bar constituted therein, a Civil Court from exercising any jurisdiction thereupon, being an untrammeled statutory embargo or a fetter unamenable to any dilution. He further contends qua hence even a portion of the property standing mortgaged with the petitioner herein for servicing/realising the loan borrowed by the defendant No.2 from it, the suit as constituted at the instance of the plaintiff before the learned trial Court was wholly not maintainable rather it entailed its rejection. However, the aforesaid submission addressed by the learned counsel for the petitioner herein stands denuded of its legal force in the face of a judgement

rendered by the Hon'ble Apex Court in Vishal N.Kalsaria vs. Bank of India and others, *2016 SCC OnLine SC 64,* the relevant paragraph 40 whereof stands extracted hereinafter:-

> "40. In view of the above legal position, if we accept the legal submissions made on behalf of the Banks to hold that the provisions of SARFAESI Act override the provisions of the various Rent Control Acts to allow a Bank to evict a tenant from the tenanted premises, which has become a secured asset of the Bank after the default on loan by the landlord and dispense with the procedure laid down under the provisions of the various Rent Control Acts and the law laid down by this Court in catena of cases, then the legislative powers of the state legislature are denuded which would amount to subverting the law enacted by the State Legislature. Surely, such a situation was not contemplated by the Parliament while enacting the SARFAESI Act and therefore the interpretation sought to be made by the learned counsel appearing on behalf of the Banks cannot be accepted by this Court as the same is wholly untenable in law.",

wherein the Hon'ble Apex Court while resolving the conflict inter se the right of a tenant occupying a portion of the property mortgaged by the principal borrower with the Financial Institution for servicing the loan advanced to him vis.a.vis. the ouster of jurisdiction of a Civil Court under the aforesaid provisions of the Act of 2002 to entertain any suit or proceedings arising out of or relating to enforcement/availment at the instance of the Financial Institution concerned of the provisions contemplated therein for servicing/realizing the loan advanced by it to the principal borrower, has held that the right of a tenant occupying any portion of the building/property though standing mortgaged as a security to service or realize the loan borrowed by the principal debtor from the financial institution concerned cannot stand either belittled or overridden by any provisions constituted in the Act of 2002. In trite, the jurisdiction of a Civil Court to entertain any suit or proceedings as constituted before it, by a person in occupation as a tenant of a portion of the mortgaged assets/premises for protecting his rights therein, against any legal onslaught mounted by the financial institution concerned, is a pristine right, even though such assets/premises when stand mortgaged as security by the principal borrower with the Financial Institution concerned are facilitative to the latter to realise the loan by resorting to the coercive statutory mechanism contemplated therein, cannot either stand dissipated nor stands overcome by the apposite provisions constituted in the Act of 2002, even if the latter provisions statutorily restrain it from entertaining, trying or adjudicating any suit or proceedings constituted before it devolving upon a subject matter whereupon the Debts Recovery Tribunal statutorily alone under the Act of 2002 stands vested with jurisdiction to take recourse to the coercive provisions embodied therein to enable the Financial Institution concerned to realize the dues/debts advanced by it to the principal debtor besides preeminently the apposite ouster of jurisdiction of a Civil Court contemplated in Sections 34 and 35 of the Act of 2002 extracted hereinabove cannot be put on anvil to either belittle or countervail or arbitrarily usurp the indefeasible rights of a tenant in possession of a part of the asset mortgaged by the principal borrower with the financial institution concerned as security for realizing the debt obtained by him from it.

3. Be that as it may, extantly when the plaintiff-respondent No.1 herein is in occupation as a tenant in a part of the property mortgaged by the landlord with a financial institution, his rights as a tenant therein are covered with a protective umbrella for forestalling the financial institution concerned to, for realizing the loan advanced by it to the principal debtor, evict him therefrom by resorting to the coercive statutory mechanism contemplated in the Act of 2002, predominantly on the anvil of the jurisdiction of the Civil

Court standing constituted in the afore extracted provisions of the Act of 2002, to suffer ouster. Contrarily the preemptive suit instituted by the plaintiff before the learned trial Court for restraining the financial institution concerned besides his landlord from interfering in his peaceful possession as a tenant qua a part of the property mortgaged with defendant No.1, is a tenable protective endeavour to restrain the defendants in the Civil Suit, to except in accordance with law constituted by his landlord evicting him therefrom under an apposite decree rendered by the Rent Controller concerned especially when his dispossession therefrom is under an imminent threat in the face of the premises occupied by him as a tenant standing mortgaged with defendant No.1/petitioner herein in garb whereof the latter may in derogation of the judgement of the Hon'ble Apex Court whose relevant paragraphs stand extracted hereinabove may resort to coercively under the statutory mechanism contemplated in the Act of 2002, usurp his indefeasible right as a tenant therein for realization of the money lent by it to the principal debtor. Consequently, the suit as instituted by the plaintiff before the learned trial Court is maintainable.

4. In face thereof, the order of the learned trial Court dismissing the application preferred before it by the Financial Institution is tenable and is affirmed. The petition is disposed of accordingly, so also the pending application(s) if any.

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

Khim Raj son of Shri Piare Lal ....Appellant

Versus

State of H.P. ....Respondent

Cr. Appeal No. 325 of 2014
Judgment reserved on: 27th February 2016
Date of Judgment: 5th April 2016

Indian Penal Code, 1860- Section 302- 'B' was married earlier- accused brought her and started residing with her as her husband- she brought four children born from her previous husband- PW-2 came to the house and started consuming liquor with 'B' and the accused- accused pushed the deceased, gave her beatings and leveled allegation of adultery- PW-2 tried to save 'B'- 'B' ran out of the house but was brought back by the accused and beaten- 'B' suffered injuries and died - accused was tried and convicted by the trial Court- held, in appeal that the dead body was found inside the residential house- there is no possibility that some other persons had entered inside the house and had committed murder- Medical Officer had found 28 ante mortem injuries which proved to be fatal- it was suggested in cross-examination that 'B was found naked and R was running away from residential house which furnishes the motive to kill the deceased- accused admitted that he ran away on the date of incident and stayed through the night in the school- no explanation was given as to why accused had left his home and had stayed in the school- possibility of sustaining injuries by way of fall is not established - minor contradictions are bound to come with the passage of time and are not fatal for the prosecution case – no plea was taken that offence was committed under sudden and grave provocation- trial Court had properly appreciated the evidence- there is no reason to interfere with the judgment- appeal dismissed.

(Para- 12 to 27)

Cases referred:
Bhe Ram Vs. State of Haryana, AIR 1980 S.C.957
Rai Singh Vs. The State of Haryana, AIR 1971 S.C. 2505
State of U.P. vs. Dr. Ravindra Prakash Mittal, AIR 1992 SC 2045
Hanumant Govind Nargundkar and another vs. State of Madhya Pradesh, AIR 1952 SC 343
Musheer Khan @ Badshah Khan and another vs. State of Madhya Pradesh, AIR 2010 SC 762
Shivaji @ Dadya Shankar Alhat vs. State of Maharashtra, AIR 2009 SC 56
State of Maharashtra vs. Annappa Bandu Kavatage, AIR 1979 Apex Court 1410
S.P. Bhatnagar and another vs. The State of Maharashtra, AIR 1979 Apex Court 826
Ashok Kumar Chatterjee vs. State of Madhya Pradesh, AIR 1989 SC 1890
Sakharam vs. State of Madhya Pradesh, AIR 1992 SC 758
Dharm Das Wadhwani vs. The State of Uttar Pradesh, AIR 1975 SC 241
Bhagat Ram vs. State of Punjab, AIR 1954 SC 621
Kusuma Ankama Rao vs. State of A.P, AIR 2008 SC 2819
Ashish Batham vs. State of M.P., Air 2002 SC 3206
Rohtash Kumar vs. State of Haryana, (2013)14 SCC 434
Gajanan Dashrath Kharate vs. State of Maharashtra, JT 2016(2) SC 459

For the Appellant: Mr. Vivek Singh Thakur, Advocate.
For the Respondent: Mr. V.S. Chauhan Additional Advocate General with Mr. Kush Sharma, Deputy Advocate General and 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 Ghumarwin District Bilaspur (H.P.) camp at Bilaspur in Sessions Trial No. 1-7 of 2012/2011 title State of H.P. vs. Khim Raj decided on 31.10.2012.

Brief facts of the case

2. It is alleged by prosecution that in the intervening night of 30/31.8.2011 at Sandholi accused committed murder of deceased Babli in his residential house. It is alleged by prosecution that deceased Babli was married with Penu Ram at place Jamethi and four children were born out of their wedlock. It is alleged by prosecution that accused brought deceased Babli from Luhri Rampur and started residing with deceased as husband. It is alleged by prosecution that deceased Babli brought her four children born from her previous husband. It is alleged by prosecution that one daughter of deceased namely Chandana was married and thereafter another daughter of Babli also started residing with Chandana after her marriage. It is alleged by prosecution that two children of deceased Babli namely Shiva and Tanu were residing with accused and Babli at place Sandholi. It is alleged by prosecution that on 30.8.2011 at about 7 PM Guddu @ Ramesh PW2 came to the residential house of accused and thereafter Shiva PW12 was sent by Babli for purchasing liquor and he was given currency note of Rs.100/- (Rupees one hundred only). It is alleged by prosecution that thereafter liquor bottle was brought at the rate of Rs.60/- (Rupees sixty only) and Rs.40/- (Rupees forty only) returned and thereafter liquor was consumed by accused and deceased Babli. It is alleged by prosecution that thereafter in the night accused along with deceased Babli and Guddu @ Ramesh started consuming liquor. It is alleged by prosecution

that after consuming liquor accused pushed deceased Babli and levelled allegations of adultery and also gave beatings to deceased. It is alleged by prosecution that thereafter Guddu @ Ramesh tried to save deceased Babli but accused did not stop and thereafter deceased Babli went towards river as she was frightened by accused. It is alleged by prosecution that thereafter accused also ran after deceased and deceased was brought back by accused and accused also started beating the deceased with fuel wood. It is alleged by prosecution that deceased was dragged by accused to courtyard and beaten the deceased and thereafter took the deceased inside the house. It is alleged by prosecution that Tanu and Shiva children went for sleeping in the house of Gian Chand in night. It is alleged by prosecution that due to beating given by accused to deceased by way of fist and kick blows as well as by fuel wood deceased sustained multiple injuries and subsequently deceased died on account of injuries. It is alleged by prosecution that thereafter Gian Chand PW1 in the morning found deceased Babli lying dead and he intimated Dayalu Ram ward member and thereafter Dayalu Ram ward member intimated the police officials. It is alleged by prosecution that dead body of deceased was wrapped with blanket and bed sheet containing blood stains. It is alleged by prosecution that after receiving information rapat Ext.PW13/A was registered and thereafter investigating agency proceeded to the spot and statement under Section 154 Cr.P.C. recorded. It is alleged by prosecution that thereafter ruka was sent through HHC Roop Lal for registration of FIR and FIR Ext.PW8/E was registered. It is alleged by prosecution that thereafter inquest papers prepared and application for post mortem of deceased filed. It is alleged by prosecution that blood stained bed sheet and blood stained blanket recovered vide seizure memo. It is alleged by prosecution that broken pieces of fuel wood also took into possession vide seizure memo. It is alleged by prosecution that empty bottles of liquor also recovered. It is alleged by prosecution that site plan was prepared and accused was medically examined. It is alleged by prosecution that statements of prosecution witnesses recorded and photographs also obtained. It is alleged by prosecution that report of chemical analyst also obtained.

3. Charge was framed by learned Additional Sessions Judge Ghumarwin camp at Bilaspur (H.P.) against appellant Khim Raj under Section 302 IPC on dated 17.2.2012. Accused did not plead guilty and claimed trial.

4. Prosecution examined thirteen oral witnesses in support of its case and also tendered documentaries evidence.

5. Learned trial Court convicted appellant under Section 302 IPC and sentenced the appellant to rigorous imprisonment for life and fine to the tune of Rs.5,000/- (Rupees five thousand only). Learned trial Court further directed that in default of payment of fine appellant would undergo rigorous imprisonment for six months.

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 Additional 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 judgment of learned Trial Court is perverse and based upon non appreciation of oral and documentaries evidence properly as mentioned in memorandum of grounds of appeal?

Point No. 2

Final Order**.**

9. Reasons for findings on point No.1:

9.1. PW1 Gian Chand has stated that he is daily wager and he is familiar with accused. He has stated that accused is his nephew and is also his neighbour. He has stated that about four years back accused Khim Raj brought deceased Babli from Luhri (Rampur) and started residing with her as her husband. He has stated that deceased Babli brought four children with her who were born from her previous husband. He has stated that one of daughter Chandana was married by accused and one daughter of Babli started residing with Chandana after marriage of Chandana. He has stated that two children namely Shiva and Tanu were residing with accused and deceased Babli. He has stated that he found that accused and Babli were abusing each other. He has stated that thereafter accused and deceased left to their house and he does not know what happened thereafter. He has stated that in the morning he found that Babli was found lying dead in her residential house. Thereafter he intimated ward member Dayalu Ram by way of telephone. He has stated that thereafter many persons also gathered and Dayalu Ram intimated the police officials and police also came in house of accused and dead body was shifted to hospital for post mortem.He has stated that no other proceedings were completed by investigating agency at the spot. Witness was declared hostile by prosecution. He has denied suggestion that accused administered beatings to deceased in his couryard with fist and kicks. He has denied suggestion that he tried to save deceased Babli from accused. He has denied suggestion that accused picked up a piece of fuel wood from his courtyard and administered beatings to deceased with piece of fuel wood. He has denied suggestion that his nephew Ramesh was also present and he saved deceased from wraths of accused. He has denied suggestion that he also heard cries of deceased Babli from inside her residential house. He has denied suggestion that when deceased Babli was crying then her children Shiva and Tanu came to his house for sleep. He has denied suggestiuon that at about 8 AM in the morning accused came to his house and stated that due to excessive drinking he gave severe beatings to deceased with fuel wood and stick and consequently she died. He has denied suggestion that bed sheet was containing blood stains. He has denied suggestion that blood was lying upon the stones in the courtyard. He has denied suggestion that deceased was killed by accused by way of giving beatings to deceased with piece of fuel wood. He has denied suggestion that he had also sustained injuries while saving the deceased from accused. He has admitted that on the date of incident when accused reached in the house deceased Babli had consumed liquor and was heavily drunk. He has denied suggestion that he was interested to maintain illicit relations with Babli. He has denied suggestion that his wife also suspected about his illicit relations with deceased Babli. He has denied suggestion that Ramesh came to the house of accused on the date of incident. He has denied suggestion that Ramesh deputed the accused to bring two bottles of liquor from liquor shop. He has stated that he does not know that when accused came back to his residential house with two bottles of liquor he saw that Ramesh was running from residential house of accused from back side. He has denied suggestion that when accused entered his room he found deceased Babli in naked condition. He has denied suggestion that accused ran after Ramesh and caught hold of him and brought him to courtyard. He has denied suggestion that scuffle took place between accused and Ramesh in courtyard. He has denied suggestion that Babli came to courtyard and tried to intervene. He has denied suggestion that while saving accused and Ramesh from quarrelling Babli fallen down from retaining wall and sustained injuries. He has denied suggestion that accused fled away from spot to save his life. He has admitted that accused had two rooms and one of rooms is without door. He has denied suggestion that he and Ramesh in connivance with police officials manipulated a

false story. He has denied suggestion that he engaged the children of deceased in illegal acitivities.

9.2 PW2 Guddu @ Ramesh has stated that he is junk dealer and accused is his cousin. He has stated that deceased was his God sister who was brought by accused from Luhri. He has stated that he came to residential house of deceased to invite her on the occasion of birth of his daughter. He has stated that deceased Babli was found drunk and he left to his house. He has stated that he does not know how deceased Babli died. Witness was declared hostile. He has denied suggestion that on 30.8.2011 at about 7 PM he had gone to house of deceased Babli and accused. He has stated that both deceased and Babli were drunk. He has denied suggestion that accused went to Sandholi to bring more bottles of liquor. He has denied suggestion that he, deceased Babli and accused consumed liquor together. He has denied suggestion that accused came in intoxicated condition and started abusing the deceased Babli. He has denied suggestion that accused called deceased Babli Raand (Woman of easy virtue). He has denied suggestion that deceased became annoyed and she ran towards river. He has denied suggestion that he tried to control the situation but due to intoxication both deceased and accused did not obey his command. He has denied suggestion that accused ran after deceased Babli and brought deceased Babli to courtyard of Gian Chand. He has denied suggestion that accused started beating the deceased. He has denied suggestion that accused dragged the deceased Babli to courtyard and given her severe beatings with piece of fuel wood. He has denied suggestion that Gian Chand and he also tried to save the deceased and Gian Chand and he also sustained injuries. He has stated that he does not know that Tanu and Shiva have also seen the incident. He has stated that he could not state that deceased had died due to merciless beatings with piece of fire wood under the influence of liquor. He has denied suggestion that he has resiled just to save the accused. He has denied suggestion that deceased Babli was naked inside the room. He has denied suggestion that scuffle took place between him and accused in courtyard. He has denied suggestion that deceased came out from room to save him and accused and she fallen down from retaining wall on piece of fuel wood and stone and sustained injuries on her body. He has stated that Gian Chand tried to maintain illicit relations with deceased. He has denied suggestion that he was having illicit relations with deceased. He has denied suggestion that they have falsely implicated the accused.

9.3 PW3 Leela Devi has stated that accused Khim Raj is her nephew. She has stated that on the date of incident she along with her husband were present in house. She has stated that on the date of incident when her husband came he found that deceased Babli and accused were heavily drunk. She has stated that when accused came deceased Babli started abusing the accused and refused to cook food. She has stated that thereafter accused and deceased Babli moved to their residential house. She has stated that she does not know how the deceased Babli died. Witness was declared hostile. She has denied suggestion that accused has given merciless beatings to deceased with fist and kick blows. She has denied suggestion that accused had also given severe beatings with piece of fire wood. She has denied suggestion that Tanu and Shiva children of deceased came to her house when accused started beatings to deceased. She has denied suggestion that accused used to suspect the character of deceased. She has denied suggestion that she has resiled from her previous statement just to save the accused. She has denied suggestion that her husband also interested to maintain illicit relations with deceased. She has denied suggestion that Ramesh was found present on the date of incident in the residential house of deceased and also denied suggestion that Ramesh was having illicit relations with deceased. She has denied suggestion that quarrel took place between accused and Ramesh and deceased came to save them and fallen down from retaining wall.

9.4 PW4 Rana Verma has stated that he is running video studio and he was associated in investigation. He has stated that investigating agency brought memory card to his studio and he sent the memory card to Chandigarh and on receipt of photographs and memory card he supplied the same to police officials. He has stated that photographs are Ext.PW4/A-1 to Ext.PW4/A-15.

9.5 PW5 C.Hem Raj has stated that he is posted in P.S. Sadar and on 31.8.2011 he remained associated in investigation. He has stated that SHO directed him to take photographs of dead body and spot and he took photographs with digital camera and thereafter gave memory card to Prem Studio for deveoping the photographs.

9.6 PW6 Bhutto Kumar has stated that he is junk dealer and he is son-in-law of deceased Babli. He has stated that on coming to know about death of deceased Babli on 31.8.2011 at about 9 AM he rushed to house of his mother-in-law. He has stated that his mother-in-law used to reside with accused Khim Raj present in Court as his wife. He has stated that name of his wife is Chandana. He has stated that on reaching house of his mohter-in-law he found dead body of his mother-in-law lying in courtyard. He has stated that many villagers were gathered there and Ramesh was also present there. He has stated that investigating agency also reached. He has stated that police completed the investigation at the spot and further stated that dead body of his mother-in-law was lying in bed sheet covered with blanket. He has stated that police officials took into possession bed sheet and blanket vide seizure memo in his presence and in presence of Gian Chand. He has stated that accused was also present there. He has stated that bed sheet and blanket were wrapped and parceled in a piece of cloth which was sealed with seal. He identified the signatures in memo. He has stated that no other proceedings were completed in his presence. Witness was declared hostile by prosecution. He has stated that Ramesh is cousin of his mother-in-law. He has denied suggestion that on 31.8.2011 in the morning Ramesh @ Guddu came to his house and disclosed that accused and his mother-in-law quarrelled with each other on previous night and thereafter accused mercilessly beaten his mother-in-law under the influence of liquor. He has denied suggestion that Ramesh also told him that when he and Gian Chand tried to save deceased from wrath of accused then accused also gave beatings to them. He has denied suggestion that eight pieces of fire fuel wood of different sizes were lying in courtyard which were took into possession. He has denied suggestion that two bottles of country liquor were also lying in room. He has stated that he does not know that blood was lying upon stone in courtyard. He has denied suggestion that he has no cordial relations with accused and also denied suggestion that he has resiled from his earlier statement in order to save the accused being his son-in-law.

9.7 PW7 Chandana has stated that she used to reside at Jamethi (Luhari) District Kullu along with her mother Babli. She has stated that after death of her father Penu Ram her mother along with her children started residing with accused at Sandholi. She has stated that relations of her mother and accused were cordial. She has stated that accused did not administer beatings to her mother. She has stated that on 31.8.2011 she came to know about death of her mother. She has stated that she does not know how her mother died. Witness declared hostile. She has admitted that her deceased mother along with Shiva and Tanu used to reside with accused. She has denied suggestion that accused used to doubt the character of her deceased mother. She has denied suggestion that accused used to beat the deceeased mercilessly. She has denied suggestion that on the intervening night of 30/31.8.2011 accused given mercilessly beatings to deceased due to which deceased died. She has stated that she does not know that pieces of fire wood were lying in courtyard when they reached in courtyard. She has denied suggestion that accused had caused the death of deceased with piece of fire wood. She has denied suggestion that

she has resiled from her earlier statement just to save the accused so that accused would take care of her minor brother and sister.

9.8 PW8 HC Dev Raj has stated that he was posted as MHC in police station. He has stated that on 31.8.2011 sealed parcels deposited and he recorded entry at Sr. No. 99 in malkhana register. He has stated that extract of register is Ext.PW8/A. He has stated that on 30.9.2011 he sent all parcels and docket except one parcel containing hairs, golden ring, ring silver, black thread and black bangle etc. to FSL Gutkar vide RC No. 132 of 2011 through HHC Ganesh Singh. He has stated that parcels remained intact in his custody. He has stated that he was also posted as SHO as senior officers were away and after receipt of ruka he recorded FIR Ext.PW8/B and thereafter sent the file to SHO through HHC Roop Lal.

9.9 PW9 Yashpal has stated that he is Pardhan of Gram Panchayat. He has stated that Babli was known to him. He has stated that Babli was married with Penu Ram and four children were born from loins of Penu Ram and Babli. He has stated that Penu Ram expired in the year 2008 and after death of Penu Ram Babli came to District Bilaspur.

9.10 PW10 HHC Ganesh Singh has stated that he remained posted as HHC at P.S. Sadar during the year 2011 and on 3.9.2011 HHC Dev Raj handed over to him seven parcels, three plastic jars and two vials and two envelopes to deposit the same in laborary and he deposited the same case property in RFSL Gutkar. He has stated that parcels remained intact in his custody.

9.11 PW11 Dr.N.K. Sankhyan has stated that he remained senior medical officer in RH Bilaspur from December 1990 to February 2011 and retired as Deputy Director Health and Family Welfare Department Government of H.P. and further stated that he was re-appointed as Medical officer P.G. Forensic Medicines in R.H. Bilaspur from 20.6.2011. He has stated that on 31.8.2011 at about 4.30 PM an application Ext.PW11/A was filed by police officials along with inquest papers Ext.PW11/B and Ext.PW11/C for conducting post mortem of deceased. He has stated that he conducted the post mortem of deceased Babli. He has stated that as per inquest report deceased was killed by Khim Raj by way of giving beatings. He has stated that deceased resided with Khim Raj as his wife for the last four years. He has stated that on examination he observed the ante-mortem injuries as follow. He has stated that dead body was of adult stout female having length 160 cms and scalp and pubic hairs were black. He has stated that deceased was wearing golden coloured metallic nose pin, golden coloured metallic one ring in index finger of left hand, black coloured thread with black beads around left wrist, one steel kara around left wrist, one black ring of rubber in middle finger of right hand, one black bangle of plastic around right wrist, one black sacred thread around right ankle, reddish coloured full sleeves shirt and salwar of blue colur. He has stated that rigor mortis was present all over the body and very faint bluish purple coloured hypostasis was present over face, neck and back surface of body and was fixed. He has further stated that body had almost cooled down to room temperature. He has stated that on neck there was no ligature mark and during dissection of neck subcutaneous tissue of neck, muscles, cartilages, bones, nerves and vessels were found to be normal about 5 ml. brownish foloured fluid was pressent in trachea and larynx. He has stated that on examination he observed the ante-mortem injuries as follow. (1) There were four reddish coloured linear abrasions of length 3 cms.x7cms.2cms. and 2.5cms. obliquely placed over right check from above to below respectively. (2) Reddish coloured abrasion on right pinna in its upper portion in area of 2 cms.x 1cm blood fluid was coming out from this abrasion. (3) Reddish blue colured contusion was present over right parotid area and right angle of mandible in area 8 cms. X 3 cms. On clinic examination underlying bones and joints were normal. (4) There was reddish blue coloured contusion on left side of chin in area of 5 cms. X 2 cms. The underlying wound was normal. (5) There was bluish red coloured

contusion over shoulder right side in area of 9 cms. X 7 cms. Underlying bones and joints were normal. (6) In area of 10 cm x. 11 cm there was bluish red coloured contusion over surface of right arm underlying bones was normal. (7) There were two reddish blue coloured contusions over posteriolateral surface of right forearm in area of 10 cms x 6 cms and 4 cms x 3 cms. in upper and lower half right forearm respectively and underlying bones were normal. (8) There was reddish blue coloured contusion over dorsum of right hand in area of 11 cms. X 19 cms and underlying bones were normal. There were multiple reddish coloured linear small size abreasions over this contusion in area of 2 cm x 3 cm and in its middle portion. (9) There was contusion/swelling over left temporal region in area of 7 cm x 9 cm over the scalp. During dissection and after relecting the scalp there was gross reddish coloured contusion on inner surface of scalp and skull bones over left temporal region in area of 5 cm x 7 cm. There was no fracture of skull bones, after removing the skull cap. There was no extra dural haemorrhage dura was intact there was subdural haematoma on right temporal region with subarechnoid haemorrhage in right temporal right parietal and right occipital regions no visible injuries seen in the brain and base of skull was normal. (10) There was blush red coloured contusion on front of chest on right side extending to lower abdomen in area of 33 cm x 12 cm and during dissection of thrax the thoracic muscles on right side were grossly contused, plurae was contused adjoining 2nd, 3rd, 4th, 6th, 7th, 8th and 9th ribs on right side with fracture of 2nd, 3rd, 6th, 7th and 8th ribs right side. There were multiple reddish coloured linear small size grazed abrasion on front and back of chest on both sides and both lungs were normal and pale. Pericardium was normal, heat and large vessels were normal and almost empty and only about 7 ml of blood fluid was present. (11) There were multiple reddish coloured small sized grazed abrasions on back surface and out surface right forearm extending towards the right thumb in area of 11 cms x 10 cms and there was old fracture dislocation in proximal part of right thumb. (12) There was gross contusion of bluish red coloured over out surface of right thigh in area of 32 cm x 22 cm. There were multiple reddish coloured grazed abrasions over this said conusion in area of 17 cm x 13 cm and underlying bone femur was normal. (13) There was reddish blud colured contusion on right knee and destal part of right thigh on its front side in area of 6 cm x 9 cm. Underlying bones and joint were normal. (14) There was reddish coloured contusion in upper half of right leg in area of 5 cm x 3 cm. There were two abrasions of reddish coloured of size 3.5 cm x. 2.5 cm and 4 cm x 3 cm over this said contusion. Underlying bones were normal. (15) There was bluish red coloured contusion in upper half portion of right leg in its outer surface in area of 12 cm x 11 cm. There was reddish coloured abrasion over said contusion in area of 2 cm x 0.5 cm. Underlying bones were normal. (16) There were two reddish coloured linear abrasions on the back of left knee of length 2 cm. (17) There was bluish red coloured contusion over out surface of left arm in area of 22 cm x 12 cm. Underlying bones were normal. (18) There was bluish red colured contusion on right side of abdomen including right iliac fossa in area of 16 cm x 12 cm. There were multiple reddish coloured abrasions over this said contusion. (19) There was reddish coloured contusion in epigastrium in area of 9 cm x 10 cm. There was reddish coloured abrasion over said contusion in area of 5 cm x 1 cm. During dissection of the peritoneum and abdominal muscles were grossly contused in this area of epigastrium. Stomach was normal in size and shake and was having about 200 ml of blood fluid with no specific with smell of alcohol or poison. (20) There were multiple reddish coloured abrasion on back of trunk in area of 30 cm x 25 cm. Underlying bones and joints were normal. (21) There was bluish red coloured contusion over back surface of left forearm in area of 30 cm x 12 cms. Underlying bones were normal. There were multiple reddish coloured abrasions over said contusion in area of 6 cm x 4 cm. In distal part of this forearm. (22) There were multiple reddish coloured abrasions over dorsal aspect of left hand in area of 7 cm x 5 cm. (23) There was reddish coloured contusion over iout surface of left hip in area of 22 cm x 11 cm with three reddish

coloured abrasions of size 4 cm x 2 cm, 2 cm x 0.5 cm and 0.5 cm x 2 cm. Underlying bone and joint were normal. (24) There was bluish red coloured contusion on outer surface of left thigh in area of 16 cm x 20 cm. Reddish coloured abrasions of small size were present over the said contusion in area of 5 cm x 11 cm. Underlying bone was normal. (25) There was bluish red coloured contusion on front of left knee and upper portion of left leg in area of 10 cm x 11 cm. There were two reddish coloured abrasions over said contusion. These were of size 2 cm x 1 cm and one linear abrasion of length 2 cm. Underlying bones and joints were normal. (26) There was reddish coloured contusion in upper portion of left leg on its front in area of 7 cm x 5 cm. There was reddish coloured abrasion over this contusion horizontally placed. It was 2 cm in length and underlying bones were normal. (27) There was reddish blue coloured contusion of size 6 cm x 3 cm on front of leg left side in its middle portion. There were two reddish coloured abrasions over said contusion and these were of size 0.5 cm x 2 cm and 2 cm x 1 cm. (28) There were three lacerated wounds on front of left leg in its lower half portion. These wounds were of sized as follows. (i) 2 cm x 1 cm x bone deep. (ii) 2 cm x 1 cm x bone deep. (iii) 2.5 cm x 1 cm bone deep. Clotted blood was present in above said three wounds and around these wounds. There was no fracture of underlying bones. He has further stated that no poison or alcohol was detected in viscera. He has stated that probable time elapsed between injury and death was half hour to six hours and time which elapsed between death and post mortem was 12 hours to 36 hours. He has stated that he issued post mortem report Ext.PW11/D which is in his hand and bears his signatures. He has stated that deceasad had died due to cardio respiratory failure as a result of ante mortem injuries. He has stated that injuries mentioned in post mortem report were possible if a person is beaten with large size piece of fire wood. He has stated that he also examined Khim Raj and found following injuries. (1) Laceration in proximal part of left thumb on frontolateral size measuring 2.5 cm x 3 cm x 0.2 cm with edema and there was swelling around the wound and X-ray of right hand was advised. (2) There were two abrasions on back surface of left thumb on its proximal part in area of 3.5 cm x 1.5 cm. (3) There was complaint of pain on right knee and on clinical examination no visible injury was seen. (4) There was swelling on back of trunk right side of spine corresponding to L-2, L-3, of 4 cm x 3 cm with tenderness and X-ray was advised. He has stated that injury Nos. 2 and 3 were simple and all injuries were possible by blunt weapon and had been sustained within 12 to 30 hours. He has stated that MLC is Ext.PW11/H. He has stated that on the same day he also examined Gian Chand and Ramesh Kumar and on examination of Gian Chand following injuries were found. (1) There was reddish colour abrasion on inner side of upper lip corresponding to left lateral incisor upper jaw measuring 2 cm x 1 cm. (2) There was reddish colour abrasion measuring 2 cm x 1 cm in lower lip corresponding to left medial and later incisor lower jaw. He has stated that both injuries were simple in nature and had been sustained with blunt object within 6 to 26 hours. He has stated that on examination of Ramesh an abrasion with pus formation was seen on upper lip left side on its inner side corresponding to canine premolars teeth left side of upper jaw measuring 3 cm x 3.5 cm and these injuries were simple in nature and had been sustained within 12 to 36 hours with blunt object. He has stated that injuries present on person of Gian Chand and Ramesh were possible with fist blows. He has denied suggestion that injuries on the person of deceased were not possible with hit of fuel wood stick. He has denied suggestion that he did not conduct the post mortem of deceased. He has admitted that injuries on the person of Ramesh and Gian Chand were possible by way of fall. He has admitted that injuries on the person of accused were possible with fist and hit with sticks. He has denied suggestion that accused did not consume alcohol.

9.12 PW12 Shiva aged 11 years has stated that he is living in village Jabal with his sister Chandana and name of his deceased mother was Babli and she had died. He has stated that his father used to keep his mother in proper manner and his father is casual

labourer. He has stated that his father did not use to abuse his mother and his father did not use to beat his deceased mother. Witness was declared hostile. He has denied suggestion that his father used to give beatings to his mother in state of intoxication. He has denied suggestion that liquor was consumed jointly by his deceased mother and accused. Self stated that liquor was consumed only by his mother. He has denied suggestion that Guddu @ Ramesh came to the house of accused in night. He has denied suggestion that accused went to fetch another bottle of liquor. He has denied suggestion that liquor was consumed by his parents and Guddu. He has denied suggestion that after consuming liquor his father started abusing his mother and started levelling the allegations of adultery. He has denied suggestion that accused had given beatings to deceased. He has denied suggestion that deceased ran away towards river and also denied suggestion that deceased was brought back by accused in courtyard of Gian Chand. He has denied suggestion that accused beaten the deceased with fire wood and thereafter dragged the deceased upto courtyard and inside the residential house. He has stated that he and Tanu went to sleep in house of Gian Chand and further stated that his parents slept in the residential house in night. He has denied suggestion that deceased had died on account of beatings given by accused. He has denied suggestion that he has resiled in order to save the accused.

9.13 PW13 Dy.SP Partap Singh has stated that he was posted as SHO in P.S. Sadar in the year 2011. He has stated that on 31.8.2011 at about 8.30 AM he received a telephonic call from Dayalu Ram ward panch that one woman was killed by her husband at village Sandholi. He has stated that rapat No. 14 Ext.PW13/A was registered and he proceeded to spot along with staff and conducted spot inspection. He has stated that Gian Chand son of Durga met him at the spot and gave his statement under Section 154 Cr.P.C. Ext.PW13/C. He has stated that ruka was sent and FIR registered. He has stated that inquest papers prepared and he filed application for post mortem of dead body of deceased. He has stated that he also took into possession broken wood of different sizes. He has stated that bed sheet Ext.P13 and blanket Ext.P14 are same which were took into possession by him vide seizure memo. He has stated that broken pieces of wood are Ext.P4 to Ext.P11. He has stated that one empty bottle of liquor and one 3/4th filled bottle of liquor recovered vide seizure memo Ext.PW13/D. He has stated that blood was also lifted from the courtyard and he also prepared spot map. He has stated that he also filed application for medical examination of Ramesh @ Guddu and Gian Chand and both were medically examined. He has stated that case property was sent for chemical examination and after receipt of report of Chemical Examiner he prepared challan and presented it in Court and he identified the accused in Court. He has denied suggestion that he did not record statements of witnesses as per their versions. He has denied suggestion that when Khim Raj came with liquor he saw Ramesh running from back side of residential house. He has denied suggestion that Khim Raj found his wife in naked condition when he came back with bottle of liquor. He has denied suggestion that Khim Raj followed Ramesh. He has denied suggestion that scuffle took place beetween accused and Ramesh in courtyard of accused and also denied suggestion that deceased Babli came out to separate them. He has denied suggestion that scuffle took place between accused and Ramesh. He has denied suggestion that deceased Babli tried to separate accused and Ramesh and fallen down from retaining wall on wood. He has denied suggestion that Khim Raj did not used to beat deceased. He has denied suggestion that deceased was not killed by accused. He has stated that Ramesh and Gian Chand told him that deceased Babli was beaten by accused with fire wood. He has denied suggestion that false case filed against the accused.

10. Statement of accused recorded under Section 313 Cr.P.C. Accused has stated that he is innocent and further stated that he was asked by Ramesh @ Guddu to bring two bottles of liquor and when he came back he found deceased Babli naked in bed.

He has stated that Guddu @ Ramesh ran away when he saw him. He has stated that he caught hold of Guddu alias Ramesh outside. He has stated that during scuffle deceased came out to separate accused and Guddu @ Ramesh. He has stated that deceased had fallen down from retaining wall. He has stated that he ran away from place of incident and stayed throughout night in school. He has stated that Babli deceased sustained injuries due to fall from retaining wall. He has stated that he came in morning to his house and found that deceased was lying on stones and cut woods. He has stated that he took the deceased to his residential house. Accused did not lead any defence evidence.

11. Prosecution tendered the following documentaries evidence. (1) Ext.PW1/A is seizure memo of fire wood. (2) Ext.PW1/B is seizure memo of wood with hairs. (3) Ext.PW1/C sample seal upon plain cloth. (4) Ext.PW1/A-1 to Ext.PW4/A-12 are photographs of deceased. (5) Ext.PW6/A is the seizure memo of bed sheet and blanket. (6) Mark A-6 is MLC of Gian Chand. (7) Mark A-8 is MLC of Ramesh. (8) Ext.PW8/A is extract of register of malkhana. (9) Ext.PW8/B is application whereby viscera and other parcels sent for chemical analysis. (10) Ext.PW8/C is road certificate. (11) Ext.PW8/E is FIR No. 211 dated 31.8.2011. (12) Ext.PW11/A is application filed by investigating officer to medical officer for post mortem of deceased aged 40 years. (13) Ext.PW11/B and Ext.PW11/C are inquest reports wherein dead body of deceased was found in residential room of accused at mark A. (14) Ext.PW11/D is post mortem report of deceased Babli aged 40 years. (15) Ext.PW11/E is report of FSL Mandi. (16) Ext.PW11/G is application filed by investigating officer to medical officer for medical examination of accused Khim Raj. (17) Ext.PW11/H is MLC of accused. (18) Ext.PW11/L is application filed for medical examination of Gian Chand and Ramesh @ Guddu. (19) Ext.PW13/A is GD entry No. 14-A dated 31.8.2011. (20) Ext.PW13/B is GD entry No. 15-A dated 31.8.2011. (21) Ext.PW13/C is statement of Gian Chand recorded under Section 154 Cr.P.C. (22) Ext.PW13/D is seizure memo of two liquor bottles. (23) Ext.PW13/E is recovery memo of blood. (24) Ext.PW13/F is site plan wherein it has been specifically mentioned that dead body of deceased was found in residential house of accused at portion A. (25) Ext.PW13/G and Ext.PW13/H are statements of Shiva and Bhutto for contradiction purpose. (26) Ext.PW13/I is statement of Chandana for contradiction purpose. (27) Ext.PW13/J is statement of Smt. Leela Devi for contradiction purpose. (28) Ext.PW13/K is statement of Gian Chand for contradiction purpose. (29) Ext.PW13/L is statement of Guddu @ Ramesh for contradiction purpose. (30) Ext.PW13/M is report of FSL Mandi.

12. PW1 Gian Chand has specifically stated in positive manner when he appeared in witness box that on the date of death of deceased he found deceased and accused abusing each other. PW1 has specifically stated in positive manner that thereafter deceased and accused left to their house and thereafter deceased was found dead in residential house of accused within forewalls as per site plan Ext.PW13/F placed on record. Hence last seen theory is proved beyond reasonable doubt. Even as per testimony of PW3 Smt. Leela Devi prior to death of deceased when accused came deceased Babli started abusing the accused and refused to cook the food and thereafter deceased Babli and accused left to their residential house. Last seen theory of deceased and accused in residential house of accused is proved as per testimony of PW3 beyond reasonable doubt in present case. The same fact is fatal to accused.

13. As per site plan Ext.PW13/F dead body of deceased was found within forewalls of residential house of accused at place 'A' shown in site plan Ext.PW13/F. It is proved on record that death of deceased was conducted inside the forewalls of residential house of accused and possibility of third person committing the offence is not possible in present case. There is no evidence on record in order to prove that some third person

entered into the residential house of accused and committed murder of deceased. Even as per site plan mentioned in inquest report Ext.PW11/B placed on record dead body of deceased was found in residential house of accused as shown at place 'A. It is proved on record that accused has two rooms covered with tin sheets and dead body of deceased was found in one of rooms shown at place 'A' in site plan annexed with inquest report. As per inquest report placed on record deceased had sustained injuries upon her right ear, right cheek, right hand, neck, arms, legs. As per inquest report deceased had sustained injuries upon her entire body by way of dragging in room. Above stated facts clearly prove that accused had committed the brutal murder of deceased during night period when only deceased and accused were present in forewalls of residential room as shown in site plan annexed with inquest report. The same fact is fatal to accused.

14. As per post mortem report No. 118 dated 31.08.2011 Ext.PW11/D and as per testimony of medical officer who conducted post mortem deceased had sustained 28 ante mortem injuries. It is proved beyond reasonable doubt that there were 28 ante mortem injuries on body of deceased. Factum of 28 ante mortem injuries upon body of deceased is fatal to appellant. It is proved on record beyond reasonable doubt that deceased had sustained 28 ante mortem injuries upon her body within forewalls of residential house of accused when deceased was in company of accused in her residential matrimonial house. It is proved beyond reasonable doubt that deceased had died due to cardio respiratory failure as a reasult of hypovolumic shock due to multiple injuries. Above stated proved fact is fatal to accused.

15. PW12 Shiva minor aged 11 years has specifically stated in positive manner when he appeared in witness box that on the date of incident he and Tanu went for sleeping in house of Gian Chand and his parents slept in residential house where dead body of deceased was found. In present case Court asked the question from minor as to why minor PW12 Shiva and his sister Tanu went to house of Gian Chand for sleeping during midnight on the date of incident then minor witness did not give any answer despite giving sufficient time by Court. The facts that minors namely Shiva and Tanu went to sleep in house of Gian Chand during night period on the date of incident when deceased was killed is fatal to accused in present case and demur of PW12 Shiva is also fatal to accused in present case.

16. Accused in cross examination has suggested that when accused entered his residential room he saw deceased Babli in naked condition upon bed and he also saw that Ramesh was running away from residential house of accused from back side. Above stated suggestion of accused in cross examination proves beyond reasonable doubt motive to kill the deceased. Above stated fact is also fatal to accused in present case.

17. Admission of accused to question No. 55 recorded under Section 313 Cr.P.C.that accused ran away on the date of incident and stayed throughout night in school is a relevant fact under Section 8 of Indian Evidence Act 1872. No explanation has given by accused as to why accused left his residential house on the date of incident during mid night period when death of deceased was caused. Accused was not an employee of school and accused was simply a labourer. Fact that immediately after incident accused left the residential house during night period and stayed in school is fatal to accused in present case. As per Section 8 of Indian Evidence Act 1872 subsequent conduct of accused after incident is a relevant fact.

18. Submission of learned Advocate appearing on behalf of appellant that scuffle took place between accused and Guddu @ Ramesh and deceased came out to separate Guddu @ Ramesh and accused and fallen down from retaining wall and sustained 28 injuries 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 if any person would fall from retaining wall by way of push then 28 injuries would not be possible as mentioned in post mortem report. In present case it is proved on record that deceased had sustained different injuries upon different parts of body and we are of the opinion that if injured person would fall from retaining wall then injured would sustain the injuries upon one side of portion of body only i.e. body portion which would hit on ground surface. In view of proved facts in present case that deceased had sustained 28 different injuries on different parts of body it is held that plea of accused that deceased had sustained injuries by way of fall from retaining wall is not proved on record and same is rejected on concept of *ipse dixit.* (An assertion made without proof).

19. Submission of learned Advocate appearing on behalf of appellant that PW1 Gian Chand, PW2 Guddu @ Ramesh, PW3 Leela Devi, PW6 Bhutto, PW7 Chandana and PW12 Shiva have not supproted the prosecution story as alleged by prosecution and on this ground appeal be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. In present case the act of murder was committed during mid night in residential house within forewalls only in presence of accused and deceased. PW1 Gian Chand, PW2 Guddu @ Ramesh, PW6 Bhutto, PW7 Chandana and PW12 Shiva were not present within forewalls of residential house of accused when criminal offence was committed by accused. In view of the fact that above stated witnesses were not present at the time of commission of criminal offence of murder within four walls of residential house we are of the opinion that it is not expedient in the ends of justice to allow the appeal filed by accused.

20. We have also taken judicial notice of the fact that PW1, PW2, PW3, PW6, PW7 and PW12 are close relatives of accused and they were not present when criminal offence of murder was committed within forewalls of residential house of accused during midnight.

21. Submission of learned Advocate appearing on behalf of appellant that there is material contradiction and improvement in testimonies 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. There is no material contradiction in present case which goes to the root of case. It is well settled law that 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 during intervening night of 30/31.8.2011 and testimonies of prosecution witnesses recorded on 16.4.2012, 17.4.2012, 18.4.2012, 25.5.2012, 26.5.2012, 14.9.2012 after a gape of sufficient time. It is held that minor contradictions are bound to come when testimonies of prosecution witnesses recorded after a gap of sufficient time in criminal case. It is well settled law that concept *falsus in uno falsus in omnibus* is not applicable in criminal proceedings. ***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.***

22. Submission of learned Advocate appearing on behalf of appellant that appellant was asked to bring two bottles of liquor by Guddu @ Ramesh from liquor shop and when he came back he found his deceased wife naked in bed and also saw Guddu @ Ramesh running away from back portion of residential house when he saw the accused and hence present case is covered under sudden and grave provocation and on this ground appeal filed by appellant be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. There is no positive cogent and reliable evidence on record in order to prove that deceased Babli and Guddu @ Ramesh were in compromising condition upon the bed. Accused did not file any FIR against Guddu @ Ramesh. Even accused did not surrender

before police with plea that he had committed the offence under sudden and grave provocation. On contrary accused has admitted that he left the residential house during midnight and stayed in school during midnight. No explanation given by accused as to why the accused stayed in school during midnight. Above stated subsequent conduct of accused proves that accused had committed the murder of deceased in brutal manner after giving twenty eight injuries upon deceased. It is held that plea of sudden and grave provocation is an afterthought plea of accused just to save himself from heinous criminal offence of murder. In view of the fact that there is no positive cogent and reliable evidence that deceased Babli and Guddu @ Ramesh were found in compromising condition upon bed we are of the opinion that benefit of grave and sudden provocation cannot be given to accused in present case.

23. We have also perused photographs placed on record. As per photographs placed on record it is proved beyond reasonable doubt that accused had committed the murder of his wife aged forty years in very brutal and heinous manner during midnight period when deceased was within four walls of her matrimonial residential house.

24. We have also perusal MLC of accused Ext.PW11/H placed on record. It is proved on record that accused had also sustained four injuries. Hence it is held that accused had sustained four injuries when deceased struggled herself from clutches of accused to save herself within four walls of her matrimonial residential house.

25. Even as per chemical analyst report Ext.PW13/M placed on record human blood of Group B was found upon bed sheet, wooden pieces, salwar of deceased, shirt of deceased and pant and underwear of accused. Even as per chemical analyst report hairs collected from wooden pieces were identified as human head hairs.

26. It is well settled law that circumstantial evidence means combination of facts creating a net without any tear through which accused can escape. Essential ingredients to prove the guilt of accused by circumstantial evidence are (i) Circumstances from which conclusion is drawn should be fully proved (ii) Circumstances should be conclusive in nature (iii) All the facts so established should be consistent only with the hypothesis of guilt and inconsistent with innocence of accused (iv) Circumstance should, to a moral certainty exclude the possibility of guilt of any person other than the accused. ***See AIR 1992 SC 2045 title State of U.P. vs. Dr. Ravindra Prakash Mittal. See AIR 1952 SC 343 Hanumant Govind Nargundkar and another vs. State of Madhya Pradesh. See AIR 2010 SC 762 title Musheer Khan @ Badshah Khan and another vs. State of Madhya Pradesh. See AIR 2009 SC 56 title Shivaji @ Dadya Shankar Alhat vs. State of Maharashtra. See AIR 1979 Apex Court 1410 title State of Maharashtra vs. Annappa Bandu Kavatage. See AIR 1979 Apex Court 826 title S.P. Bhatnagar and another vs. The State of Maharashtra. See AIR 1989 SC 1890 title Ashok Kumar Chatterjee vs. State of Madhya Pradesh. See AIR 1992 SC 758 title Sakharam vs. State of Madhya Pradesh. See AIR 1975 SC 241 title Dharm Das Wadhwani vs. The State of Uttar Pradesh. See AIR 1954 SC 621 title Bhagat Ram vs. State of Punjab.*** It is well settled law that last seen theory comes into play only where time gap between the point of time when accused and deceased were lastly seen together alive and when deceased found dead is so small that possibility of third person committing offence other than accused becomes impossible. ***See AIR 2008 SC 2819 title Kusuma Ankama Rao vs. State of A.P. See Air 2002 SC 3206 title Ashish Batham vs. State of M.P. See (2013)14 SCC 434 title Rohtash Kumar vs. State of Haryana.*** It was held in case reported in ***JT 2016(2) SC 459 title Gajanan Dashrath Kharate vs. State of Maharashtra*** that if offence is committed within forewalls of house then burden is upon owner of house to prove his innocence as per Section 106 of Indian Evidence Act 1872.

27. In view of above stated facts and case law cited supra it is held that judgment and sentence passed by learned trial Court is strictly in consonance with proved facts and law and it is held that judgment of learned Trial Court is not perverse. Point No. 1 is answered in negative.

Point No. 2 (Final Order)

28. 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.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Shri Sanjay Aggarwal .....Applicant.

Versus

BLCCO Lawrie Limited & another .....Respondents.

OMP No.205 of 2015 and
Arbitration Case No.73 of 2014
Reserved on: 31.03.2016
Date of Decision: April 5 , 2016

Arbitration and Conciliation Act, 1996- Section 9- Application was filed for restraining the respondent No. 2 from releasing any amount in favour of the respondent No. 1 and to attach the amount pending to be disbursed to respondent No. 1 in the first running bill submitted by respondent No. 1 to respondent No. 2- it was contended that parties have chosen to confer jurisdiction solely and exclusively upon the Courts of South 24 Pargana, Alipore, Kolkata- held, that application under Section 9 is to be filed before the principal Civil Court of original jurisdiction which includes the High Court in exercise of original civil jurisdiction- application for arbitration is to be made before the Court which will have jurisdiction- notice inviting tender was issued from Kolkata where the registered office of respondent No. 1 is situated- parties have confined the jurisdiction to the Courts located at Kolkata- quotation was also submitted at Kolkata- the cause of action had arisen at Kolkata- hence, Courts at Himachal Pradesh will have no jurisdiction- application is not maintainable before the Court and is directed to be returned to the Court for presentation before the Court having jurisdiction. (Para-7 to 19)

Cases referred:

A.B.C. Laminart Pvt. Ltd. Versus A.P. Agencies, Salem, (1989) 2 SCC 163
Swastik Gases Private Limited Versus Indian Oil Corporation Limited, (2013) 9 SCC 32
B.E. Simoese Von Starburg Niedenthal and another Versus Chhattisgarh Investment Limited, (2015) 12 SCC 225

For the Applicant: Mr. Janesh Gupta, Advocate, for the petitioner.

For the Respondents: Mr. Bimal Gupta, Sr. Advocate with Mr.Vineet Vashista, Advocate, for respondent No.1.
Mr. Satyen Vaidya, Sr. Advocate with Mr.Vivek Sharma, Advocate, for respondent No.2.

The following judgment of the Court was delivered:

Sanjay Karol, J.

Petitioner Sanjay Aggarwal filed an application under Section 9 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act) against BLCCO Lawrie Limited and H.P. State Electricity Board Limited, with the following prayer:-

> "It is, therefore, prayed that the application may be allowed and the respondent No.2 may be restrained from releasing any amount in favour of respondent No.1 for the Award Annexure A-1 and further to attach the amount to the tune of Rs. 22,26,621/- pending to be disbursed to respondent No.1 in the first running bill submitted by respondent No.1 to respondent No.2"

2. It is not in dispute that for commissioning of work of respondent No.2, respondent No.1 allotted certain works to be executed by the petitioner. This was in terms of work order dated 20.07.2013. Allegedly, petitioner completed certain works and despite bills being raised, no payment was released. According to the applicant, bills amounting to Rs.17,79,101/- are pending with respondent No.1.

3. On 01.12.2014, this Court passed an interim order directing respondent No.2 not to release any amount pursuant to bill dated 11.09.2013 (Annexure A-2) in favour of respondent No.1.

4. Upon receipt of the notice, respondent No.2 filed the instant application (being OMP No. 205 of 2015), invoking Order 7 Rule 10 read with Section 151 of the Code of Civil Procedure, with the following prayer:-

> "It is, therefore, respectfully prayed that this application may kindly be allowed and the petition filed by the Non-Applicant/ Petitioner may kindly be held not maintainable before this Hon'ble Court and the same may kindly be dismissed and returned to the Non-Applicant/ Petitioner for presentation/filing in the Court as per stipulations in the Contract entered into between the parties."

5. It is contended that in term of Clause 34 of the Notice Inviting Tenders (NIT) parties have chosen to confer jurisdiction solely and exclusively upon the Courts of South 24 Pargana, Alipore, Kolkata.

6. At the threshold, it is clarified that application is not to be rejected solely on the ground that the applicant has referred to incorrect/wrong provisions of law. If this Court does not have jurisdiction or if the parties have otherwise conferred jurisdiction, in accordance with law, upon a particular Court, this Court would not refrain from passing any order, merely on account of such defect. The Court is obliged to examine the matter and decide the *lis,* in accordance with law. Jurisdictional issue can be considered and decided even *suo motu.* Hence such issue needs to be examined.

7. Part-1 of the Code of Civil Procedure (CPC) deals with the jurisdiction of Courts. Unless expressly or impliedly barred, all Courts have jurisdiction to try all suits of civil nature.

8. An application under Section 9 of the Act is to be filed before a "Court", which under Section 2(e) of the Act, has been defined to mean the principal Civil Court of original jurisdiction in a district, and includes the High Court in exercise of its ordinary

original civil jurisdiction, having jurisdiction to decide the questions forming the subject-matter of the arbitration, if the same had been the subject-matter of a suit, but does not include any civil court of a grade inferior to such principal Civil Court, or any Court of Small Causes.

9. Chapter-II of the Act does not provide for territorial limits of the Court, where such applications are to be filed. Only limitation prescribed is in Section 42 (Chapter-X) of the Act. The jurisdictional issue of the respective Courts is referred to therein, which is not relevant for adjudication of the controversy in issue. However, it be only observed that with respect to the arbitration agreement, an application is to be made under Part-I before a Court, and only that Court alone shall have jurisdiction over the arbitral proceedings and all subsequent applications arising out of the agreement and the arbitral proceedings are to be made only in that Court and no other Court.

10. The question which arises for consideration is as to before which Court, an application under Section 9 of the Act would lie. To answer the same, one has to again look into the provisions of Part-I of CPC. Section 15 prescribes that civil suit has to be instituted in the Court of the lowest grade, competent to try the same; Sections 17/18 deal with the cases pertaining to immovable properties; and Section 19 deals with the places where suits for actionable claims of moveable property are to be filed. Rest all other cases are to be dealt with, in accordance with the provisions of Section 20, which reads as under:-

> "20. Other suits to be instituted where defendants reside or cause of action arises.—Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—
>
> (a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the Court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
>
> (c) the cause of action, wholly or in part, arises.

11. Significantly objection with regard to the jurisdiction is required to be taken at the first instance and at the earliest possible opportunity, as is so provided in Section 21. Sections 24 and 25 deal with transfer of suits by various Statutory/Constitutional Authorities. From the bare reading of Section 20, it is apparent that the suit has to be instituted in a Court within the local limits of the jurisdiction where the defendant resides/carries on business or the cause of action, wholly or in part, arises.

12. The apex Court in *A.B.C. Laminart Pvt. Ltd. Versus A.P. Agencies, Salem,* (1989) 2 SCC 163, has observed that so long as the parties to a contract do not oust the jurisdiction of all the Courts, which would otherwise have jurisdiction to decide the cause of action under the law, it cannot be said that the parties have by their contract ousted the jurisdiction of the Court. If under the law, several courts have jurisdiction and the parties agree to submit to one of these jurisdictions and not to other or others, it cannot be said that there is total ouster of jurisdiction. In other words, where the parties to a contract agree to submit the disputes arising from it to a particular jurisdiction, which would otherwise also be a proper jurisdiction under the law, their agreement to the extent they

agree not to submit to other jurisdictions cannot be said to be void as against public policy. If on the other hand the jurisdiction they agree to submit to, would not otherwise be proper jurisdiction to decide disputes arising out of the contract, it must be declared void being against public policy. The apex Court further held that:-

> "20. When the court has to decide the question of jurisdiction pursuant to an ouster clause it is necessary to construe the ousting expression or clause property. Often the stipulation is that the contract shall be deemed to have been made as a particular place. This would provide the connecting factor for jurisdiction to the courts of that place in the matter of any dispute on or arising out of that contract. It would not, however, ipso facto take away jurisdiction of other courts. Thus, in *Salem Chemical Industries v. Bird & Co.,* AIR 1975 Guj 72**,** where the terms and conditions attached to the quotation contained an arbitration clause provided that : "any order placed against this quotation shall be deemed to be a contract made in Calcutta and any dispute arising therefrom shall be settled by an arbitrator to be jointly appointed by us", it was held that it merely fixed the situs of the contract at Calcutta and it did not mean to confer an exclusive jurisdiction on the court at Calcutta, and when a part of the cause of action had arisen at Salem, the court there had also jurisdiction to entertain the suit under Section 20(c) of the Code of Civil Procedure. "

13. Also, the apex Court in *Swastik Gases Private Limited Versus Indian Oil Corporation Limited,* (2013) 9 SCC 32, has held that:-

> "… … …
>
> 29. When it comes to the question of territorial jurisdiction relating to the application under Section 11, besides the above legislative provisions, Section 20 of the Code is relevant. Section 20 of the Code states that subject to the limitations provided in Sections 15 to 19, every suit shall be instituted in a court within the local limits of whose jurisdiction:
>
> (a) the defendant, or each of the defendants where there are more than one, at the time of commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or
>
> (b) any of the defendants, where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain, provided that in such case either the leave of the court is given, or the defendants who do not reside, or carry on business, or personally work for gain, as aforesaid, acquiesce in such institution; or
>
> (c) the cause of action, wholly or in part arises.
>
> … … …
>
> 32. For answer to the above question, we have to see the effect of the jurisdiction clause in the agreement which provides that the agreement shall be subject to jurisdiction of the courts at Kolkata. It is a fact that whilst providing for jurisdiction clause in the agreement the words like "alone", "only", "exclusive" or "exclusive jurisdiction" have not been used but this, in our view, is not decisive and does not make any material difference. The intention of the parties—by having Clause 18 in the agreement—is clear and unambiguous that the courts at Kolkata shall have jurisdiction which means that the courts at Kolkata alone shall have jurisdiction. It is so because for

construction of jurisdiction clause, like Clause 18 in the agreement, the maxim *expression unius est exclusio alterius* comes into play as there is nothing to indicate to the contrary. This legal maxim means that expression of one is the exclusion of another. By making a provision that the agreement is subject to the jurisdiction of the courts at Kolkata, the parties have impliedly excluded the jurisdiction of other courts. Where the contract specifies the jurisdiction of the courts at a particular place and such courts have jurisdiction to deal with the matter, we think that an inference may be drawn that parties intended to exclude all other courts. A clause like this is not hit by Section 23 of the Contract Act at all. Such clause is neither forbidden by law nor it is against the public policy. It does not offend Section 28 of the Contract Act in any manner.

… … …

37. In my opinion, the very existence of the exclusion of jurisdiction clause in the agreement would be rendered meaningless were it not given its natural and plain meaning. The use of words like "only", "exclusively", "alone" and so on are not necessary to convey the intention of the parties in an exclusion of jurisdiction clause of an agreement. Therefore, I agree with the conclusion that jurisdiction in the subject-matter of the proceedings vested, by agreement, only in the courts in Kolkata."

14. In *B.E. Simoese Von Starburg Niedenthal and another Versus Chhattisgarh Investment Limited,* (2015) 12 SCC 225, the apex Court had the occasion to deal with a case where parties had confined the jurisdiction to the Courts at Goa. Under identical circumstances, where an application under Section 9 of the Act was filed before the District Judge, Raipur, which Court otherwise also had jurisdiction to try the same, the Court held that competent Court of jurisdiction to try the *lis* was only Goa and not Raipur.

15. Now applying the aforesaid principles to the instant case, it is seen that Annexure A-1 was issued in favour of the applicant having its place of business in the State of Himachal Pradesh. But it was issued from Kolkata. Notice Inviting Tender was also issued in Kolkata, where the registered office of respondent No.1-Company is situate. However, as per Annexure A-1, parties had confined the jurisdiction with the Court at Kolkata. Also all disputes were to be referred to a nominated person. For ready reference, Clauses-31 and 32 of the agreement are reproduced as under:-

"… … …

31. ARBITRATION**:** Any dispute of any nature whatsoever or regarding any right, liability, act or account of any of the parties hereto arising out of or in relation to this contract / order shall be referred to the sole Arbitration of the Managing Director of Biecco Lawrie Limited, Kolkata. The award of Arbitrator so appointed shall be final and conclusive and binding on all parties to this agreement/standard terms and conditions relating to this order, subject to provisions of the Arbitration and conciliation act, 1996 or statutory modification of the enactment thereof.

32. JURISDICTION OF CONTRACT: The Contract / Purchase order shall be governed by the laws of India in force for the time being. The courts of South 24 Parganas, Alipore, Kolkata only shall have exclusive jurisdiction to deal with any dispute arising out of this contract."

16. From the communications *inter se* the petitioner and respondent No.1, it is evident that cause of action also arose in Kolkata. Parties exchanged several

communications through E-mails and postal communications were sent and received at their respective offices situate in the State of Himachal Pradesh and Kolkata. Applicant had responded to the Notice Inviting Tender by submitting his quotation at Kolkata, which is evident from letters (Pages 78-79).

17. Submissions made on behalf of the petitioner, that no cause of action arose in Kolkata, is factually incorrect. Conveniently he wants the Court to forget his following averments made in the petition:-

> "The applicant thereafter called to Kolkata office by respondent No.1 to sort out the issue and he was assured that the payment will soon be released in favour of the applicant with respect to the first bill as has been raised by him. He was asked to continue with the work and since it is a government undertaking the work and the clearance was required at various levels was the only reason as to why necessary documentation etc. was taking such long. Since the applicant had no reasons to disbelieve assurances of the respondent No.1 officials and especially when such assurances were being extended by the top management of respondent No.1, the applicant believing the same to be true came back to Nahan and continued the work at the project site." (Emphasis supplied)

18. Petitioner himself had visited Kolkata, where assurances were meted out by senior level officers of respondent No.1 in their office at Kolkata.

19. Hence, it is held that the parties being governed by agreement containing the Arbitration Clause and restricting jurisdiction to the Courts of South 24 Pargana, Alipore, Kolkata, present application not being maintainable before this Court, is directed to be returned to the applicant for presentation before the Court having competent jurisdiction.

20. Registrar General of this Court is directed to retain a photocopy of the application for its record and do the needful. Interim order dated 01.12.2014 stands vacated.

****

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

State of H.P. ...Appellant.

Vs.

Sri Ram son of Roop Lal. ...Respondent.

Cr. Appeal No.412 of 2008
Judgment reserved on:29.2.2016.
Date of judgment: March 22 ,2016

Indian Penal Code, 1860- Section 341, 342, 506 and 376 IPC read with Section 511- Accused attempted to commit rape on the prosecutrix aged 9 years and threatened to kill her- he was tried and acquitted by the Court- held, in appeal that testimony of prosecutrix is trustworthy, reliable and inspires confidence- her testimony is corroborated by other witnesses- minor prosecutrix was threatened by the accused which is proper explanation for the delay- litigation is two edged weapon and will not help the accused- minor contradictions are bound to come with the passage of time- they will not make the prosecution version

doubtful- absence of injuries on the private parts or elsewhere upon the person of the minor prosecutrix is of no consequence- the case of the prosecution was proved beyond reasonable doubt- accused convicted and sentenced. (Para-11 to 38)

Cases referred:
Bhe Ram Vs. State of Haryana, AIR 1980 SC 957
Rai Singh Vs. State of Haryana, AIR 1971 SC 2505
Gurcharan Singh Vs. State of Haryana AIR 1972 SC 2661
Rafiq Vs. State of Uttar Pradesh AIR 1981 SC 559
Madan Lal Vs. State of J&K, AIR 1998 Apex Court 386
State of Rajasthan Vs. Smt. Kalki and another AIR 1981 SC 1390
State of Punjab Vs. Hari Singh and another AIR 1974 SC 1168
Bhupendra Singh Vs. State of Punjab AIR 1968 SC 1438
State of Punjab Vs. Gurmit Singh and others 1996 (2) SCC 384
State of HP Vs. Lekh Raj and another 2000 (1) SCC 247
Madan Gopal Khaker Vs. Naval Dubey and another 1992 (3) SCC 204
Bodhisattwa Gautam Vs. Miss Subhra Chakraborty, AIR 1996 S.C. 922
State of HP Vs. Asha Ram, AIR 2006 SC 381
Jose Vs. State of Kerla, AIR 1973 SC 944
Abhayanand Mishra Vs. State of Bihar AIR 1961 S.C1698
Koppula Venkat Rao Vs. State of A.P., 2004 (3) SCC 602
State of M.P. vs. Surendra Singh, AIR 2015 SC 398
Raj Bala vs. State of Haryana and others, (2016)1 SCC 463
Gurmukh Singh vs. State of Haryana, (2009)15 SCC 635

For the appellant:	Mr. V.S.Chauhan, Addl. Advocate General with Mr.Kush Sharma, Deputy Advocate General and Mr.J.S.Guleria, Assistant Advocate General.
For the respondent:	Mr. Anand Sharma, Advocate. Ms.Ranjana Parmar, Sr. Advocate as Amicus Curiae.

The following judgment of the Court was delivered:

P.S.Rana, Judge.

Present appeal is filed against the judgment dated 4.1.2008 passed by learned Sessions Judge Bilaspur District Bilaspur HP in sessions trial No. 41 of 2005 titled State of HP Vs. Siri Ram.

Brief facts of prosecution case:

2. Brief facts of the case as alleged by prosecution are that on dated 19.11.2004 at about 3.30 PM at village Patta police station sadar District Bilaspur minor prosecutrix aged nine years was on her way and accused aged twenty three years wrongfully and illegally restrained minor prosecutrix from proceeding further and thereafter accused illegally and wrongfully confined minor prosecutrix aged nine years in his house. It is further alleged by prosecution that accused made attempt to commit rape of minor prosecutrix aged nine years and also intimidated minor prosecutrix to cause her death. It is further alleged by prosecution that FIR Ext PW7/A was filed and minor prosecutrix was medically examined by PW1 Dr. Savita Mehta and MLC Ext PW1/A was issued. It is further alleged by prosecution that site plan was prepared. It is further alleged by prosecution that clothes of minor

prosecutrix salwar Ext PW2 and shirt Ext PW3 took into possession vide seizure memo Ext PW5/A. It is further alleged by prosecution that birth certificate of minor prosecutrix obtained. It is further alleged by prosecution that medical examination of accused was conducted and MLC of accused is Ext PW2/A. Learned trial Court framed charges against accused on 28.9.2006 under Sections 341, 342, 506 and 376 IPC read with Section 511 IPC. Accused did not plead guilty and claimed trial.

3. Prosecution examined thirteen oral witnesses and also tender documentaries evidence accused also examined one oral witness in his defence. Learned trial Court acquitted the accused.

4. Feeling aggrieved against the judgment passed by learned trial Court appellant State of HP filed present appeal.

5. We have heard learned Additional Advocate General appearing on behalf of State and learned Advocate appearing on behalf of accused and also gone through the entire record carefully.

6. Following points arise for determination in present appeal:

1. Whether appeal filed by State is liable to be accepted and whether learned trial Court did not appreciate oral as well documentary evidence placed on record properly and whether learned trial court caused miscarriage of justice and whether judgment of learned trial Court is perverse as alleged in memorandum of ground of appeal?.

2. Final order.

7.Findings on point No.1 with reasons:

7.1 PW1 Dr. Savita Mehta has stated that she is posted as medical officer in regional hospital Bilaspur since 1996. She has stated that on 24.11.2004 at 10.30 AM she examined minor prosecutrix aged nine years resident of village Patta District Bilaspur. She has stated that prosecutrix was conscious and normal. She has stated that there was no mark of injury on the body of minor prosecutrix and there was no mark of injury on private parts of minor prosecutrix and hymen of minor prosecutrix was intact. She has stated that there was no possibility of penetration. She has stated that she identified minor prosecutrix in Court. She has stated that she issued MLC Ext PW1/A.

7.2. PW2 Dr. Satish Sharma has stated that he is posted as medical officer in regional hospital Bilaspur HP since 2001. He has stated that on dated 25.11.2004 at about 5.10 PM he examined accused Siri Ram son of Roop Lal aged 23 years. He has stated that he identified accused in Court. He has stated that pubic hairs of accused was fully grown, genitals well developed. He has stated that there was no bite marks or scratch marks on the body of accused. He has stated that there was no smegma found on glans of accused. He has stated that there is no evidence to suggest that accused could not perform sexual act. He has stated that he issued MLC Ext PW2/A.

7.3 PW3 Mehar Chand Sub Registrar gram panchayat Kallar has stated that he was associated in investigation of case. He has stated that date of birth certificate of minor prosecutrix is Ext PW3/A and the same is correct as per original record. He has stated that he could not state on which date the entry of minor prosecutrix was entered in birth register.

7.4. PW4 Shankuntala Devi has stated that she is posted as head teacher in government primary school Patta since November 2003 and she was associated in investigation of case. She has stated that she has brought original register of admission and

withdrawal of students. She has stated that minor prosecutrix was admitted in government primary school on 16.4.2001 and her date of birth is 24.2.1996. She has stated that she issued certificate Ext PW4/A.

7.5 PW5 Chet Ram has stated that he remained associated with police. He has stated that in his presence mother of minor prosecutrix produced clothes which were sealed in a parcel. He has stated that shirt of minor prosecutrix is Ext P2 and salwar is Ext P3. He has stated that shirt and salwar of minor prosecutrix took into possession vide memo Ext PW5/A which bears his signature.

7.6 PW6 Balbir Singh has stated that he partly investigated the case. He has stated that during investigation he obtained date of birth certificate of minor prosecutrix from Secretary gram panchayat Kallar. He has stated that he did not try to ascertain the entries in whose handwriting the entry was made.

7.7. PW7 minor prosecutrix has stated that in the year 2004 she was student of class IV. She has stated that on 19.11.2004 she returned from school along with her younger brother Adarsh at about 3.30 PM. She has stated that when she returned home from school along with her younger brother then her mother had gone to cut grass in the field and her father was also not present in home and was out of residential house in connection with his work. She has stated that after dropping school bags in residential house she and her brother were in the process to move towards fields where her mother had gone to cut grass. She has stated that when he and her brothers were proceeding towards fields then accused present in Court came from behind and caught her arm and took her inside the room of accused situated on the ground floor of house. She has stated that thereafter accused asked her brother Adarsh to bring water which he brought. She has stated that thereafter accused asked her brother Adarsh to leave the place and change his school uniform. She has stated that thereafter her brother left the place and thereafter accused bolted the door of room from inside. She has stated that thereafter accused aged twenty three years opened his pant and underwear and thereafter opened her salwar. She has stated that thereafter accused laid upon her and started performing indecent activities. She has stated that thereafter she started crying and in the meanwhile someone knocked the door of room from outside. She has stated that accused threatened her to kill her in case she would narrate the incident to anybody. She has stated that thereafter accused put up his clothes and she also put up her salwar. She has stated that thereafter accused opened the door. She has stated that outside the door one Haria electrician was present. She has stated that thereafter she came back to her house. She has stated that after four days she told her mother about the incident. She has stated that she was brought to police station and FIR Ext PW7/A was lodged. She has stated that she was medically examined in District hospital Bilaspur. She has stated that MLC Ext. PW1/A was prepared which bears her signature. She has stated that her mother had produced her salwar Ext 2 and shirt Ext P3 to investigating agency. She has identified her salwar Ext P2 and shirt Ext P3 in Court. She has denied suggestion that in the evening on 19.11.2004 the mother of accused was also called. She has denied suggestion that on 23.11.2004 her parents had quarreled with accused and his parents regarding tethering of cattle. She has denied suggestion that accused did not touch any part of her body. She has denied suggestion that she had not gone to see her mother in the fields. She has denied suggestion that accused had not caught her from arms. She has denied suggestion that accused did not take her inside the room. She has denied suggestion that her family members have a dispute with the father of accused relating to house in abadi. She has denied suggestion that at the instance of her family members she has filed a false case against accused. She has stated that she did not disclose to Hariya because accused had threatened to kill her if she would disclose the

incident to anyone. She has stated that after four days the fear of threat went away automatically.

7.8 PW8 Rattani Devi has stated that she has two children. She has stated that the age of minor prosecutrix is 11 years and the age of her son Adarsh is nine years. She has stated that on 23.11.2004 minor prosecutrix told her that on 19.11.2004 when she came from school along with her brother Adarsh at about 3.30 PM then minor prosecutrix found none in her residential house. She has stated that after dropping school bag in the residential house minor prosecutrix along with her brother Adarsh were proceeding towards fields where she was cutting grass. She has stated that when minor prosecutrix was proceedings accused caught arms of minor prosecutrix and took minor prosecutrix inside room situated on the ground floor of house of accused. She has stated that inside the room accused asked brother of minor prosecutrix Adarsh to bring water and thereafter Adarsh brought water. She has stated that thereafter accused asked minor Adarsh to change his school uniform and thereafter minor Adarsh left the place of incident. She has stated that when minor Adarsh left the place of incident then accused bolted the door of room from inside. She has stated that thereafter accused aged twenty three years opened his pant and underwear and thereafter opened salwar of minor prosecutrix aged nine years. She has stated that thereafter accused aged twenty three years laid upon the body of minor prosecutrix aged nine years and started performing indecent activities. She has stated that thereafter prosecutrix cried and raised alarm and in the meantime one Hariya electrician knocked the door of residential house of accused. She has stated that accused threatened minor prosecutrix not to narrate the incident to anybody otherwise minor prosecutrix would face dire consequences. She has stated that thereafter accused and prosecutrix put up their clothes and thereafter accused opened the door. She has stated that prosecutrix did not narrate incident prior to 23.11.2004 due to fear. She has stated that she narrated incident to her husband and thereafter went to police station and FIR Ext PW7/A was recorded. She has stated that minor prosecutrix was also medically examined. She has stated that she produced salwar Ext P2 and shirt Ext P3. She has stated that Devi Ram and Lekh Ram are real brothers. She has stated that Devi Ram is the grand father of accused and Lekh Ram is her father-in-law. She has stated that half share of house situated on abadi-deh is owned by her relative and half share is owned by the father of accused. She has denied suggestion that on 23.11.2004 there was a fight between the families of accused. She has denied suggestion that in order to pressurize the family of accused false case is planted against accused.

7.9 PW9 Vijay Pal has stated that on 23.11.2004 when he reached at home during evening from Nalagarh his wife told him about the incident occurred on 19.11.2004. He has stated that when minor prosecutrix came from school at about 3.30 PM along with her brother Adarsh minor prosecutrix did not found her mother in house and thereafter minor prosecutrix after dropping her school bag in residential house proceeded towards field where his wife was cutting grass. He has stated that when minor prosecutrix was on the way she was caught by accused and was brought in the room of accused. Thereafter accused asked minor brother of minor prosecutrix to bring water and thereafter asked minor brother of prosecutrix to leave the place and to change his school uniform. He has stated that when minor brother of minor prosecutrix left the place of incident thereafter accused bolted the room from inside and thereafter accused opened his pant and underwear and thereafter accused opened salwar of minor prosecutrix and laid upon her. He has stated that when prosecutrix cried then someone knocked door from outside. He has stated that accused threatened minor prosecutrix not to disclose the incident to anyone otherwise minor prosecutrix would face dire consequences. He has stated that thereafter accused put up his clothes and minor prosecutrix put her salwar and thereafter accused opened the door. He

has stated that one Hariya electrician was standing out side the room of accused. He has stated that FIR Ext PW7/B was filed in police station. He has stated that minor prosecutrix was also medically examined. He has stated that investigating agency also investigated the place of incident. He has denied suggestion that quarrel took place on 23.11.2004. He has denied suggestion that after filing FIR he pressurized the father of accused to vacate the possession of joint house. He has denied suggestion that no incident took place on 19.11.2004. He has denied suggestion that false FIR was filed against accused.

7.10. PW10 Hari Ram has stated that on 19.11.2004 at about 3.34 PM he went to remove electric fault in the house. He has stated that accused present in court was present at the place of incident. He has stated that minor prosecutrix was also present. He has stated that father of accused is T-mate in the electricity department. He has denied suggestion that he did not knock the door. He has denied suggestion that door was not opened by accused. He has stated that when he was cited as prosecution witness he filed an affidavit in Hon'ble High Court of HP in bail proceedings filed by accused.

7.11 PW11 minor Adarsh aged eight years has stated that on dated 19.11.2004 at about 3.30 PM he reached his house along with minor prosecutrix. He has stated that there was none in the residential house because his mother had gone to field and his father was away in connection with his work. He has stated that after dropping school bag in residential house he and minor prosecutrix proceeded towards fields where his mother had gone. He has stated that when he and minor prosecutrix were proceedings towards fields then accused present in Court caught minor prosecutrix from her arm and took her inside room. He has stated that accused asked him to bring water and thereafter he brought water and thereafter accused asked him to leave the place and to change his school uniform. He has stated that thereafter he came out from room of accused and started playing. He has denied suggestion that on reaching house from school students of village Patta started playing in the court yard. He has stated that the house of accused aged twenty three years is adjacent to the house of minor prosecutrix. He has denied suggestion that there is dispute relating to house which is in the possession of family members of accused. He has denied suggestion that on 23.11.2004 there was dispute between his family and the family of accused relating to tethering of cattle. He has denied suggestion that he deposed falsely at the instance of his mother.

7.12. PW12 Bansi Lal has stated that in the year 2004 he was posted as Sub Inspector in police station sadar Bilaspur HP. He has stated that minor prosecutrix aged nine years came to police station along with her parents and FIR Ext. PW7/A was recorded. He has stated that after registration of case investigation was conducted. He has stated that he filed application for medical examination of minor prosecutrix aged nine years and he also visited the spot and prepared site plan Ext PW12/B. He has stated that salwar and shirt were took into possession vide memo Ext PW5/A. He has stated that shirt Ext P2 and salwar Ext P3 were produced by Rattani Devi. He has stated that sample of seal was took on a piece of cloth. He has stated that application for medical examination of accused was filed. He has stated that underwear of accused took into possession. He has stated that record relating to birth of minor prosecutrix also obtained. He has denied suggestion that false case has been filed against accused. He has stated that FIR was recorded by him. He has stated that he does not know that complainant party has quarreled with accused parents.

7.13 PW13 Inspector Manoj Kumar has stated that from September 2004 till April 2007 he remained posted as SHO police station sadar Bilaspur HP. He has stated that on receipt of FSL report Ext PW13/A final report under Section 173 Cr.PC was prepared by him and challan was presented in Court. He has stated that he does not remember that Sukh Dei filed rapat No.11 mark D1 in police station.

8. Following documentaries evidence produced by prosecution. (1) Ext PW1/A is medical report of minor prosecutrix aged nine years. (2) Ext PW2/A is the MLC of accused aged twenty three years (3) Ext PW3/A is the certificate issued by sub registrar gram panchayat wherein it has been specifically mentioned that prosecutrix was born on 24.2.1996 (4) Ext PW4/A is the certificate issued by head master government primary school Patta relating to minor prosecutrix wherein it has been specifically mentioned that prosecutrix was born on 24.2.1996.(5) Ext PW5/A is the seizure memo of clothes of minor prosecutrix aged nine years i.e. shirt and salwar. (6) Ext PW7/A is the FIR. (7) Ext PW12/A is the application filed by investigating officer for medical examination of prosecutrix aged nine years. (8) Ext PW12/B is the site plan of the place of incident. (9) Ext PW12/C is the application filed by investigating officer for medical examination of accused (10) Mark D1 is the copy of rapat No.11 dated 24.11.2004 filed by Smt. Sukh Dei wife of Roop Lal. (11) Ext DA is the statement of Meena Kumari. (12) Ext PW13/A is the report of chemical analyst. (13) Ext D1 is the proceeding of gram panchayat dated 25.12.2004.

9. Statement of accused recorded under section 313 Cr.PC. He has stated that abadi deh land measuring 1.4 bigha is in the name of Lekh Ram grand father of minor prosecutrix in revenue record. He has further stated that house has been constructed by his father upon land which is in the ownership of Lekh Ram grand father of minor prosecutrix. He has stated that there is dispute upon abadi deh land. He has stated that on 23.11.2004 family members of prosecutrix gave beatings to his mother in the evening and a report in this regard was lodged in police station sadar Bilaspur HP. He has stated that he has been falsely implicated in present case.

10. DW1 Roop Lal father of accused has stated that accused is his son. He has stated that name of his grand father was Massadi Ram. He has stated that Massadi Ram died in the year 1974. He has stated that property of Massadi Ram was inherited by his three sons namely Lehnu, Devi Ram, Lekh Ram and his daughter Bhutto Devi and widow Banjaru Devi in equal shares. He has stated that consolidation proceedings took place in the year 1978-79. He has stated that his uncle Lekh Ram was literate person and consolidation proceedings conducted in his presence. He has stated that during consolidation proceedings Lekh Ram got entered khasra No. 105 in his name and in name of Banjaru Devi and Bhutto Devi. He has stated that two storeyed building belonging to joint family is situated in khasra No. 105. He has stated that all members of joint family are residing in the same building since long time. He has stated that he is in possession of 1/3rd share of building. He has stated that in lieu of land comprising in khasra No. 105 no other land was allotted to his father Devi Ram. He has stated that in November 2004 Lekh Ram and his family members asked him to vacate the possession from building situated in khasra No. 105. He has stated that in November 2004 he came to know that land comprising in khasra No. 105 has also been entered in the name of Banjaru and Bhutto Devi. He has stated that Lekh Ram claimed that Banjaru had given her share to Lekh Ram vide Will. He has stated that Bhutto Devi was also called in the village and she was asked to relinquish her share in favour of Lekh Ram. He has stated that Lekh ram asked his father Devi Ram to vacate the possession of house and his father refused to do so. He has stated that complainant party Lekh Ram quarreled with them w.e.f. 19.11.2004 till 23.11.2004. He has stated that on 23.11.2004 his wife Sukh Dei and his son Siri Ram were beaten by Lekh Ram and his family members. He has stated that report was lodged. He has stated that police did not take any action and on the contrary counter case was registered against his son. He has stated that Lekh Ram is harassing his family members and panchayat was also convened and document Ext D1 was prepared. He has stated that Lekh Ram has filed false case against his son in order to compel him to vacate his possession from building situated in khasra No. 105. He has stated that during trial Lekh Ram continued to compel him and his father to vacate the possession of house

but they have refused to do so. He has denied suggestion that on 19.11.2004 when minor prosecutrix was proceeding with her minor brother towards fields then accused caught minor prosecutrix from her arms and took her inside the room situated in the ground floor of house of accused. He has denied suggestion that minor brother of minor prosecutrix was asked to bring water. He has denied suggestion that after bringing water accused asked minor brother of minor prosecutrix to leave the place and to change his school uniform. He has denied suggestion that accused bolted the door of room from inside and thereafter opened his pant and underwear. He has denied suggestion that thereafter accused opened salwar of minor prosecutrix and committed indecent activities with the intention to commit rape. He has denied suggestion that one Hariya electrician came in the house of accused and knocked the door. He has denied suggestion that thereafter accused put up his clothes and threatened minor prosecutrix not to disclose the incident to anybody. He has admitted that victim was medically examined. He has admitted that accused was also medically examined. He has denied suggestion that being father of accused he deposed falsely in Court.

11. Submission of learned Additional Advocate General appearing on behalf of appellant that learned trial Court has not properly appreciated oral as well documentary evidence placed on record and miscarriage of justice has been caused to minor victim aged nine years who was student of 4th class at the time of incident and submission of learned Additional Advocate General that judgment of learned trial Court is perverse is accepted for the reasons hereinafter mentioned. We have carefully perused the testimony of minor prosecutrix aged nine years. PW7 minor prosecutrix has specifically stated in positive manner that in the year 2004 she was student of 4th class and on dated 19.11.2004 when minor prosecutrix aged nine years returned from school along with minor brother Adarsh at 3.30 PM there was none in her residential house because her mother had gone to cut grass in the fields and her father was also away in connection with his work. PW7 minor prosecutrix aged nine years has specifically stated that after dropping her school bag in residential house she and her minor brother Adarsh proceeded towards fields where her mother had gone to cut grass. PW7 minor prosecutrix has stated in positive manner that accused came from behind and caught arms of minor prosecutrix aged nine years and took minor prosecutrix inside his room situated in ground floor as mentioned in site plan Ext PW12/B placed on record. PW7 minor prosecutrix further stated in positive manner that accused asked her minor brother Adarsh to bring water which he brought and thereafter accused consumed water and asked her minor brother Adarsh to leave the place and to change his school uniform. PW7 minor prosecutrix has specifically stated in positive manner that when her minor brother Adarsh went out of room then accused bolted door of room from inside and thereafter accused opened his pant and underwear and then opened salwar of minor prosecutrix. PW7 minor prosecutrix has specifically stated that thereafter accused laid upon her and started performing indecent activities. Minor prosecutrix has specifically stated that thereafter she started crying and in the meantime someone knocked door from outside and thereafter accused threatened minor prosecutrix not to disclose the incident to anybody otherwise he would kill minor prosecutrix. Minor prosecutrix has specifically stated that thereafter accused put up his clothes and thereafter minor prosecutrix also put up her salwar and thereafter door was opened and one Hariya electrician was present. Testimony of minor prosecutrix is trustworthy, reliable and inspires confidence of Court. In the present case incident took place inside the four walls of room and the testimony of minor prosecutrix is very material. There is no positive evidence on record that minor prosecutrix was tutored by any person. There is no reason to disbelieve the testimony of minor prosecutrix.

12. Testimony of minor prosecutrix is further corroborated by minor witness PW11 Adarsh aged eight years. PW11 Adarsh minor witness has specifically stated in

positive manner that on dated 19.11.2004 at about 3.30 PM he reached his house along with minor prosecutrix and there was none in the residential house because mother of minor prosecutrix had gone to field and father of minor prosecutrix was away in connection with some work. PW11 Adarsh minor witness has stated in positive manner that he and minor prosecutrix after dropping their school bags in residential house moved towards the fields where their mother had gone. PW11 minor Adarsh has stated in positive manner that accused present in Court caught hold the arms of minor prosecutrix and took minor prosecutrix inside the room and asked him to bring water. PW11 minor Adarsh has specifically stated that thereafter he brought water and thereafter accused asked him to leave the place of incident. Testimony of minor prosecutrix that accused caught hold of minor prosecutrix from her arms and took her inside the room of accused is duly corroborated by testimony of PW11 Adarsh. Testimony of PW11 is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of minor witness PW11. There is no positive evidence on record in order to prove that PW11 Adarsh was tutored by any relatives.

13. Testimony of minor prosecutrix aged nine years is also corroborated by PW8 Rattani Devi mother of prosecutrix. PW8 has specifically stated in positive manner that accused caught hold minor prosecutrix from her arms and thereafter took minor prosecutrix inside the room and thereafter bolted room from inside and thereafter accused opened his pant and underwear and also opened salwar of minor prosecutrix and thereafter laid upon minor prosecutrix and started performing indecent activities. Testimony of PW8 Rattani Devi is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve the testimony of PW8 Rattani Devi who is the mother of minor prosecutrix.

14. Testimony of minor prosecutrix is also further corroborated by PW9 Vijay Pal who is the father of minor prosecutrix. PW9 Vijay Pal has stated in positive manner that on 19.11.2004 at about 3.30 PM accused caught minor prosecutrix from her arms and took minor prosecutrix inside the four walls of room and thereafter bolted the room from inside. PW9 Vijay Pal has specifically stated in positive manner that thereafter accused opened his pant and underwear and opened the salwar of minor prosecutrix and thereafter started performing indecent activities. Testimony of PW9 Vijay Pal is trustworthy, reliable and inspires confidence of Court. There is no reason to disbelieve testimony of PW9 Vijay Pal.

15. Testimony of minor prosecutrix is also partly corroborated by PW10 Hari Ram who has specifically stated in positive manner that on 19.11.2004 at about 3.30 PM he had gone to repair electric fault in the house of accused. He has specifically stated that accused and minor prosecutrix were present in the house and he obtained a screw diver from minor prosecutrix.

16. Submission of learned Advocate appearing on behalf of accused that there is delay of four days in filing FIR and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. In the present case victim was minor aged nine years and was student of 4th class at the time of incident. PW7 minor prosecutrix has specifically stated when she appeared in witness box that accused had threatened minor prosecutrix not to disclose the incident to anybody otherwise accused would kill minor prosecutrix. In view of the fact that fear was given to minor prosecutrix not to disclose incident to anybody and in view of the fact that minor prosecutrix was aged nine years and was student of 4th class at the time of incident we are of the opinion that delay in lodging FIR has been satisfactorily explained by prosecution.

17. Submission of learned Advocate appearing on behalf of accused that there is dispute between complainant party and accused family members relating to land situated in

khasra No. 105 and due to enmity a false criminal complaint filed by minor prosecutrix is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that civil dispute and criminal dispute are independent disputes. It is well settled law that civil dispute is two edged weapons and same can be used by accused also upon minor prosecutrix in order to spoil the life of minor prosecutrix. In the present case criminal offence as alleged by prosecution is proved beyond reasonable doubt as per testimony of oral witnesses and as per documentaries evidence placed on record.

18. Submission of learned Advocate appearing on behalf of accused that independent witness namely PW10 Hari Ram did not support prosecution story and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimony of PW10 Hari Ram. It is proved on record that PW10 Hari Ram was posted in electricity department and it is also proved on record that the father of accused was also posted as T-mate in electricity department. It is proved on record that PW10 Hari Ram independent witness and father of accused were posted in same department at the time of incident. It is proved on record that even PW10 Hari Ram has given an affidavit in favour of accused during bail proceeding before Hon'ble High Court of HP. We are of the opinion that it is not the case of prosecution that PW10 is the eye witness of incident but on the contrary it is the case of prosecution that incident took place inside the four walls of room after bolting the door of room from inside by accused. Eye witness of the incident is only prosecutrix and accused because only minor prosecutrix and accused were present inside the four walls of room which was bolted from inside by accused. PW10 Hari Ram was not inside the four walls of room which was bolted from inside when alleged incident was committed by accused. On the contrary it is the case of prosecution that PW10 was standing outside the room which was bolted from inside. PW10 has admitted the presence of minor prosecutrix along with accused at the place of incident.

19. Submission of learned Advocate appearing on behalf of accused that in view of document mark 'D' whereby rapat No.11 dated 24.11.2004 was filed by Smt. Sukh Dai wife of Roop Lal appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the contents of rapat No.11 dated 24.11.2004. Rapat No. 11 dated 24.11.2004 was filed against Meena wife of Kuldip and Rattani wife of Vijay Pal. There is no evidence on record that Meena wife of Kuldip and Rattani Devi wife of Vijay Pal were convicted by competent Court of law on the basis of rapat No.11 dated 24.11.2004. We are of the opinion that mere filing of rapat No.11 dated 24.11.2004 by Sukh Dai against Meena wife of Kuldip and Rattani Devi wife of Vijay Pal will not exonerate accused qua criminal offence committed by accused upon minor prosecutrix prior to time of rapat No.11 dated 24.11.2004. Rapat No. 11 dated 24.11.2004 was not filed against minor prosecutrix but it was filed against Meena and Rattani Devi. Meena and Rattani Devi is not victim in the present case. In the present case victim is minor prosecutrix who was aged nine years and was student of 4th class at the time of incident. The age of the accused at the time of incident was twenty three years. We are of the opinion that major person cannot be allowed to commit sexual assault upon minor prosecutrix aged nine years otherwise anarchy would prevail in the society. We are of the opinion that rapat No. 11 dated 24.11.2004 and FIR No. 375 of 2004 dated 23.11.2004 were filed relating to different incidents and they could not be clubbed together. We are of the opinion that rapat No. 11 dated 24.11.2004 was filed subsequent to FIR No. 375/2004. It is proved on record that FIR No. 375 of 2004 Ext PW7/A was filed by minor prosecutrix on dated 23.11.2004 prior to rapat No. 11 dated 24.11.2004. In view of the fact that rapat No. 11 dated 24.11.2004 was filed relating to different incident subsequently to FIR No. 375/2004 dated 23.11.2004 it is not expedient in the ends of justice to dismiss the appeal filed by State simply on the ground

that rapat No. 11 dated 24.11.2004 was filed by Smt. Sukh Dai against Meena Devi and Rattani Devi.

20. Submission of learned Advocate appearing on behalf of accused that in view of document Ext D1 dated 25.12.2004 placed on record appeal filed by State be dismissed is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused document Ext D1. The signatories of document Ext D1 are not eye witnesses of incident of sexual assault upon minor prosecutrix aged nine years. In view of the fact that signatories of document Ext D1 are not eye witnesses of sexual assault upon minor prosecutrix it is not expedient in the ends of justice to dismiss the appeal filed by State simply on the ground of contents of document Ext D1 placed on record. It is well settled law that under Section 67 of Indian Evidence Act 1872 contents of document should be proved by way of testimony of person who is signatory to document. Accused did not examine any person in court who is signatory to document Ext D1.

21. Submission of learned Advocate appearing on behalf of accused that there are material contradictions and improvements in prosecution story and on this ground appeal filed by State be dismissed is also rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimonies of oral eye witnesses examined by prosecution. There is no material contradiction in the testimony of prosecution witness which goes to the root of case. It is well settled law that minor contradictions are bound to come in a criminal case when the testimony of prosecution witnesses recorded after a gap of sufficient time. In the present case it is proved on record that incident took place on dated 19.11.2004 at about 3.30 PM and testimonies of prosecution witnesses were recorded on dated 2.12.2006, 26.3.2007, 28.3.2007, 16.7.2007 and 17.7.2007 after a gap of sufficient time. It is also well settled law that principle of falsus in uno falsus in omnibus is not applicable in criminal trials. 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.

22. Submission of learned Advocate appearing on behalf of accused that there is no recital in FIR that accused laid upon body of minor prosecutrix aged nine years and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused the contents of FIR. It is well settled law that FIR is not substantive piece of evidence. It is well settled law that FIR can be used only for corroborative and contradiction purpose only. There is recital in FIR that accused caught minor prosecutrix from her arms and thereafter brought minor prosecutrix inside four walls of room and thereafter accused told minor brother of minor prosecutrix to leave place of incident and change his school uniform and thereafter accused bolted the door from inside the four walls of room and thereafter accused opened his pant and underwear and thereafter accused opened trouser of minor prosecutrix aged nine years and thereafter accused started performing indecent activities upon minor prosecutrix. We are of the opinion that there is positive recital in FIR that accused opened his pant and underwear and opened trouser of minor prosecutrix aged nine years and started performing indecent activities with minor prosecutrix within four walls of room after bolting room from inside.Ingredients of attempt to rape was specifically mentioned by minor prosecutrix in the FIR. Sexual assaults upon minor girls are increasing day by day in the society. It is well settled law that every minor girl and women has legal right to live with honour and dignity in the society. In the present case it is proved on record that the age of minor prosecutrix was nine years and she was student of 4th class at the time of commission of offence and the age of accused was twenty three years at the time of commission of offence.

23. Submission of learned Advocate appearing on behalf of accused that hymen of minor prosecutrix was intact and no injury was found upon vagina of minor prosecutrix

as per medical certificate given by medical officer and on this ground appeal filed by State be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that in the present case the age of minor prosecutrix at the time of incident was nine years and the age of accused was twenty three years. At the time of incident minor prosecutrix was student of 4th class and minor prosecutrix could not resist due to her tender age and due to the fact that age of accused was twenty three years at the time of incident. It was held by Hon'ble Apex Court of India in case reported in Gurcharan Singh Vs. State of Haryana AIR 1972 SC 2661 that absence of injury or marks of violence on the private parts or elsewhere on the person of prosecutrix is of no consequence when the prosecutrix is minor and could not resist violence. Also see Rafiq Vs. State of Uttar Pradesh AIR 1981 SC 559. It is held that for offence of attempt to rape penetration of penis is not essential into vagina of prosecutrix. In the present case accused has gone beyond stage of preparation. Mere absence of penetration would not absolve accused from offence of attempt to commit rape. See AIR 1998 Apex Court 386 titled Madan Lal Vs. State of J&K. Attempt to commit criminal offence is third stage in the commission of offence.

24. Submission of learned Advocate appearing on behalf of accused that PW8 Rattani Devi, PW9 Vijay Pal and PW11 Adarsh are interested witnesses and conviction cannot be given to accused on the basis of interested witnesses is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that relative witnesses are not equivalent to the interested witnesses. See State of Rajasthan Vs. Smt. Kalki and another AIR 1981 SC 1390**,** See State of Punjab Vs. Hari Singh and another AIR 1974 SC 1168. Also see Bhupendra Singh Vs. State of Punjab AIR 1968 SC 1438.

25. Submission of learned Advocate appearing on behalf of accused that minor prosecutrix is a child witness and her testimony cannot be relied upon is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that under Section 118 of Indian Evidence Act 1872 child witness is competent witness. In the present case learned Sessions Judge has given certificate that child witness i.e. PW7 minor prosecutrix is mature enough to give statement under section 118 of Indian Evidence Act 1872. Even learned Sessions Judge has given certificate that PW11 Adarsh aged eight years is also competent to give statement under Section 118 of Indian Evidence Act 1872 and testimonies of minor witnesses were recorded on oath by learned trial Court.

26. It is well settled law that testimony of minor prosecutrix must be appreciated in the background of entire case and court must be alive to its responsibility and court should be sensitive while dealing with cases involving sexual molestation. See State of Punjab Vs. Gurmit Singh and others 1996 (2) SCC 384, See State of HP Vs. Lekh Raj and another 2000 (1) SCC 247, See Madan Gopal Khaker Vs. Naval Dubey and another 1992 (3) SCC 204.

27. Rape is not only a crime against the victim but it is a crime against entire society which destroys the entire psychology of woman and pushes the woman into deep emotional crisis. It is crime against basic human right and it is also violative of victim fundamental right granted under Article 21 of Constitution of India. See AIR 1996 S.C. 922 titled Bodhisattwa Gautam Vs. Miss Subhra Chakraborty. It is well settled law that sole testimony of prosecutrix is enough to convict accused person if the testimony of prosecutrix is free from blemish and reliable such testimony does not need corroboration. It is well settled law that minor contradiction or insignificant discrepancy in the statement of prosecutrix should not be ground for throwing out an otherwise reliable prosecution case. See AIR 2006 SC 381 titled State of HP Vs. Asha Ram. It is well settled law that conviction can be based on the testimony of solitary witness. See AIR 1973 SC 944 titled Jose Vs. State of Kerla.

28. It is well settled law that commission of offence comprises four stages. (1) Forming intention to commit crime. (2) Making preparation for the commission. (3) Attempting to commit crime (4) Actual commission of crime. See. Abhayanand Mishra Vs. State of Bihar AIR 1961 S.C1698. It is well settled law that an attempt to commit an offence can be said to begin when the preparations are complete and culprit commences to do something with the intention of committing offence and which is a step towards the commission of offence. See. 2004 (3) SCC 602 titled Koppula Venkat Rao Vs. State of A.P. In the present case it is proved beyond reasonable doubt that (1) Accused bolted the door of room from inside the room after preparation. (2) Accused confined minor prosecutrix aged nine years in the four walls of room who was student of 4th class at the time of incident. (3) Accused removed his pant and underwear and also removed salwar of minor prosecutrix aged nine years. Hence it is held that attempt to commit rape by accused upon minor prosecutrix aged nine years is proved on record in the present case beyond reasonable doubt.

29. Submission of learned Advocate appearing on behalf of accused that on testimony of DW1 Sh Roop Lal appeal filed by State of HP be dismissed is rejected being devoid of any force for the reasons hereinafter mentioned. DW1 is not eye witness of incident. DW1 was not present where criminal offence was committed by accused inside four walls of house shown in site plan Ext PW12/B. As per section 59 of Indian Evidence Act 1872 all facts except contents of documents can be proved by oral evidence. As per section 60 of Indian Evidence Act 1872 oral evidence must be direct. DW1 is not direct eye witness of criminal offence as alleged by minor prosecution aged nine years. DW1 was not present inside four walls of room where criminal offence was committed by accused.

30. Submission of learned Advocate appearing on behalf of accused that accused aged twenty three years is cousin of minor prosecutrix and it is not possible that close relative will attempt to commit rape upon minor prosecutrix is rejected being devoid of any force for the reasons hereinafter mentioned. We have taken judicial notice of facts that close relatives of girls or women are committing sexual assaults as of today in society. In present case offence against accused is proved beyond reasonable doubt as per oral and documentaries evidence placed on record

31. It is held that learned trial Court did not properly appreciate oral as well as documentary evidence placed on record and judgment of learned trial court is perverse and contrary to proved facts placed on record. It is held that learned trial Court has committed miscarriage of justice. It is held that offence punishable under Section 376 IPC read with Section 511 IPC (Attempt to commit rape) is proved against accused beyond reasonable doubt in present case. It is held that it is proved beyond reasonable doubt that accused has wrongfully restrained minor prosecutrix and offence under Section 341 IPC is proved beyond reasonable doubt as per oral testimony adduced by prosecution. It is held that criminal offence under Section 342 IPC wrongful confinement of minor prosecutrix in the four walls of room by accused is also proved beyond reasonable doubt as per oral as well as documentary evidence placed on record. It is held that offence punishable under Section 506 IPC is also proved beyond reasonable doubt against accused as per oral as well as documentary evidence placed on record. In view of above stated facts point No.1 is answered in affirmative.

Point No.2(final order).

32. In view of findings on point No1 appeal filed by State of H.P is allowed and judgment passed by learned trial.

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Cr.Appeal No. 412 of 2008.
QUANTUM OF SENTENCE:

5.4.2016
Present: Mr. V.S.Chauhan, Addl. Advocate General with Mr.Kush Sharma, Deputy Advocate General and Mr.J.S.Guleria, Assistant Advocate General for appellant.
Mr.Anand Sharma Advocate for convict.
Convict is in custody of C. Rakesh Kumar No. 459 under the supervision of ASI Rajender Kumar P.S. Sadar Bilaspur.

33. We have heard learned Additional Advocate General appearing on behalf of State and learned defence Advocate appearing on behalf of convict on quantum of sentence.

34. Learned Additional Advocate General appearing on behalf of State submitted before us that convict has attempted to commit rape upon minor prosecutrix aged 9 years who was student within four walls of room and heinous punishment be given to convict in order to maintain majesty of law.

35. On contrary learned defence Advocate appearing on behalf of convict submitted that convict is first offender and he has family to support and lenient view be taken.

36. We have considered the submissions of learned Additional Advocate General appearing on behalf of State and learned defence Advocate appearing on behalf of convict carefully.

37. In present case convict has attempted to commit rape upon minor prosecutrix aged nine years who was student within four walls of residential house. We are of the opinion that murder destroys the body of victim but rapist degrades the soul of victim. We are of the opinion that offence of rape is criminal offence against the Society at large. We are of the opinion that every minor girl has legal right to live in society with honour and dignity. We are of the opinion that it is fundamental right of minor girl to live in society with dignity and honour as per Constitution of India. It was held in case reported in ***AIR 2015 SC 398 title State of M.P. vs. Surendra Singh*** that sentence should be commensurate with gravity of offence. ***Also see (2016)1 SCC 463 title Raj Bala vs. State of Haryana and others. Also see (2009)15 SCC 635 title Gurmukh Singh vs. State of Haryana***. Keeping in view the above stated facts we sentence the convict as follows:-

Sr. No.	Offence	Sentence imposed.
1.	Section 376 read with Section 511 IPC (Attempt to rape).	Rigorous imprisonment for five years and fine to the tune of Rs.25000/- (Rupees twenty five thousand only). In default of payment of fine convict shall further undergo rigorous imprisonment for one year.
2.	Section 506 IPC	Rigorous imprisonment for two years and fine to the tune of Rs.5000/- (Rupees five thousand only). In default of payment of fine convict shall further undergo rigorous imprisonment for one month.

3.	Section 342 IPC	Rigorous imprisonment for one year and fine to the tune of Rs.1000/-(Rupees one thousand only). In default of payment of fine convict shall further undergo rigorous imprisonment for one month.
4.	Section 341 IPC	Simple imprisonment for one month and fine to the tune of Rs.500/- (Rupees five hundred only). In default of payment of fine convict shall further undergo simple imprisonment for five days.

38. All sentences shall run concurrently. Period of custody during investigation, inquiry and trial will be set off. Case property will be confiscated to State of H.P. after expiry of period of limitation of filing further criminal proceedings and in case of further criminal proceedings as directed by Hon'ble competent Authority of law. Copy of judgment and sentence will be supplied to the convict forthwith free of cost. Record of learned trial Court be sent back forthwith along with certified copy of judgment and sentence. Learned Registrar (Judicial) will issue warrant of commitment of sentence of imprisonment to the Superintendent Model Central Jail Kanda forthwith in accordance with law. Criminal appeal No. 412 of 2008 stands disposed of. Pending application if any also disposed of.

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

Tandub Chhering alias Dharama Nand .....Petitioner.

Versus

Additional District Magistrate, Pooh & ors. .....Respondents.

CMPMO No. 132 of 2015.
Reserved on: 04.04.2016.
Decided on: 05.04.2016.

Himachal Pradesh Panchayati Raj Act, 1994- 12 (1) (a) (i)- Petitioner started raising construction of his house- notice was issued to him by Gram Panchayat- Gram Panchayat passed a conditional order directing the petitioner to stop the construction and remove the construction material within 7 days- petitioner preferred an appeal before ADM, Pooh which was dismissed- held, that petitioner has not led any tangible evidence to establish his possession over the disputed land except referring to the jamabandi- according to *Shajra Nasab* the mother of the petitioner came in the village after settlement – she had house and compound in the *abadi deh* which is far away from the disputed land- disputed land was chosen for construction of Bus Stand- proceedings of the Gram Panchayat were carried strictly in accordance with law- oral and documentary evidence were correctly appreciated- petition dismissed. (Para-5 to 9)

For the petitioners: Mr. Rajneesh K. Lall, Advocate.
For the respondents: Mr. Neeraj K. Sharma, Dy. AG for respondents-State.
Mr. B.C.Verma, Advocate, for respondents No. 7 & 8.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is directed against the order dated 23.10.2014, rendered by the learned Addl. District Magistrate, Pooh in case No. 1 of 2011.

2. Key facts, necessary for the adjudication of this petition are that the petitioner started raising construction of his house on part of the land comprised in Kh. No. 530 near Shalkhar Bus Stand, opposite to Kh. No. 527 situated in village Shalkhar, Distt. Kinnaur, H.P. According to the petitioner, the land was *abadi deh.* He has started raising construction on 5.6.2011. The functionaries of the Gram Panchayat visited the spot on 6.6.2011. Notice was issued to the petitioner by the Gram Panchayat on 8.6.2011. The petitioner was permitted to place his version before the Gram Panchayat. On 23.6.2011, the petitioner submitted documents before the Gram Panchayat. The matter was adjourned to 8.7.2011. On 23.6.2011, four witnesses were produced by the petitioner, including his mother-in-law, son, nephew and sister. According to them, there was a tree below the kuhl and the petitioner used to collect its leaves. The residents of the Gram Panchayat were also permitted to give their version vide communication dated 8.7.2011. According to them, the residents of village have given the land for the construction of the Shalkhar Bus Stand. The Gram Panchayat passed the conditional order on 8.8.2011 directing the petitioner to stop the construction and remove the construction material within seven days. The petitioner, feeling aggrieved by order dated 8.8.2011 of the Gram Panchayat, Shalkhar, preferred an appeal before the learned Addl. District Magistrate, Pooh bearing case No. 1 of 2011. The learned Addl. District Magistrate, Pooh dismissed the same on 23.10.2014. Hence, this petition.

3. The villagers have brought to the notice of the Appellate Authority that the petitioner despite the stay order has started raising construction. The interim order was passed ordering the parties to maintain status quo. The copy of the order was sent to Naib Tehsildar as well as Pradhan of the Gram Panchayat, Shalkhar for due compliance.

4. I have heard learned counsel for the parties and gone through the impugned order dated 23.10.2014, carefully.

5. The petitioner has filed the written arguments before the Appellate Authority. The petitioner has not led any tangible evidence to establish his possession over the disputed land except referring to the jamabandi. It is evident that jamabandi has not been produced before the Gram Panchayat and the Appellate Authority. The fact of the matter is that the Bus Stand is on *abadi deh.* According to the objections raised by the Gram Panchayat, it was common land and the same was given to PWD for the construction of the Bus Stand. The *kuhl* also exists on the spot. The factum of the construction raised by the petitioner was verified by the Tehsildar, Pooh. He submitted the report dated 7.9.2011. According to him, on 7.9.2011, he alongwith Naib Tehsildar Hangrang and Assistant Engineer (B & R) Pooh, found that in violation of the order of the learned Addl. District Magistrate, Pooh, the petitioner has raised six pillars. The Assistant Engineer (B & R) Pooh has certified that despite the orders of the learned Addl. District Magistrate, Pooh, the petitioner on 5.9.2011, 6.9.2011 and 7.9.2011 has started construction work by engaging 4-5 masons/labourers.

6. The petitioner, in fact, has obstructed the passage and irrigation channel, besides raising construction on the site reserved for Bus Stand. In the detailed reply filed to the petition by respondent No. 7, there is reference to *Shajra Nasab* Annexure R-8/I.

According to *Shajra Nasab* Annexure R-8/I, the mother of the petitioner Smt. Neema Dolma came in the village after settlement which took place in the year 1984. According to Shajra Nasab Annexure R-8/I, the petitioner is the son of Smt. Neema Dolma. Smt. Neema Dolma was having house and compound in the *abadi deh* area of Kh. No. 530 which is far away from the proposed site of Bus Stand Shalkhar. In the spot map/*tatima*, Annexure R-8/2, the site of the house of Smt. Neema Dolma is shown at Point "A" and the proposed site of Bus Stand Shalkhar is shown at point "B". The distance between the two points is about 100 meters.

7. The Gram Panchayat has been authorized under Section 12 (1) (a) (i) of the Himachal Pradesh Panchayati Raj Act, 1994, (hereinafter referred to as the Act) to make conditional order requiring owner or the occupier of any building or land to remove any encroachment on a public street, place or drain. The Gram Panchayat has passed the conditional order on 8.8.2011 and despite that the petitioner has neither removed the encroachment over the land nor stopped the construction work.

8. Rule 51 of the Himachal Pradesh Panchayati Raj (General) Rules, 1997, prescribes the procedure for examination of the parties and their witnesses under Section 54 (3) of the Act. In the present case, it is the petitioner alone who has produced four witnesses. There is no evidence on record that during the course of proceedings before the Gram Panchayat, any witness has appeared on behalf of the complainants. The petitioner has also not raised this issue before the Appellate Authority. The petitioner, despite the orders passed by the Gram Panchayat and the Appellate Authority has continued to raise the construction. This fact was verified by the Tehsildar, Pooh by visiting the spot on 7.9.2011 alongwith Naib Tehsildar Hangrang and Assistant Engineer (B & R) Pooh.

9. The site for construction of Bus Stand Shalkhar has been chosen by the proprietors of Mauja Shalkhar in larger public interest. The budget has been sanctioned. The compound wall has already been constructed. The photograph Annexure P-6 does not prove that the petitioner was owner of the suit land. The proceedings of the Gram Panchayat were carried strictly in conformity with the Act and the Rules framed thereunder. The Gram Panchayat has correctly appreciated the entire oral as well as documentary evidence while passing the order dated 8.8.2011. The order of the first appellate Authority is reasoned/detailed. All the points urged in the appeal have been dealt with by the Appellate Authority.

10. Consequently, there is no merit in this appeal and the same is dismissed. Order dated 5.5.2015 is vacated. No costs.

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

Yagya Dutt alias Rinku .....Appellant.

Versus

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

Cr. Appeal No. 99 of 2015.
Reserved on: pril 04, 2016.
Decided on: April 05, 2016.

Indian Penal Code, 1860- Section 376, 366-A, 506- **Protection of Children From Sexual Offences Act, 2012-** Section 4- Prosecutrix had left home and on inquiry it was found that she had not even attended the school- she delivered a female child- according to DNA test, accused is biological father and prosecutrix is biological mother of the baby- accused was tried and convicted by the Court- prosecutrix was less than 18 years of the age at the time of incident- prosecutrix supported the prosecution version- her testimony was duly corroborated by the prosecution witnesses- report of DNA duly proved that prosecutrix was biological mother and accused was biological father of the baby- prosecution case was duly proved and the accused was rightly convicted by the trial Court. (Para-21 to 24)

For the appellant: Mr. Chander Shekhar Sharma, Advocate.
For the respondent: Mr. Neeraj K. Sharma, Dy. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 26.9.2014 and 27.9.2014, respectively, rendered by the learned Special Judge, Hamirpur, H.P., in Sessions Trial No. 21 of 2013, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 376, 366-A, 506 IPC read with Section 4 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act), has been convicted and sentenced to undergo seven years rigorous imprisonment and to pay fine of Rs. 20,000/- under Section 4 of the POCSO Act and in default of payment of fine to further undergo three months simple imprisonment. He was also sentenced to undergo one month's rigorous imprisonment and fine of Rs. 1000/- for offence punishable under Section 506 Part II, IPC and in default to further undergo simple imprisonment for 15 days. Both the sentences were ordered to run concurrently. The accused was acquitted of the charges under Sections 363 and 366 IPC. Since the POCSO Act is a special enactment, therefore, charge under Section 376 IPC merged under Section 4 of the POCSO Act.

2. The case of the prosecution, in a nut shell, is that on 10.8.2013, complainant Babu Ram, resident of Village Kohla submitted a complaint to the SHO concerned, to the effect that his daughter PW-2 (name withheld) aged around 17 years on 2.8.2013 left for the Government School, Bijhar where she was studying in 10th standard. She had not returned home and on inquiry from Physical Education Teacher, it was informed that she had not visited the school on the relevant date. She was searched out in his relations' house. He came to know that on 4th and 5th August, 2013, she was seen roaming in Sector 43, Chandigarh. Thereafter, he alongwith his brother-in-law Mohinder visited Chandigarh Police, but it was informed that she had boarded the bus for Hamirpur. On receipt of the written complaint, the case was registered and investigation was carried out. The copy of the birth certificate was obtained, according to which, the date of birth of the prosecutrix was 30.10.1996. The accused was arrested. The victim was medically examined at RH Hamirpur. Her vaginal swabs and slides were retained and got analyses. During the course of investigation/trial, PW-2 prosecutrix delivered a female child and was adopted by one Attri Devi. On the request of the police, the doctor retained the blood samples of victim, accused and newly born female child for DNA profile. PW-2 prosecutrix is the biological mother and accused is biological father of newly born female baby Kanak. The statement of the victim was also recorded under Section 164 Cr.P.C. by the JMIC, Barsar.

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 23 witnesses. The accused was also examined under Section 313 Cr.P.C. He pleaded innocence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Chander Shekhar Sharma, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Neeraj K. Sharma, Dy. Advocate General for the State has supported the judgment of the learned trial Court dated 26/27.9.2014.

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

6. PW-1 Sheetla Devi is the mother of the prosecutrix. Her daughter was 17 years of age. She was studying in 10th class in Government Senior Secondary School Bijhari. On 2.8.2013, her daughter had gone to school as usual but she did not return back to home till evening. In the evening, she received a telephone call from village Bharari that her daughter had not attended school and has gone to Chandigarh. She knew Sushma Devi who belongs to village Bharari. She also inquired from her who told her that the prosecutrix used to talk on telephone with Sanjay Kumar alias Yagya Dutt, accused. She also disclosed that the prosecutrix told her that the accused was working at Chandigarh. The prosecutrix returned home on 17.8.2013 from Chandigarh. She informed that the accused used to meet her in the fields and there he had committed sexual intercourse with her. She also disclosed her that the accused threatened her with dire consequences if she disclosed the incident to her parents. On 3.8.2013, when the prosecutrix had become pregnant she was called by the accused at Mehre for abortion but the accused did not turn up. He told the prosecutrix to meet him at Chandigarh. At Chandigarh, she was intercepted by the police. She boarded the bus to Hamirpur at the instance of the police. She stayed during night in the shed near Jahu. The prosecutrix gave birth to a female child in District Hospital, Hamirpur. The female child was adopted by Smt. Attri Devi, resident of Village Kuthera, Tehsil Ghumarwin. In her cross-examination, she deposed that the prosecutrix was born in her parental house in Tehsil Ghumarwin. Her marriage took place about 18 years back. The name of the prosecutrix was entered in the Panchayat record by her brother-in-law (Dever) Suresh after five months of her birth.

7. PW-2 is the prosecutrix. According to her, in the month of February, 2013, she came in contact with accused Yagya Dutt. The accused used to call her from his mobile number. In the month of February, 2013, her mother was admitted in RH Hamirpur. She used to stay at her house. She had gone to fields to bring grass and accused was already there. The accused committed sexual intercourse with her and threatened with dire consequences if she disclosed this fact to anyone. The accused used to meet her in the fields as and when she went to bring grass. In the month of May/June, she skipped her menstruation period. She informed the accused who told that he would get the same aborted. On 1.8.2013, accused told her to meet at Mehre on 2.8.2013. When she reached at Mehre accused did not turn up. She was having Rs. 700/- with her. She rang him up, upon which accused told her to come to Chandigarh. When she went to Chandigarh, accused did not meet her. Chandigarh police inquired the prosecutrix. She boarded the bus and reached Hamirpur at 6:00 PM. At Hamirpur bus stand she met with one lady who took her to her house as it was dark. Her medical examination was conducted at RH Hamirpur vide MLC Mark “C”. On 5.11.2013, she gave birth to a female child at RH

Hamirpur. The female child was adopted by Smt. Attri Devi resident of Village Kuthera, Tehsil Ghumarwin.

8. PW-3 Babu Ram is the father of the prosecutrix. According to him, the prosecutrix was studying in 10th class in Government Senior Secondary School Bijhari. On 2.8.2013, his daughter left to school but did not return home. He inquired from a teacher and told him that she has not attended the school. On 2.8.2013, he was in the house of his in-laws and his wife informed him on telephone and told that the prosecutrix did not come home. On 3.8.2013 one driver told him that his daughter was at Chandigarh. Then, they went to Chandigarh but she was not found. On inquiry from police at Chandigarh, it was revealed that she had boarded the bus to Hamirpur. Thereafter, they came back from Chandigarh. His daughter was 17 years old. On 10.8.2013, he moved an application vide Ext. PW-3/A to the police. On 17.8.2013, he was informed telephonically by one lady of Ropari about the prosecutrix. He went there and brought his daughter to home. In his cross-examination, he deposed that he searched for his daughter at Shimla, Hamirpur and various other places.

9. PW-4 Meeran Devi deposed that she was running a Karyana shop at Ropari. She knew the prosecutrix and her mother as they used to visit her shop. On 17.8.2013 at about 5:15 PM the prosecutrix was roaming nearby her shop and she called her to her shop and made her to sit. At about 6:00 PM, she rang up her relative Asha Devi in village Kohla and told her that the prosecutrix was sitting in her shop. Thereafter, father of the prosecutrix came at Ropari and took her with him.

10. PW-5 Surinder Kumar deposed that on 26.8.2013 I.O. moved an application for issuance of date of birth certificate of the prosecutrix. He issued it vide Ext. PW-5/A. In his cross-examination, he deposed that the date of birth of the prosecutrix was entered in the Birth Register on 13.7.2001. The informant was Babu Ram. The age of mother of the prosecutrix was 23 years in the Birth Register. Within one year and one month of birth of a child, the entry was made by the orders of the CMO and thereafter the concerned Sub Divisional Magistrate. In this case, there were no orders of CMO/SDM.

11. PW-7 Dr. Ms. Rajneesh Thakur, has examined the prosecutrix. According to her opinion, there was evidence of sexual intercourse and patient was pregnant with gestational age of 28 weeks one day. She issued MLC Ext. PW-7/B.

12. PW-12 Sushma Devi deposed that she was studying in Plus One in Government Senior Secondary School Bijhari. She knew the prosecutrix. They also visited the fair together. The prosecutrix was having mobile but she did not disclose its number. She used to talk with some boy named, Sanju and that boy was doing some job at Chandigarh.

13. PW-13 ASI Jai Devi is the I.O. He visited the spot and prepared site plan vide Ext. PW-13/A. The accused was arrested on 19.8.2013. He was taken for medical examination. The victim was also got medically examined. In his cross-examination, he deposed that as per the version of the father of the prosecutrix, she told Chandigarh police her age to be 19 years, student of B.A-I and belonging to place Ropar.

14. PW-14 Dr. Manish Sharma has medically examined the accused. He issued MLC Ext. PW-14/A. In his opinion, there was nothing to suggest that male examined was not capable of indulging in sexual activity.

15. PW-15 Dr. Sanjeev Sharma, Radiologist, RH Hamirpur has conducted ultrasound examination of the prosecutrix. He proved report Ext. PW-15/A. According to his report, the age of the foetus was 28 weeks.

16. PW-16 Attri Devi deposed that the newly born child was adopted by her with the consent of the prosecutrix and her parents.

17. PW-17 Dr. Pushpinder Verma deposed that on 25.11.2013, an application Ext. PW-17/A was moved for collecting blood sample of the prosecutrix for DNA profiling by the police. It was collected on the same day and put on the FTA card.

18. PW-18 Dr. Rakesh Dhiman deposed that on 23.8.2013 on the request of the police he took blood sample of accused for DNA profiling and the same was put on FTA card. On 14.11.2013 he took blood sample of female Kanak and put the same on FTA card.

19. PW-21 HC Ranjit Singh deposed that on 30.11.2013 all the three sealed envelopes alongwith sample seal and other documents were sent to FSL Junga through Const. Sanjeev Kumar vide RC No. 157/2013 dated 30.11.2013.

20. PW-23 SI Mohinder Singh deposed that on 10.8.2013, Babu Ram presented complaint Ext. PW-3/A, on the basis of which FIR Ext. PW-23/A was registered. The prosecutrix delivered a female child Kanak. By taking notice of it, further investigation was entrusted to ASI Parkash Chand. The report of the FSL, Junga Ext. PW-23/G was obtained.

21. The date of birth of the prosecutrix as per Ext. PW-5/A was 30.10.1996. She was below 18 years of age at the time when she was sexually assaulted by the accused. Ext. PW-5/A birth certificate, has been duly proved by PW-5 Surinder Kumar.

22. PW-2 prosecutrix, in her examination in chief, has categorically stated that the accused used to call her from his mobile number and she came in contact with the accused in the month of February, 2013. When her mother was admitted in RH Hamirpur, she used to stay at her house. She had gone to fields to bring grass. The accused was present there. He committed sexual intercourse with her and threatened her with dire consequences. She skipped her menstruation period in the month of May/June, 2013. She disclosed this fact to the accused. He promised her to get the same aborted. She was told by the accused to be present at Mehre but he did not turn up. Thereafter, the accused asked her to meet him at Chandigarh but he was not present even at Chandigarh. The Chandigarh police made her to board bus to Hamirpur. It is, in these circumstances, the prosecutrix returned back to Hamirpur and delivered a female child, namely, Kanak on 5.11.2013. The child was adopted by Smt. Attri Devi PW-16.

23. The statement of PW-2, prosecutrix has been duly corroborated by PW-1 Sheetla Devi and PW-3 Babu Ram, mother and father of the prosecutrix, respectively. PW-2 prosecutrix has informed PW-1 Sheetla Devi that accused was visiting the fields and committing sexual intercourse with her. The accused has also threatened her with dire consequences. According to her, the age of the prosecutrix was 17 years. Similarly, PW-3 Babu Ram also deposed that the age of the prosecutrix was 17 years. He was informed on 17.8.2013 on telephone by one lady of Ropari in the evening about the prosecutrix. Thereafter, he brought his daughter back to home. He moved an application Ext. PW-3/A before the police, on the basis of which, FIR was lodged.

24. The prosecutrix was medically examined by PW-7 Dr. Ms. Rajneesh Thakur. The age of the foetus was found to be 28 weeks 1 day. The blood samples of the prosecutrix, accused and baby Kanak were also retained. The report of the FSL is Ext. PW-23/G. The victim was the biological mother of the newly born baby, namely, Kanak and accused was

her biological father, as per the report. Thus, the prosecution has proved its case against the accused beyond reasonable doubt. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 26/27.9.2014.

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

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

Smt. Bano Devi ...Appellant.
Versus
Smt. Rashilu Devi & others ..Respondents.

FAO No. 344 of 2007
Reserved on : 29.03.2016
Date of Decision: April 6, 2016

Workmen Compensation Act, 1923- Section 22- Employee died as a result of motor vehicle accident- his mother and wife were dependent upon him- mother filed an application for compensation, which was allowed- wife re-married subsequent to the accident- when mother filed an application for release of the amount, wife also sought the release of the amount which was declined- held, that a widow falls within the definition of dependent and employer is under an obligation to deposit the amount with the Commissioner Workmen Compensation- wife was dependent upon the deceased being his widow- dependency has to be determined on the date of the accident- merely because she had not filed the claim petition within two years is not sufficient to deny the compensation to her- hence, the order of the Commissioner set aside and the amount ordered to be apportioned in the ratio of 30:70. (Para-3 to 18)

Cases referred:
Pratap Narain Singh Deo Versus Srinivas Sabata and another, (1976) 1 SCC 289
Kerala State Electricity Board and another Versus Valsala K. and another, (1999) 8 SCC 254
Oriental Insurance Co. Ltd. Versus Khajuni Devi and others, (2002) 10 SCC 567
New India Assurance Co. Ltd. Versus Momina Khatum and others, 2008 ACJ 2734
Maan Singh alias Man Bahadur and another Versus New India Assurance Co. Ltd. and another, 2005 LAB I.C. 1300.
Oriental Insurance Company Versus Dayamavva and others, (2013) 9 SCC 406

For the Appellant: Mr. Vinod Kumar Thakur, Advocate.
For the Respondents: Mr. G.R. Palsra, Advocate, for respondents No.1 and 2.
Mr. Lalit Sharma, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Sanjay Karol, J.

In this appeal filed under Section 30 of the Workmen's Compensation Act, 1923 (hereinafter referred to as the Act), petitioner has assailed the impugned order dated 07.08.2007, passed by Commissioner under the Workmen's Compensation Act, 1923,

Sundernagar, District Mandi, H.P., in File No.2, titled as *Smt. Rashilu Devi Versus Secretary, Self Help Group Bhaterh & another.*

2. Appeal stands admitted on the following substantial questions of law:-

1. Whether the learned Commissioner could have rejected the application on the ground that the petitioner was not the claimant though it was duly proved that she was a dependent of the deceased workman at the relevant time being his wife?

2. Whether the learned Commissioner erred in concluding that it could not exercise powers for apportioning the compensation under the Workmen Compensation Act, particularly, once the petitioner was proved to be a dependent?

3. The issue which arises for consideration in the present appeal is as to whether in the absence of lodging of any claim, a widow of the deceased employee, only on account of her subsequent remarriage, is precluded from receiving compensation so determined by the Commissioner (Workmen's Compensation), in a petition filed by another dependant-her mother in law.

4. Certain facts are not in dispute. Jagdish Chand, an employee of respondent No.2, during the course of his employment, died on 13.11.2002. He died as a result of a motor vehicle accident. It is not in dispute that at the time of his death, his mother Rashilu (respondent No.1 herein) and wife Bano Devi alias Banita (present petitioner), were dependent upon him. It is also not in dispute that Rashilu Devi alone filed an application under Section 22 of the Act, which came to be allowed in terms of order dated 26.06.2006, passed by the Commissioner (Workmen's Compensation), in File No.2, titled as *Smt. Rashilu Devi Versus Secretary, self help group Bhaterh & another.* Bano Devi was not a party therein and such order attained finality. It is also not in dispute that Bano Devi remarried on 07.09.2003. It is also not in dispute that subsequently, Rashilu Devi filed an application for release of compensation, in which on her asking, notice came to be issued to Bano Devi. The authority below, rejected her entitlement, in terms of impugned order dated 07.08.2007. The authority found the claim of Bano Devi to have been eclipsed for non filing of claims within a period of two years, so prescribed under Section 10 of the Act.

5. Hence the present appeal, so filed under Section 30 of the Act.

6. For the purposes of adjudication of the controversy in issue, it is appropriate to reproduce the relevant provisions of the Act:-

> 2. Definitions.-- (1)….
>
> (d) "dependent" means any of the following relatives of a deceased workman, namely:-
>
> (i) a widow, a minor legitimate or adopted son, an unmarried legitimate or adopted daughter, or a widowed mother; and
>
> (ii) if wholly dependent on the earnings of the workman at the time of his death, a son or a daughter who has attained the age of 18 years and who is infirm;
>
> (iii) If wholly or in part dependent on the earnings of the workman at the time of his death,-
>
> (a) a widower,
>
> (b) a parent other than a widowed mother, … … … (Emphasis supplied)

3.Employer's liability for compensation.—(1) If personal injury is caused to a workman by accident arising out of and in the course of his employment, his employer shall be liable to pay compensation in accordance with the provisions of this Chapter:

Provided that the employer shall not be so liable—

(a) in respect of any injury which does not result in the total or partial disablement of the workman for a period exceeding three days;

(b) in respect of any[injury, not resulting in death or permanent total disablement, caused by an accident which is directly attributable to—

(i) the workman having been at the time thereof under the influence of drink or drugs, or

(ii) the willful disobedience of the workman to an order expressly given, or to a rule expressly framed, for the purpose of securing the safety of workmen, or

(iii) the willful removal or disregard by the workman of any safety guard or other device which he knew to have been provided for the purpose of securing the safety of workmen. … … …"

(5) Nothing herein contained shall be deemed to confer any right to compensation on a workman in respect of any injury if he has instituted in a Civil Court a suit for damages in respect of the injury against the employer or any other person; and no suit for damages shall be maintainable by a workman in any Court of law in respect of any injury—

(a) if he has instituted a claim to compensation in respect of the injury before a Commissioner; or

(b) if an agreement has been come to between the workman and his employer providing for the payment of compensation in respect of the injury in accordance with the provisions of this Act."

(Emphasis supplied)

4. Amount of compensation – (1) Subject to the provisions of this Act, the amount of compensation shall be as follows, namely:-

(a) Where death results from the injury	an amount equal to fifty per cent of the monthly wages of the deceased workman multiplied by the relevant factor; or an amount of eighty thousand rupees, whichever is more;

Explanation I. – For the purposes of clause (a) and clause (b), "relevant factor", in relation to a workman means the factor specified in the second column of Schedule IV against the entry in the first column of that Schedule specifying the number of years which are the same as the completed years of the age of the workman on his last birthday immediately preceding the date on which the compensation fell due.

… … …

Explanation II. – Where the monthly wages of a workman exceed four thousand rupees, his monthly wages for the purposes of clause (a) and clause (b) shall be deemed to be four thousand rupees only;

.. … …

(1-A) Notwithstanding anything contained in sub-section(1), while fixing the amount of compensation payable to a workman in respect of an accident occurred outside India, the Commissioner shall taken into account the amount of compensation, if any, awarded to such workman in accordance with the law of the country in which the accident occurred and shall reduce the amount fixed by him by the amount of compensation awarded to the workman in accordance with the law of that country.

.. .. ..

(4) If the injury of the workman results in his death, the employer shall, in addition to the compensation under sub-section (1), deposit with the Commissioner a sum of two thousand and five hundred rupees for payment of the same to the eldest surviving dependant of the workman towards the expenditure of the funeral of such workman or where the workman did not have a dependant or was not living with his dependant at the time of his death to the person who actually incurred such expenditure.

(Emphasis supplied)

8. Distribution of compensation.—(1) No payment of compensation in respect of a workman whose injury has resulted in death, and no payment of a lump sum as compensation to a woman or a person under a legal disability, shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation:

Provided that, in the case of a deceased workman, an employer may make to any dependant advances on account of compensation of an amount equal to three months' wages of such workman and so much of such amount as does not exceed the compensation payable to that dependant shall be deducted by the Commissioner from such compensation and repaid to the employer.

(2) Any other sum amounting to not less than ten rupees which is payable as compensation may be deposited with the Commissioner on behalf of the person entitled thereto.

(3) The receipt of the Commissioner shall be a sufficient discharge in respect of any compensation deposited with him.

(4) On the deposit of any money under sub-section (1), as compensation in respect of a deceased workman the Commissioner shall, if he thinks necessary, cause notice to be published or to be served on each dependant in such manner as he thinks fit, calling upon the dependants to appear before him on such date as he may fix for determining the distribution of the compensation. If the Commissioner is satisfied after any inquiry which he may deem necessary, that no dependant exists, he shall repay the balance of the money to the employer by whom it was paid. The Commissioner shall,

on application by the employer, furnish a statement showing in detail all disbursements made.

(5) Compensation deposited in respect of a deceased workman shall, subject to any deduction made under sub-section (4), be apportioned among the dependants of the deceased workman or any of them in such proportion as the Commissioner thinks fit, or may, in the discretion of the Commissioner, be allotted to any one dependant.

(6) Where any compensation deposited with the Commissioner is payable to any person, the Commissioner shall, if the person to whom the compensation is payable is not a woman or a person under a legal disability, and may, in other cases, pay the money to the person entitled thereto.

(7) Where any lump sum deposited with the Commissioner is payable to a woman or a person under a legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the woman, or of such person during his disability, in such manner as the Commissioner may direct; and where a half-monthly payment is payable to any person under a legal disability, the Commissioner may, of his own motion or on an application made to him in this behalf, order that the payment be made during the disability to any dependant of the workman or to any other person, whom the Commissioner thinks best fitted to provide for the welfare of the workman.

(8) Where, on application made to him in this behalf or otherwise, the Commissioner is satisfied that, on account of neglect of children on the part of a parent or on account of the variation of the circumstances of any dependant or for any other sufficient cause, an order of the Commissioner as to the distribution of any sum paid as compensation or as to the manner in which any sum payable to any such dependant is to be invested, applied or otherwise dealt with, ought to be varied, the Commissioner may make such orders for the variation of the former order as he thinks just in the circumstances of the case:

Provided that no such order prejudicial to any person shall be made unless such person has been given an opportunity of showing cause why the order should not be made, or shall be made in any case in which it would involve the repayment by a dependant of any sum already paid to him."

(Emphasis supplied).. ... ...

10. Notice and claim.—(1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years of the occurrence of the accident or, in case of death, within two years from the date of death:

Provided that, where the accident is the contracting of a disease in respect of which the provisions of sub-section (2) of section 3 are applicable, the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease:

Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to

absent himself from work, the period of two years shall be counted from the day the workman gives notice of the disablement to his employer:

Provided further that if a workman who, having been employed in an employment for a continuous period, specified under sub-section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:

Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim—

(a) if the claim is preferred in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place where the accident occurred, or

(b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed had knowledge of the accident from any other source at or about the time when it occurred:

Provided further that the Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause.

(2) Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon[any one of several employers, or upon any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed.

(3) The State Government may require that any prescribed class of employers shall maintain at their premises at which workmen are employed a notice book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured workman employed on the premises and to any person acting *bona fide* on his behalf.

(4) A notice under this section may be served by delivering it at, or sending it by registered post addressed to, the residence or any office or place of business of the person on whom it is to be served, or, where a notice book is maintained, by entry in the notice book.

(Emphasis supplied)

"22. Form of application.—(1) Where an accident occurs in respect of which liability to pay compensation under this Act arises, a claim for such compensation may, subject to the provisions of this Act, be made before the Commissioner.

(1-A) Subject to the provisions of sub-section (1), no application for the settlement of any matter by a Commissioner, other than an application by a dependant or dependants for compensation, shall be made unless and until some question has arisen between the parties in connection therewith which they have been unable to settle by agreement. (2) An application to a Commissioner may be made in such form and shall be accompanied by such fee, if any, as may be prescribed, and shall contain, in addition to any particulars which may be prescribed, the following particulars, namely—

(a) a concise statement of the circumstances in which the application is made and the relief or order which the applicant claims;

(b) in the case of a claim for compensation against an employer, the date of service of notice of the accident on the employer, and, if such notice has not been served or has not been served in due time, the reason for such omission;

(c) the names and addresses of the parties; and

(d) except in the case of an application by dependants for compensation a concise statement of the matters on which agreement has and of those on which agreement has not been come to.

(3) If the applicant is illiterate or for any other reason is unable to furnish the required information in writing, the application shall, if the applicant so desires, be prepared under the direction of the Commissioner."

(Emphasis supplied)

7. Widow whether financially dependant or not is a dependant, for the purpose of the Act as is evidently clear from the definition of the word 'dependant' (Section 2(d)).

8. From the conjoint reading of Sections 3 and 4 of the Act, it is clear that in the event of injury/death of an employee resulting by virtue of an accident during the course of employment, duty is cast upon the employer to pay compensation, in the prescribed manner. The employer is under an obligation to deposit the amount, within the stipulated period, with the Commissioner (Workmen's Compensation).

9. Disbursement of the amount of compensation so deposited with the Commissioner has to be under Section 8 of the Act.

10. In terms of Section 10 of the Act, in the event of claim being preferred within two years from the occurrence of the accident/death, Commissioner (Workmen's Compensation) is under an obligation to determine the compensation. Significantly even in the absence of notice, failure explained for a sufficient cause, Commissioner has to determine the same. All that Section 10 postulates is that notice of accident is required to be furnished to the Commissioner. All claims are adjudicated under Chapter III of the Act. All claims with regard to determination of compensation and liability thereof, including disbursement of the amount, is to be adjudicated only and only by the Commissioner. Even the jurisdiction of a Civil Court stands specifically excluded, as is evident from the bare reading of Section 19 of the Act.

11. An application for determination of compensation is to be filed before the Commissioner on a prescribed form. Neither any Section nor does the form stipulates that all the dependants must be party applicants. The Commissioner in terms of sub-section (2) of Section 22, is enjoined with the duty to adjudicate the rights of the dependants and the amount of compensation to which each one of them are entitled to.

12. In the instant case, present petitioner Bano Devi, was dependent upon the deceased, being his widow. The question which still needs to be considered is as to whether such dependency has to be considered as on the date of the accident; date of filing of the application; date of adjudication of the claims; or date of disbursement of the amount. This question is no longer *res integra,* for the apex Court in *Pratap Narain Singh Deo Versus Srinivas Sabata and another,* (1976) 1 SCC 289; *Kerala State Electricity Board and another Versus Valsala K. and another,* (1999) 8 SCC 254 and *Oriental Insurance Co. Ltd. Versus Khajuni Devi and others,* (2002) 10 SCC 567, has categorically held the rights of the dependants are to be determined as per the laws prevalent on the date of the accident.

13. At the cost of repetition the purpose of the Act is clarified. Widow need not be financially dependent. The Act is a beneficial legislation enacted to provide for payment by certain classes of employer to their workman, compensation as a result of injury by accident. Object being to protect the interest of the workman and alleviate the suffering and eliminate their hardships. A mechanism is provided for resolving the dispute at the earliest and avoid unjust suffering to an employee/his dependent. The onus to furnish information of the accident and pay compensation is upon the employer. It is a beneficial piece of legislation enacted to compensate the workmen and their dependants in the event of accidents during the course of employment. Section 3 fastens liability upon the employer to pay compensation to the dependants/injured/deceased, in accordance with the provisions of the Act. What would be that amount of compensation is to be determined in terms of formula laid down under Section 4 of the Act. Significantly Section 8 clarifies that money is to be paid to the dependants. If the dependent is a woman or a person with legal disability, compensation so determined is to be paid only through the Commissioner (Workmen's Compensation), who is duty bound to determine the question of apportionment and disbursement thereof. This has to be done in terms of Section 8 of the Act, which also empowers the Commissioner (Workmen's Compensation) to vary the orders with regard to the determination of the amount from time to time, depending upon the change in the circumstances of the dependants. Section 10 requires issuance of notice to the Commissioner (Workmen's Compensation) informing the occurrence of the accident/death. This has to be done within two years therefrom. However, as is evident from the 4th proviso of Clause (b) that even failure on the part of the dependant to serve such notice, is not fatal to the claim for compensation preferred by the dependent if the employer had knowledge of the factum of the accident. [*New India Assurance Co. Ltd. Versus Momina Khatum and others,* 2008 ACJ 2734 & *Maan Singh alias Man Bahadur and another Versus New India Assurance Co. Ltd. and another,* 2005 LAB I.C. 1300. Whole purpose and object of the notice is to move the machinery in the office of the Commissioner (Workmen's Compensation) for just and fair determination and quick disbursement of the amount due to the rightful claimants. The idea is to make the employer accountable and not defeat the claim of the dependants. The Commissioner (Workmen's Compensation) is empowered, upon being satisfied with the reasons for delay, in entertaining the claim beyond a period of two years. The Act does not prescribe that each one of the dependants is required to issue an independent or a collective notice. Information sought to be furnished is with regard to occurrence of the accident regardless of the person, who comes forward to do the needful. In fact, as is evident from the form prescribed for determination of compensation (Section 22) claims can be made by a third party for and on behalf of the claimants.

14. The apex Court in *Oriental Insurance Company Versus Dayamavva and others,* (2013) 9 SCC 406, has clarified that the procedure prescribed under Section 8 of the Act, is initiated at the behest of the employer *"suo motu"* and cannot be considered as an exercise of option by the dependants/claimants to seek compensation under the provisions of the Act.

15. The question of claim of the petitioner being eclipsed by law of limitation, as held by the Commissioner does not arise. Strictly, laws of limitation do not apply to the proceedings under the Workmen's Compensation Act, 1923. Of course principle of delay and laches, in the given facts and circumstances, may or may not apply.

16. In the instant case, claim petition came to be filed on behalf of one of the dependants. That was sufficient for determination of compensation. Limitation so prescribed under Section 10 is only with regard to issuance of notice to the Commissioner Workmen and the object and purpose being to enable the Commissioner to take appropriate action against such of those employers, who commit default in complying with the mandatory provisions of Sections 3 and 4 of the Act.

17. In view of the aforesaid discussion, present appeal needs to be allowed. The order is illegal, perverse and erroneous. The Commissioner Workmen seriously erred in misconstruing the provisions of law in holding that petitioner herein, was not a dependant as her claim stood eclipsed by time and as such not entitled for apportionment of the amount to be disbursed, in terms of impugned order dated 07.08.2007, passed by the Commissioner under the Workmen's Compensation Act, 1923, in File No.2, titled as *Smt. Rashilu Devi Versus Secretary Self Help Group Bhaterh & another.*

18. Since the petitioner herein has remarried and the original claimant has also shouldered the burden in discharging certain liabilities of the deceased, as mutually agreed, amount so determined by the Commissioner is directed to be apportioned between the present petitioner Bano Devi and private respondent Rashilu Devi in the ratio of 30:70 respectively. Accordingly Registry is directed to disburse the same, alongwith proportionate rate of interest. Substantial questions of law are answered accordingly.

With the aforesaid observations, present appeal stands disposed of, so also pending application(s), if any.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE TARLOK SINGH CHAUHAN, J.

Bharat Sanchar Nigam Limited and Ors. ...Petitioners.

VERSUS

Darshan Lal and Anr. ...Respondents.

CWP No.3991 of 2015
Decided on: April 06, 2016

Constitution of India, 1950- Article 227-respondent no. 1 was ordered to be transferred to a non-difficult area as he was nearing the age of 55 years- it was submitted that respondent No. 1 had not attained the age of 55 years when the transfer order was made- held, that respondent No. 1 had not attained the age of 55 years and provision of posting of employee in a tenure station will not be applicable to him- however, he had attained age of 55 years during the pendency of the petition- hence, order maintained but a direction issued not to treat it as a precedent. (Para-2 to 6)

For the petitioners: Mr.Rajiv Jiwan, Advocate.

For the Respondents: Mr.I.D. Bali, Senior Advocate, with Ms.Pratibha Bali, Advocate, for respondent No.1.

Nemo for respondent No.2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J.(Oral)

Subject matter of this writ petition is the order, dated 7th September, 2015, passed by the Central Administrative Tribunal, Chandigarh Bench, Chandigarh, (for short, the Tribunal), in OA No.063/00086/2015, whereby the Original Applicant (respondent No.1 herein) was ordered to be transferred to a non-difficult area, instead of difficult area i.e. Noradhar, keeping in view the fact that the Original Applicant was nearing the age of 55 years, (for short, the impugned order).

2. During the course of hearing, Mr.Rajiv Jiwan, the learned counsel for the petitioners, strenuously argued that at the time of transferring respondent No.1 Darshan Lal, he was below 55 years of age and that the transfer policy, occupying the field, postulates that an employee who has attained the age of 55 years would not be posted in a tenure station. Therefore, it was submitted that since respondent No.1 had not crossed the age of 55 years on the day when the transfer order was made, the impugned order passed by the Tribunal, on the face of it, is not sustainable in the eyes of law and deserves to be set aside.

3. After going through the pleadings and the order impugned before us, we are of the opinion that there is substance in the argument advanced by Mr.Jiwan for the simple reason that at the time of making the transfer order, respondent No.1 had not crossed the age of 55 years and the policy, as submitted by Mr.Jiwan, provides that posting of employees, in tenure stations, above the age of 55 years, as on 31st March of a calendar year, would be avoided.

4. Faced with the above situation, Mr.I.D. Bali, learned Senior Counsel, appearing for respondent No.1 Darshan Lal submitted that now the said respondent has crossed the age of 55 years and, therefore, the impugned order passed by the Tribunal is not required to be interfered with.

5. Keeping in view the facts of the case, the Original Applicant (respondent No.1 herein) was not falling within the exception of 55 years, as discussed hereinabove, and therefore, the impugned order, to that effect, needs to be set aside. However, by now he has crossed the age of 55 years and falls within the said exception.

6. Having glance of the above, the final operation of the impugned order is maintained for the reasons given hereinabove. However, it is made clear that it should not be treated as precedent.

7. The writ petition is disposed of accordingly, so also the pending CMPs, if any. Interim directions, if any, stand vacated.

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

General Manager, Ranjit Sagar Dam ..Appellant

Versus

Thakur Chand and others ...Respondents/cross-objectors

RFA No. 132/2010 (a/w CO No. 24/2016) along with others.
Reserved on: 5.4.2016
Decided on: 6.4.2016

Land Acquisition Act, 1884- Section 18- Land was acquired for the construction of Ranjit Sagar (Thein Dam) Project – aggrieved from the award, made by the Land Acquisition Collector, reference was sought to District judge who enhanced the compensation- appeals were preferred against the award of District judge on the ground that petitions were barred by limitation- claimant also sought enhancement of compensation- Land Acquisition Collector had assessed the value of "Bagicha Barani Faldar" at Rs. 5 lakhs per bigha or say Rs. 25,000/- per biswa- Learned District Judge had awarded Rs.3 lacs ber bigha after making deduction of 60%- held, that when sale deeds are of small areas and the land acquired is a big chunk, the deductions are permissible while assessing the market value of the land- value of the structures was assessed on the basis of the estimates prepared by the Junior Engineer at the site- compensation for the trees was worked by the DFO Dalhousie- award was made on 27.1.1999 - reference petitions were filed on 20.2.1999- petition was received in the Reference Court on 2.12.1999- delay in sending the reference was on the part of the Land Acquisition Collector and the claimants cannot be held liable for the same- when the land owner is not present or the copy of the award is not supplied to him, he can seek reference within 6 months from the date of the knowledge - in the present case, award was not made in the presence of the claimant nor copy was supplied to him- hence, award cannot be said to be barred by limitation. (Para-7 to 33)

Cases referred:

Trishala Jain and another versus State of Uttaranchal and another, (2011) 6 SCC 47

Major General Kapil Mehra and others vs. Union of India and another, (2015) 2 SCC 262

State of Punjab vs. Mst. Qaisar Jehan Begum and another, AIR 1963 SC 1604

Pratap Narain vs. The Chief Commissioner, Delhi and others, 1969 (3) SCC 631

Gulab Singh vs. Union of India and another, AIR 1973 Delhi 231

State of Punjab vs. Mst. Qaisar Jehan Begum and another, AIR 1963 SC 1604

Pratap Narain vs. The Chief Commissioner, Delhi and others, 1969 (3) SCC 631

State of Maharashtra and another vs. Abdul Sattar and others, AIR 1995 Bombay 85

Spl. Land Acquisition Officer vs. Tukkareddy, AIR 1996 Karnataka 26

Bhagwan Das and others vs. State of Uttar Pradesh and others, (2010) 3 SCC 545

Raja Harish Chandra Raj Singh vs. The Deputy Land Acquisition Officer and another, (2011) 6 SCC 47

Premji Nathu vs. State of Gujarat and another, (2012) 5 SCC 250

Madan and another vs. State of Maharashtra, (2014) 2 SCC 720

Rajasthan Housing Board versus New Pink City Nirman Sahkari Samiti Limited and another, (2015) 7 SCC 601

For the Appellants : Mr. Anuj Nag, Advocate, for the appellants & non-cross-objectors.

For the Respondents : Mr. Adarsh Sharma, vice Counsel, for the private respondents/cross-objectors in respective appeals.

Mr. Parmod Thakur, Additional Advocate General, for the respondent-State, in all the appeals.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in all these appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. "Key facts" necessary for the adjudication of these appeals and cross-objections are that the land of the respondents-claimants situated in Mohal Bhotan, Pargana Chuhan, Tehsil Dalhousie, District Chamba was acquired for public purpose, namely, for construction of reservoir of Ranjit Sagar (Thein Dam) Project. Notification under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act") was published on 7.4.1997. It was published in the Rajpatra on 10.5.1997. It was also published in two daily newspapers Jansatta and Indian Express on 29.4.1997. The Notification was also displayed at the conspicuous place of the locality. Thereafter, notification under Sections 6 and 7 of the Act was issued on 3.9.1997. It was also got published in State Rajpatra on 20.9.1997. The notification was also published in two daily newspapers i.e. Jansatta and Indian Express on 4.10.1997 and 5.10.1997. Wide publicity of the same was also given by displaying the notification at the conspicuous place in village Bhotan through Pradhan, Gram Panchayat. The notices as required under Sections 9(3) and (4) of the Act were served upon the concerned land owners, to file their respective claims and their objections and the Collector after conducting enquiry assessed the market value of the acquired land situate in village Bhotan as given in the Award for different classifications of land alongwith statutory benefits. The claimants aggrieved by the Award made by the Land Acquisition Collector on 27.1.1999 filed reference petition under Section 18 of the Act for enhancement of the compensation. The learned District Judge enhanced the rate of compensation irrespective of the classification of the land on 10.12.2009 to Rs.15,000/- per biswa or say Rs.3.00 Lakh per bigha alongwith statutory benefits. Hence, these appeals. The claimants in RFA's No. 132, 133, 135, 136 and 138/2010 also filed cross-objections for enhancement of the Award.

3. Mr. Anuj Nag, Advocate has vehemently argued that the reference petitions were barred by limitation. He has supported the Award made by the Land Acquisition Collector dated 27.1.1999.

4. Mr. Adarsh Sharma, Advocate, has vehemently argued that the deductions made by the learned District Judge, are contrary to the law. He has prayed for enhancement of the compensation.

5. I have heard the learned Counsel for the parties and gone through the record carefully.

6. The Land Acquisition Collector has made the Award on 27.1.1999. The acquired land falls in Mohal Bhotan. The land was acquired for construction of reservoir. The reference petitions were ordered to be tagged on 25.9.2000 and 22.12.2001 with LAC petition No. 17/2000 titled as Thakur Chand vs. GM Ranjit Sagar Dam and others. Learned District Judge, Chamba has framed issues on 25.9.2000, 27.9.2000 and 28.9.2000.

7. The claimants have placed strong reliance on sale deed dated 27.3.1997. The sale deed is Ext PW-3/A and notification under Section 4 of the Act was made on 7.4.1997. Sale deed Ex.PW-3/A pertained to Mohal Lehri which is adjoining to Mohal Bhotan where the acquired land is situated.

8. PW-1 Mohinder Lal Singh has deposed that they were not given any notice under Section 12 (2) of the Act. When they came to know about the acquisition of their land, they went to their advocate and filed reference petitions for enhancement of compensation. The reference petitions were filed within limitation. They should have been paid compensation of Rs.25,000/- per biswa. Their land was more fertile as compared to Lahri Mohal. They used to grow ginger, garlic and cardamom. Bhotan mohal was situated at a distance of 2-3 furlong from village Salti and Dakhnyali in Punjab, which were located on the road side. They have lost their TD rights, grazing rights and fuel wood rights etc. They were not getting any agricultural land for rehabilitation and if such land was available, the cost of the land was more than Rs. 35,000/- per biswa.

9. PW-2 Om Parkash, Deputy Ranger has deposed that the people were sanctioned and granted forest produce according to their rights vide Ext. PW-2/A.

10. PW-3 Kulwant Singh has deposed that he has purchased 1 biswa 5 biswansis of land from Chaman Lal on 27.3.1997 vide Ext. PW-3/A.

11. PW-4 Chaman Lal has deposed that he has sold 1 biswa 5 biswansis of land to Shri Kulwant Singh on 27.3.1997 vide Ext. PW-3/A i.e. sale deed.

12. PW-5 Manish Kumar has proved certified copy of award of Mohal Bhotan, Ext. PW-5/A. According to him, they sent the reference petitions to the Court after compliance of sections 18 and 19 of the Act. In his cross-examination, he has admitted that they have not maintained any record in their office as to when these petitions were filed before Land Acquisition Officer.

13. PW-6 Sanjay Kumar has deposed that they have assessed the compensation of fruit trees on the basis of 1969 Schedule and copy of schedule is Ext. PW-6/A. They did not pay any premium over and above the rates of 1967.

14. RW-1 Surjit Singh has testified that there was only one shop in Mohal Bhotan, which was acquired by the Dam authorities. He has admitted that the reference petitions of Mohal Bhotan have already been decided by the Court vide Award Ext. PA and no appeal was preferred by the state before this Court. He has also admitted that sale deed of 1.5 Biswas was executed prior to notification under Section 4 of the Act.

15. The claimants have placed strong reliance on award Ex.PW-5/B dated 20.3.1999. It has been proved by PW-5 Umesh Kumar, Patwari, LAO Office, Thein Dam, Dalhousie. According to this award, land was also acquired for the purpose of reservoir of Ranjit, Sagar Dam Project, Shahpur Kandi. The Land Acquisition Officer has assessed the value of “Bagicha Barani Faldar” at Rs. 5 lakhs per bigha or say Rs. 25,000/- per biswa. It has come in the statement of PW-3 Kulwant Singh that there is no motorable road in village Bhotan and there is no Government office. Mohinder Lal has deposed that there is no industry in Mohal Bhotan. RW-1 Surjit Sen has deposed that Mohal Bhotan is not connected to road and one has to cover about 7-8 KMs to reach the road head. Learned District Judge taking into consideration the geography and topography conditions has made deductions to the extent of 60% while assessing the market value of the land in Mohal Lehri and has awarded Rs. three lakhs per bigha instead of Rs. five lakhs per bigha.

16. The claimants have also placed reliance on award dated 26.3.2001 Ex.PA/1. The market value of the land in Mohal Bhotan has been assessed at Rs. 15,000/- per biswa by the Court.

17. It is no more res integra that when sale deeds are of small areas and the land acquired is a big chunk, in those cases, the deductions are permissible while assessing the market value of the land.

18. Their Lordships of the Hon'ble Supreme in ***Trishala Jain and another*** versus ***State of Uttaranchal and another***, (2011) 6 SCC 47 have held that the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilization, amenities and infrastructure with hardly any distinction. Their Lordships have held as under:

> **44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits."**

19. Their Lordships of the Hon'ble Supreme Court in ***Major General Kapil Mehra and others*** vs. ***Union of India and another***, (2015) 2 SCC 262 have held that the factors which merit consideration as comparable sales are : (i) exemplar sale should be within reasonable time of date of issuance of notification under section 4 (i); (ii) it should be bone fide transaction; (iii) it should be of land acquired or of land adjacent to land acquired; and (iv) it should possess similar advantages. Their Lordships have further held that if sale exhibits pertained to small plots of land while large tract of land was acquired, appropriate deductions towards smallness of area were permissible. Their Lordships have held as under:

> **[11] The standard method of determination of the market value of any acquired land is by the valuer evaluating the land on the date of valuation publication of notification under Section 4(1) of the Act, acting as a hypothetical purchaser willing to purchase the land in open market at the prevailing price on that day, from a seller willing to sell such land at a reasonable price. Thus, the market value is determined with reference to the open market sale of comparable land in the neighbourhood, by a willing seller to a willing buyer, on or before the date of preliminary notification, as that would give a fair indication of the market value.**

20. It has come in the statement of PW-3 Kulwant Singh that there is no motorable road in village Bhotan and there is no Government office. Thus, it is in these circumstance deductions have been made by learned District Judge from the market value of the land acquired in village Bhotan.

21. Mr. Adarsh Sharma, Advocate has vehemently argued that inadequate compensation was paid for the structures in the acquired land by the Land Acquisition Collector.

22. The claimants have not led any evidence to prove their plea. The structures/buildings have been assessed on the basis of the estimates prepared by the

Junior Engineer at the site and duly signed by the Assistant Engineer, PWD. Now, as far as the trees are concerned, compensation of the trees was worked by the DFO Dalhousie and no evidence has been led by the claimants/ cross-objector to substantiate the plea that the Award made for the trees was inadequate.

23. Mr. Anuj Nag, Advocate has vehemently argued that the reference petitions have not been filed within the period of limitation. However, the fact of the matter is that the Award was made on 27.1.1999. The reference petitions were filed on 20.2.1999 though received in the Reference Court on 2.12.1999. It has come in the statement of PW-1Chaman Lal Patwari, Thein Dam, Land Acquisition Office Dalhousie that no notice under section 12(2) of the Land Acquisition Act was issued to the claimants nor they have maintained any record or register as to when these cases were filed in the office of LAO, Thein Dam. It was the responsibility of the Land Acquisition Collector to make a references within the period prescribed. Award was made in the absence of the claimants. The delay, in fact, was on the part of the Land Acquisition Collector and the claimants can not be held responsible for the same. Thus, the reference court has rightly concluded that the reference petitions were filed within limitation.

24. Their Lordships of the Hon'ble Supreme Court in ***State of Punjab*** vs. ***Mst. Qaisar Jehan Begum and another***, AIR 1963 SC 1604 have held that where the award was never communicated to the party the question is when did the party know the award either actually or constructively. Knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. Their Lordships have held as under:

> **[5] As to the second part of cl. (b) of the proviso, the true scope and effect thereof was considered by this court in Harish Chandra's case, 1962-1 SCR 676: (AIR 1961 SC 1500) (supra). It was there observed that a literal and mechanical construction of the words "six months from the date of Collector's award" occurring in the second part of cl. (b) of the proviso would not be appropriate and "the knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice, the expression used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. Admittedly the award was never communicated to the respondents. Therefore the question before us boils down to this. When did the respondents know the award either actually or constructively? Learned counsel for the appellant has placed very strong reliance on the petition which the respondents made for interim payment of compensation on December 24,1954. He has pointed out that the learned Subordinate Judge relied on this petition as showing the respondents date of knowledge and there are no reasons why we should take a different view. It seems clear to us that the ratio of the decision in Harish Chandra's case, 1962-1 SCR 676: (AIR 1961 SC 1500) (supra) is that the party affected by the award must know it, actually or constructively, and the period of six months will run from the date of that knowledge. Now, knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. If the award is communicated to a party under S. 12 (2) of the Act, the party must be obviously fixed with**

knowledge of the contents of the award whether he reads it. or not. Similarly when a party is present in court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award. Looked at from that point of view, we do not think that it can be inferred from the petition dated December 24, 1954 that the respondents had knowledge of the award one of the respondents gave evidence before the learned Subordinate Judge and she said :

"The application marked as Ex. D-1 was given by me but the amount of compensation was not known to me, nor did I know about acquisition of the land. Chaudhari Mohd. Sadiq, my Karinda had told me on the day I filed the said application that the land had been acquired by the Government."

This evidence was not seriously contradicted on behalf of the appellant and the learned Subordinate Judge did not reject it. It is worthy of the note that before the Collector also the appellant did not seriously challenge the statement of the respondents that they came to know of the award on July 22, 1955 the date on which the compensation was paid. On the reply which the appellant filed before the learned Subordinate Judge there was no contradiction of the averment that the respondents had come to know of the award on July 22, 1955. That being the position we have come to the conclusion that the date of knowledge in this case was July 22, 1955. The application for a reference was clearly made within six months from that date and was not therefore barred by time within the meaning of the second part of cl. (b) of the proviso to S.18 of the Act.

25. Their Lordships of the Hon'ble Supreme Court in ***Pratap Narain*** vs. ***The Chief Commissioner, Delhi and others,*** 1969 (3) SCC 631, have held that in a case where the appellant had not received any notice of the making of the award and consequently his application under section 18 was within time, this plea was not controverted by the respondents, the Land Acquisition Officer was not justified in refusing to exercise his statutory duty. Their Lordships have held as under:

[3] The appellant's case is that he had not received any notice of the making of the award and consequently his application under section 18 was within time. This plea had not been controverted by the respondents in this court. The records produced by the appellant lend support to that plea. Hence prima facie the appellant's application under Section 18 was within time, see Raja Harish Chandcra Raj Singh v. The Deputy Land Acquisition Officer and another and State of Punjab v. Mst. Osisar Jehan Begum and Another. If the allegations made by the appellant are accepted as correct as we have to do on the basis of the pleadings and material before us then there is no doubt that the land Acquisition Officer was not justified in refusing to exercise his statutory duty.

26. Learned Single Judge of Delhi High Court in *S. Gulab Singh* vs. *Union of* ***India and another***, AIR 1973 Delhi 231 while relying ***State of Punjab*** vs. ***Mst. Qaisar Jehan Begum and another***, AIR 1963 SC 1604 has held that where a person has no notice under section 12 (2), an application filed by him within six months from the date of

knowledge of essential contents of the award is competent. Learned Single Judge has held as under:

> **[2] It is not disputed that the name of the petitioner is not shown as owner in the revenue records. The Land Acquisition Collector had made the award in December, 1958 and the application of the petitioner to make a reference under Section 18 was made on 8-2-1962 (copy of which is Annexure-A to the Writ Petition). He has mentioned therein that no notice either under Section 9 or Section 12 (2) of the Act was served upon him and that only less than a month prior to the application he came to know that his land was acquired. The petition is sought to be resisted on the ground that no notice was served on the petitioner since he was not a person interested in the property in question and yet it is contended that his application was barred by time. Section 18 of the Act enables an application by a "person interested" not accepting the award to be referred by the Collector for the determination of the Court for determining the amount of compensation. Such an application has to be made**
>
> **(a) within six weeks from the date of the Collector's award if the person making it was present or was represented before the Collector at the time when he made the award;**
>
> **(b) in other cases, within six weeks of the receipt of the notice from the Collector under Section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.**
>
> **This provision was interpreted by the Supreme Court in Harish Chandra Raj Singh v. Deputy Land Acquisition Officer, 1961 AIR(SC) 1500. Gajendragadkar, J. (as his Lordship then was) explained the legal position in the following terms :**
>
> **"The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way".**
>
> **[3] It was specifically observed by S. K. Das, J. in State of Punjab v. Mst. Qaisar Jeham Begum, 1963 AIR(SC) 1604 that knowledge of the award does not mean a mere knowledge of the fact that an award has been made and that the knowledge must relate to the essential contents of the award which may be known actually or constructively. The impugned order dismissing the application for making a reference under Section 18 of the Act on the ground that it had not been filed within a period of six months from the date of the Collector's award is not correct and has to be quashed. It is hereby quashed.**

27. Division Bench of Bombay High Court in ***State of Maharashtra and another*** vs. ***Abdul Sattar and others***, AIR 1995 Bombay 85 has held that no notice under section 12(2) issued to the claimants, the application for reference made few days after claimants received payment is well within time prescribed. Division Bench has held as under:

[8] It is an admitted fact that the award passed by the Special Land Acquisition Officer does not bear the date. That necessarily means that it was not known when the award was passed. The record also does not show that any notice was served on any of the claimants under section 12(2) of the Act. No office copy of such notice having been issued finds place in the record. The claimant No.1 has stated that no notice was served on any of the claimants intimating about the passing of the award. It may be stated that, as observed by the Court below, the payment was received by the claimants under protest on 20-6-1977 and the application for reference was made on or about 1-7-1977 but it was sent to the Court on 1-4-1980. It is clear from the record that none of the claimants had any knowledge about passing of the award untill they received the amount of compensation under protest. The Court below was, therefore, justified in recording a finding that the application for reference to the Court under section 18 of the Act was well within six months from the date of passing of the award by the Special Land Acquisition Officer. The learned Special Counsel for the appellants has not been able to dis-lodge this finding of fact recorded by the Court below. There is, therefore, no force in the contention of the learned Counsel for the appellant that application for reference was not within the time prescribed under Clause (a) of sub-section (2) of section 18 of the Act. The application for reference was well within the time under clause (b) of sub-section (2) of section 18 of the Act.

28. Learned Single Judge of Karnataka High Court in ***The Spl. Land Acquisition Officer*** vs. ***Tukkareddy***, AIR 1996 Karnataka 26 has held that if the authority does not act at all, the entire period that has elapsed as a result on the part of the default of the authority will on an analogy of the provisions of section 15 (2) of the Limitation Act necessarily have to be excluded while computing limitation. In this case also, the application was filed in time but there was delay in making reference on the part of the authorities.

29. Their Lordships of the Hon'ble Supreme Court in ***Bhagwan Das and others*** vs. ***State of Uttar Pradesh and others***, (2010) 3 SCC 545 have held that if person interested or his representative was not present when the award was made, and if he does not receive notice under section 12 (2) from Collector, he can make application within six months of the date on which he actually or constructively came to know about contents of the award. Their Lordships have held as under:

[28] The following position therefore emerges from the interpretation of the proviso to section 18 of the Act :

(i) If the award is made in the presence of the person interested (or his authorised representative), he has to make the application within six weeks from the date of the Collector's award itself.

(ii) If the award is not made in the presence of the person interested (or his authorised representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under section 12(2).

(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within

six months of the date on which he actually or constructively came to know about the contents of the award.

(iv) If a person interested receives a notice under section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that the date of receipt of notice under section 12(2) of the Act was the date of knowledge of the contents of the award.

30. Their Lordships of the Hon'ble Supreme in ***Raja Harish Chandra Raj Singh*** vs. ***The Deputy Land Acquisition Officer and another***, (2011) 6 SCC 47 have held that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. So the knowledge of the party affected by the award made by the Collector under section 12 of the Land Acquisition Act, 1894, either actual or constructive is an essential requirement of fair play and natural justice. Their Lordships have held as under:

[6] There is yet another point which leads to the same conclusion. If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affect person, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. Thus considered the making of the award cannot, consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector : it must involve the communication of the said award to the party concerned either actually or constructively. If the award is pronounced in the presence of the party whose rights are affected by it, it can be said to be made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement an award is pronounced and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fairplay and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to S. 18 in a literal or mechanical way.

[11] A similar question arose before the Madras High Court in Annamalai Chetti v. Col. J. G. Cloete, ILR 6 Mad 189, Section 25 of the Madras Boundary Act XXVIII of 1860 limited the time within which a suit may be brought to set aside the decision of the settlement officer

to two months from the date of the award, and so the question arose as to when the time would begin to run. The High Court held that the time can begin to run only from the date on which the decision is communicated to the parties. "If there was any decision at all in the sense of the Act", says the judgment, "it could not date earlier than the date of the communication of it to the parties; otherwise they might be barred of their right of appeal without any knowledge of the having been passed". Adopting the same principle a similar construction has been placed by the Madras High Court in Swaminathan v. Lakshmanan Chettiar, ILR 53 Mad 491 : (AIR 1930 Mad 490) on the limitation provisions contained in Ss. 73 (1) and 77(1) of the Indian Registration Act XVI of 1908. It was held that in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed the expression "within thirty days after the making of the order" used in the said sections means within thirty days after the date on which the communication of the order reached the parties affected by it. These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. Therefore, we are satisfied that the High Court of Allahabad was in error in coming to the conclusion that the application made by the appellant in the present proceedings was barred under the proviso to S. 18 of the Act.

31. Their Lordships of the Hon'ble Supreme Court in ***Premji Nathu*** vs. ***State of Gujarat and another***, (2012) 5 SCC 250 have held that the landowner who is not present or is not represented before Collector at the time of making of award should be supplied with a copy of award so that he may effectively exercise his right of reference under section 18 (1) of the Limitation Act. Their Lordships have held as under:

[10] An analysis of the above reproduced provisions shows that by virtue of Section 12(1), an award made by the Collector is treated final and conclusive evidence of the true area and value of the land and apportionment of the compensation among the persons interested. In terms of Section 12(2), the Collector is required to give notice of his award to the interested persons who are not present either personally or through their representatives at the time of making of award.

13. Section 18(1) provides for making of reference by the Collector to the Court for the determination of the amount of compensation etc. Section 18(2) lays down that an application for reference shall be made within six weeks from the date of the Collector's award, if at the time of making of award the person seeking reference was present or was represented before the Collector. If the person is not present or is not represented before the Collector, then the application for reference has to be made within six weeks of the receipt of notice under Section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire.

32. Their Lordships of the Hon'ble Supreme Court in ***Madan and another*** vs. ***State of Maharashtra***, (2014) 2 SCC 720, have held that the date of the Collector's award

used in proviso (b) to section 18 (2) must be understood to mean the date when award is either communicated to party or is known by him either actually or constructively. Their Lordships have held as under:

> **[9] From the order dated 29.10.1993 passed in L.A.R. No. 75/1992, it is, inter alia, clear that there was a dispute amongst the land owners (the appellants are one set of such land owners) in respect of their respective shares in the acquired land on account of which no apportionment of compensation was made by the Collector who made a Reference under Section 30 of the Act to the court. Further, in the order dated 29.10.1993 it is recorded that the appellants had no knowledge of the Award till the order dated 4.9.1991 came to be passed in the Reference under Section 30. In Raja Harish Chandra Raj Singh this Court has held that the expression "the date of the award" used in proviso (b) to Section 18(2) of the Act must be understood to mean the date when the award is either communicated to the party or is known by him either actually or constructively. It was further held by this Court that it will be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way. In the present case, it has already been noticed that a finding has been recorded by the Reference Court in its order dated 29.10.1993 that "the petitioners had no knowledge about the passing of the award till the date of payment of compensation on 5.9.1991 because they were held entitled to receive the compensation after the decision of Reference under Section 30 dated 4.9.1991."**
>
> **[10] What transpires from the above is that it is for the first time on 4.9.1991 (date of the order under Section 30 of the Act) that the appellants came to know that they were entitled to compensation and the quantum thereof. It is not in dispute that the Reference under Section 18 was made within 6 weeks from the said date i.e. 4.9.1991. In the above facts, it is difficult to subscribe to the view taken by the High Court to hold that the Reference under Section 18 was barred by limitation.**
>
> **[13] For the reasons aforesaid, we hold that the High Court had erred in allowing the appeal filed by the State and reversing the order dated 29.10.1993 passed by the Second Additional District Judge, Beed. The award of compensation in the instant case having been made by the Collector as far back as in the year 1985 and the amount involved being exceedingly small we have considered the basis on which enhancement of compensation was made by the learned Reference Court in its order dated 29.10.1993. On such scrutiny, we do not find any error in the view taken by the learned Reference Court. Therefore, in the peculiar facts of the case, while allowing this appeal and setting aside the order dated 09.09.2008 passed by the High Court we deem it proper to restore the order dated 29.10.1993 passed by the Second Additional District Judge in L.A.R. No.75 of 1995.**

33. Their Lordships of the Hon'ble Supreme Court in ***Rajasthan Housing Board*** versus ***New Pink City Nirman Sahkari Samiti Limited and another***, (2015) 7 SCC 601 have held that the limitation period of six months from date of award for making reference to court commences from the date of actual or constructive knowledge of award. Their Lordships have held as under:

[11] The provisions of Rajasthan Land Acquisition Act are in pari materia with the provisions of the Land Acquisition Act, 1894 and section 12 of the Act of 1953 is extracted hereinbelow :

"12. Award of Collector when to be final.-(1) Such award shall be filed in the Collector's officer and shall, except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested.

(2) The Collector shall give immediate notice of his award or the amendment thereof to such of the persons interested as are not present personally or by their representatives when the award or the amendment thereof is made."

Section 12(2) requires immediate notice to be given of the award to such of the persons interested as are not present personally or by their representative/s when the award is made. Section 18(2) of the Act of 1953 requires to file the objections within six weeks from the date of the award if the person or the representative was present when the award was made. In other cases, within six weeks of the receipt of notice from the Collector under section 12(2) or within six months from the date of the award whichever period shall first expire.

34. Accordingly, In view of the analysis and discussion made hereinabove, all the appeals and cross-objections fail and the same are dismissed. Pending application(s), if any, also stands disposed of. No costs.

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BEFORE THE HON'BLE MR JUSTICE RAJIVE SHARMA, J.

RFA No. 68 of 2010 alongwith
RFA Nos. 127, 128, 129, 130 and 131/2010
(a/w Cross-objections No.23 of 2016)
Reserved on: 5.4.2016
Decided on: 6.4.2016

1. RFA No. 68/2010
Hari Singh. ...Appellant.
Versus
General Manager, Ranjit Sagar
(Thein Dam) and others. ...Respondents
2. RFA No. 127/2010
General Manager, Ranjit Sagar (Thein Dam Project). ...Appellant.
Versus
Ranjeet Singh and others. ...Respondents.
3. RFA No. 128/2010
General Manager, Ranjit Sagar (Thein Dam Project). ...Appellant
Versus
Kalo Devi and others. ...Respondents

4. RFA No. 129/2010
General Manager, Ranjit Sagar (Thein Dam Project). ...Appellant
Versus
Hari Singh and others. ...Respondents
5. RFA No. 130/2010
General Manager, Ranjit Sagar (Thein Dam Project). ... Appellant
Versus
Makhan Deen and others. ...Respondents
6. RFA No. 131/2010
General Manager, Ranjit Sagar (Thein Dam Project). ... Appellant
Versus
Karnail Singh others. ...Respondents
7. Cross Objections No.23 /2016
General Manager, Ranjit Sagar (Thein Dam Project. ...Non-Objector
Versus
Kalo Devi and others. ...Objector.

Land Acquisition Act, 1884- Section 18- Land of the claimant was acquired for the construction of Ranjit Sagar (Thein Dam) Project - Land Acquisition Collector awarded the compensation- aggrieved from the order of compensation, reference was sought to the District judge who enhanced the compensation, irrespective of the classification of the land- aggrieved from the award, appeals were preferred- held, that claimants have relied upon the sale deed for small areas and a big chunk of land had been acquired, deduction was permissible while assessing market value of the land- value of the structures was assessed on the basis of the estimates prepared by the Junior Engineer at the site- compensation for the trees was worked by the DFO Dalhousie- award was made on 27.1.1999 - reference petitions were filed on 20.2.1999- petition was received in the Reference Court on 2.12.1999- delay in sending the reference was on the part of the Land Acquisition Collector and the claimants cannot be held liable for the same- when the land owner is not present nor the copy of the award had been supplied to him, he can seek reference within 6 months from the date of the knowledge - in the present case, award was not made in the presence of the claimant nor copy was supplied to him- hence, award cannot be said to be barred by limitation. (Para-7 to 26)

Cases referred:

Trishala Jain and another versus State of Uttaranchal and another, (2011) 6 SCC 47
Major General Kapil Mehra and others vs. Union of India and another, (2015) 2 SCC 262
State of Punjab vs. Mst. Qaisar Jehan Begum and another, AIR 1963 SC 1604
Pratap Narain vs. The Chief Commissioner, Delhi and others, 1969 (3) SCC 631
S. Gulab Singh vs. Union of India and another, AIR 1973 Delhi 231
State of Punjab vs. Mst. Qaisar Jehan Begum and another, AIR 1963 SC 1604
State of Maharashtra and another vs. Abdul Sattar and others, AIR 1995 Bombay 85
The Spl. Land Acquisition Officer vs. Tukkareddy, AIR 1996 Karnataka 26
Bhagwan Das and others vs. State of Uttar Pradesh and others, (2010) 3 SCC 545
Raja Harish Chandra Raj Singh vs. The Deputy Land Acquisition Officer and another, (2011) 6 SCC 47
Premji Nathu vs. State of Gujarat and another, (2012) 5 SCC 250
Madan and another vs. State of Maharashtra, (2014) 2 SCC 720

Rajasthan Housing Board versus New Pink City Nirman Sahkari Samiti Limited and another, (2015) 7 SCC 601

For the Appellants :	Mr. Anuj Nag, Advocate in RFAs No. 127/2010 to 131/2010 and for respondent in RFA No. 68/2010 and for Non-objector in Cross-Objection No.23/2016.
For the Respondents:	Mr. Adarsh Sharma, vice counsel in RFAs. No.127/2010 to 131/2010 and for appellant in RFA No. 68/2010 and for objector in Cross-Objection No.23/2016. Mr. Parmod Thakur, Addl. A.G. for the respondent-State in the respective appeals/cross-objections.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in all these appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. "Key facts" necessary for the adjudication of these appeals and cross-objections are that the land of the respondents-claimants situated in Mohal Bhotan, Pargana Chuhan, Tehsil Dalhousie, District Chamba was acquired for public purpose, namely, for construction of reservoir of Ranjit Sagar (Thein Dam) Project. Notification under section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as the "Act") was published on 7.4.1997. It was published in the Rajpatra on 10.5.1997. It was also published in two daily newspapers Jansatta and Indian Express on 29.4.1997. The Notification was also displayed at the conspicuous place of the locality. Thereafter, notification under Sections 6 and 7 of the Act was issued on 3.9.1997. It was also got published in State Rajpatra on 20.9.1997. The notification was also published in two daily newspapers i.e. Jansatta and Indian Express on 4.10.1997 and 5.10.1997. Wide publicity was also given by displaying the notification at the conspicuous place in village Bhotan through Pradhan, Gram Panchayat. The notices as required under Section 9 (3) and (4) of the Act were served upon the concerned land owners to file their respective claims and objections and the Collector after conducting enquiry assessed the market value of the acquired land situate in village Bhotan as given in the Award for different classifications of land alongwith statutory benefits. The claimants aggrieved by the Award made by the Land Acquisition Collector on 27.1.1999 filed reference petitions under Section 18 of the Act for enhancement of the compensation. The learned District Judge enhanced the rate of compensation irrespective of the classification of the land. Hence, these appeals. The claimant in reference petition in 24/2000 also filed cross-objections for enhancement of the Award.

3. Mr. Anuj Nag, Advocate has vehemently argued that the reference petitions were barred by limitation. He has supported the Award made by the Land Acquisition Collector dated 27.1.1999.

4. Mr. Adarsh Sharma, Advocate, has vehemently argued that the deductions made by the learned District Judge, are contrary to the law. He has prayed for enhancement of the compensation.

5. I have heard the learned Counsel for the parties and have gone through the record carefully.

6. The Land Acquisition Collector has made the Award on 27.1.1999. The acquired land falls in Mohal Bhotan. The land was acquired for construction of reservoir. The reference petitions were ordered to be tagged with LAC petition No. 15/2000 titled as Rajkumar vs. GM Thein Dam and others on 21.9.2000. Learned District Judge, Chamba has framed issues on 19.9.2000, 20.9.2000 and 21.9.2000.

7. The claimants have placed strong reliance on sale deed dated 27.3.1997. The sale deed is mark 'A'. PW-7 Chaman Lal is the vendor. According to him, he has sold 1 biswa 5 biswansis of land at village Lehri to PW-6 Kulwant Singh for a consideration of Rs.25,000/-. PW-6 Kulwant Singh is the vendee. He has testified that he has purchased land measuring 1 biswa 5 biswansis from Chaman Lal for a consideration of Rs.25,000/-. Mark 'A' is the certified copy of sale deed. The learned reference court has taken into consideration mark 'A', sale deed dated 27.3.1997 of Mohal Lehri. Mohal Lehri is adjacent to Mohal Bhotan. The Notification under Section 4 of the Act was made on 7.4.1997. Thus, the sale deed has rightly been taken into consideration for determination of market value of the acquired land in Mohal Bhotan. Hari Singh and Kalo Devi and Amro have testified that their land was acquired for the construction of Ranjit Dam and they should be paid compensation of Rs. 25,000/- per biswas as their land was more fertile as compared to Mohal Lehri. The distance from Mohal Lehri to their village was 2 kms. There was motorable road in Mohal Lehri. Whereas there was no motorable road in Mohal Bhotan. The land of Mohal Lehri was plain and Dalhousie and Banikhet were at a distance of 25 kms from Mohal Bhotan. The sale took place on 27.3.1997, i.e. prior to the issuance of notification under Section 4 of the Act on 7.4.1997. It is settled law that there is no parameter with reference to the transfer of land of particular village. The instances of sale of adjacent land can be taken into consideration.

8. The claimants have also placed reliance upon Ex. PL, Award given by the Land Acquisition Collector in Mohal Lehri. The land in the Award in Ex. PL was also acquired for the similar purpose i.e. for reservoir of Ranjit Sagar Dam Project, Shahpur, Kandi. The Collector has assessed the value of the land to Rs.5.00 Lakh per bigha. There is no tangible evidence placed on record to suggest that award dated 20.3.1999 Ext. PL was assailed. The learned District Judge has taken into consideration the sale deed mark 'A' but has made deduction to the extent of 60%. In other words, instead of Rs.25,000/- per biswa he has awarded Rs.15,000/- per biswa or say Rs. 3.00 Lakh per bigha to the claimants taking into consideration the geographical and topographical conditions.

9. It is no more res integra that when sale deeds are of small areas and the land acquired is a big chunk, in those cases, the deductions are permissible while assessing the market value of the land.

10. Their Lordships of the Hon'ble Supreme in ***Trishala Jain and another*** versus ***State of Uttaranchal and another***, (2011) 6 SCC 47 have held that the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land with some deduction unless, there was comparability in potential, utilization, amenities and infrastructure with hardly any distinction. Their Lordships have held as under:

> **44. It is thus evident from the above enunciated principle that the acquired land has to be more or less developed land as its developed surrounding areas, with all amenities and facilities and is fit to be used for the purpose for which it is acquired without any further expenditure, before such land could be considered for no deduction. Similarly the sale instances even of smaller plots could be considered for determining the market value of a larger chunk of land**

with some deduction unless, there was comparability in potential, utilisation, amenities and infrastructure with hardly any distinction. On such principles each case would have to be considered on its own merits."

11. Their Lordships of the Hon'ble Supreme Court in ***Major General Kapil Mehra and others*** vs. ***Union of India and another***, (2015) 2 SCC 262 have held that the factors which merit consideration as comparable sales are : (i) exemplar sale should be within reasonable time of date of issuance of notification under section 4 (i); (ii) it should be bone fide transaction; (iii) it should be of land acquired or of land adjacent to land acquired; and (iv) it should possess similar advantages. Their Lordships have further held that if sale exhibits pertained to small plots of land while large tract of land was acquired, appropriate deductions towards smallness of area were permissible. Their Lordships have held as under:

[11] The standard method of determination of the market value of any acquired land is by the valuer evaluating the land on the date of valuation publication of notification under Section 4(1) of the Act, acting as a hypothetical purchaser willing to purchase the land in open market at the prevailing price on that day, from a seller willing to sell such land at a reasonable price. Thus, the market value is determined with reference to the open market sale of comparable land in the neighbourhood, by a willing seller to a willing buyer, on or before the date of preliminary notification, as that would give a fair indication of the market value.

12. It has come in the statement of PW-6 Kulwant Singh and PW-7 Chaman Lal that the road facility was available at a distance of about 6 kms from village Bhotan. Most of the land at village Bhotan was in the shape of hills. It has also come in the evidence that most of the land in village Lehri was plain or level. Thus, it is in these circumstance deductions have been made by learned District Judge from the assessed value of the land acquired in village Bhotan.

13. Mr. Adarsh Sharma, Advocate has vehemently argued that inadequate compensation has been paid for the structures in the acquired land by the Land Acquisition Collector.

14. The claimants have not led any evidence to prove their plea. The structures/buildings have been assessed on the basis of the estimates prepared by the Junior Engineer at the site and duly signed by the Assistant Engineer, PWD.

15. Now, as far as the trees are concerned, compensation of the trees was worked by the DFO Dalhousie and no evidence has been led by the claimants/ cross-objector to substantiate the plea that the Award made for the trees was inadequate.

16. Mr. Anuj Nag, Advocate has vehemently argued that the reference petitions have not been filed within the period of limitation. However, the fact of the matter is that the Award was made on 27.1.1999. The reference petitions were received in the Reference Court on 4.12.1999 though filed on 20.2.1999. It has come in the statement of PW-8 Chaman Lal Patwari, Thein Dam, Land Acquisition Office Dalhousie that before sending the land reference petitions to the Court, the same were lying with the Senior Assistant of Land Acquisition Collector. He has sought voluntary retirement. It was the responsibility of the Land Acquisition Collector to send the references within the period prescribed. Moreover, in the present case, no notice under Section 12 (2) of the Act was issued to the claimants. Award was made in the absence of the claimants. The delay, in fact, was on the part of the Land Acquisition Collector and the claimants can not be held responsible for the same.

Thus, the reference court has rightly concluded that the reference petitions were within limitation.

17. Their Lordships of the Hon'ble Supreme Court in ***State of Punjab*** vs. ***Mst. Qaisar Jehan Begum and another***, AIR 1963 SC 1604 have held that where the award was never communicated to the party the question is when did the party know the award either actually or constructively. Knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. Their Lordships have held as under:

> **[5] As to the second part of cl. (b) of the proviso, the true scope and effect thereof was considered by this court in Harish Chandra's case, 1962-1 SCR 676: (AIR 1961 SC 1500) (supra). It was there observed that a literal and mechanical construction of the words "six months from the date of Collector's award" occurring in the second part of cl. (b) of the proviso would not be appropriate and "the knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice, the expression used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. Admittedly the award was never communicated to the respondents. Therefore the question before us boils down to this. When did the respondents know the award either actually or constructively? Learned counsel for the appellant has placed very strong reliance on the petition which the respondents made for interim payment of compensation on December 24,1954. He has pointed out that the learned Subordinate Judge relied on this petition as showing the respondents date of knowledge and there are no reasons why we should take a different view. It seems clear to us that the ratio of the decision in Harish Chandra's case, 1962-1 SCR 676: (AIR 1961 SC 1500) (supra) is that the party affected by the award must know it, actually or constructively, and the period of six months will run from the date of that knowledge. Now, knowledge of the award does not mean a mere knowledge of the fact that an award has been made. The knowledge must relate to the essential contents of the award. These contents may be known either actually or constructively. If the award is communicated to a party under S. 12 (2) of the Act, the party must be obviously fixed with knowledge of the contents of the award whether he reads it. or not. Similarly when a party is present in court either personally or through his representative when the award is made by the Collector, it must be presumed that he knows the contents of the award. Having regard to the scheme of the Act we think that knowledge of the award must mean knowledge of the essential contents of the award. Looked at from that point of view, we do not think that it can be inferred from the petition dated December 24, 1954 that the respondents had knowledge of the award one of the respondents gave evidence before the learned Subordinate Judge and she said :**
>
> **"The application marked as Ex. D-1 was given by me but the amount of compensation was not known to me, nor did I know about acquisition of the land. Chaudhari Mohd. Sadiq, my Karinda had told me on the day I filed the said application that the land had been acquired by the Government."**
>
> **This evidence was not seriously contradicted on behalf of the appellant and the learned Subordinate Judge did not reject it. It is worthy of the note that before the Collector also the appellant did not seriously challenge the statement of the respondents that they came to know of the award on July 22,**

1955 the date on which the compensation was paid. On the reply which the appellant filed before the learned Subordinate Judge there was no contradiction of the averment that the respondents had come to know of the award on July 22, 1955. That being the position we have come to the conclusion that the date of knowledge in this case was July 22, 1955. The application for a reference was clearly made within six months from that date and was not therefore barred by time within the meaning of the second part of cl. (b) of the proviso to S.18 of the Act.

18. Their Lordships of the Hon'ble Supreme Court in ***Pratap Narain*** vs. ***The Chief Commissioner, Delhi and others,*** 1969 (3) SCC 631, have held that in a case where the appellant had not received any notice of the making of the award and consequently his application under section 18 was within time, this plea was not controverted by the respondents, the Land Acquisition Officer was not justified in refusing to exercise his statutory duty. Their Lordships have held as under:

[3] The appellant's case is that he had not received any notice of the making of the award and consequently his application under section 18 was within time. This plea had not been controverted by the respondents in this court. The records produced by the appellant lend support to that plea. Hence prima facie the appellant's application under Section 18 was within time, see Raja Harish Chandcra Raj Singh v. The Deputy Land Acquisition Officer and another and State of Punjab v. Mst. Osisar Jehan Begum and Another. If the allegations made by the appellant are accepted as correct as we have to do on the basis of the pleadings and material before us then there is no doubt that the land Acquisition Officer was not justified in refusing to exercise his statutory duty.

19. Learned Single Judge of Delhi High Court in ***S. Gulab Singh*** vs. ***Union of India and another***, AIR 1973 Delhi 231 while relying ***State of Punjab*** vs. ***Mst. Qaisar Jehan Begum and another***, AIR 1963 SC 1604 has held that where a person has no notice under section 12 (2), an application filed by him within six months from the date of knowledge of essential contents of the award is competent. Learned Single Judge has held as under:

[2] It is not disputed that the name of the petitioner is not shown as owner in the revenue records. The Land Acquisition Collector had made the award in December, 1958 and the application of the petitioner to make a reference under Section 18 was made on 8-2-1962 (copy of which is Annexure-A to the Writ Petition). He has mentioned therein that no notice either under Section 9 or Section 12 (2) of the Act was served upon him and that only less than a month prior to the application he came to know that his land was acquired. The petition is sought to be resisted on the ground that no notice was served on the petitioner since he was not a person interested in the property in question and yet it is contended that his application was barred by time. Section 18 of the Act enables an application by a "person interested" not accepting the award to be referred by the Collector for the determination of the Court for determining the amount of compensation. Such an application has to be made

(a) within six weeks from the date of the Collector's award if the person making it was present or was represented before the Collector at the time when he made the award;

(b) in other cases, within six weeks of the receipt of the notice from the Collector under Section 12, sub-section (2), or within six months from the date of the Collector's award, whichever period shall first expire.

This provision was interpreted by the Supreme Court in Harish Chandra Raj Singh v. Deputy Land Acquisition Officer, 1961 AIR(SC) 1500. Gajendragadkar, J. (as his Lordship then was) explained the legal position in the following terms :

"The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fair play and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way".

[3] It was specifically observed by S. K. Das, J. in State of Punjab v. Mst. Qaisar Jeham Begum, 1963 AIR(SC) 1604 that knowledge of the award does not mean a mere knowledge of the fact that an award has been made and that the knowledge must relate to the essential contents of the award which may be known actually or constructively. The impugned order dismissing the application for making a reference under Section 18 of the Act on the ground that it had not been filed within a period of six months from the date of the Collector's award is not correct and has to be quashed. It is hereby quashed.

20. Division Bench of Bombay High Court in ***State of Maharashtra and another*** vs. ***Abdul Sattar and others***, AIR 1995 Bombay 85 has held that no notice under section 12 (2) issued to the claimants, the application for reference made few days after claimants received payment is well within time prescribed. Division Bench has held as under:

[8] It is an admitted fact that the award passed by the Special Land Acquisition Officer does not bear the date. That necessarily means that it was not known when the award was passed. The record also does not show that any notice was served on any of the claimants under section 12(2) of the Act. No office copy of such notice having been issued finds place in the record. The claimant No.1 has stated that no notice was served on any of the claimants intimating about the passing of the award. It may be stated that, as observed by the Court below, the payment was received by the claimants under protest on 20-6-1977 and the application for reference was made on or about 1-7-1977 but it was sent to the Court on 1-4-1980. It is clear from the record that none of the claimants had any knowledge about passing of the award untill they received the amount of compensation under protest. The Court below was, therefore, justified in recording a finding that the application for reference to the Court under section 18 of the Act was well within six months from the date of passing of the award by the Special Land Acquisition Officer. The learned Special Counsel for the appellants has not been able to dis-lodge this finding of fact recorded by the Court below. There is, therefore, no force in the contention of the learned Counsel for the appellant that application for reference was not within the time prescribed under Clause (a) of sub-section (2) of section 18 of the Act. The application for reference was well within the time under clause (b) of sub-section (2) of section 18 of the Act.

21. Learned Single Judge of Karnataka High Court in ***The Spl. Land Acquisition Officer*** vs. ***Tukkareddy***, AIR 1996 Karnataka 26 has held that if the authority does not act at all, the entire period that has elapsed as a result on the part of the default of the authority will on an analogy of the provisions of section 15 (2) of the Limitation Act necessarily have to be excluded while computing limitation. In this case also, the

application was filed in time but there was delay in making reference on the part of the authorities.

22. Their Lordships of the Hon'ble Supreme Court in ***Bhagwan Das and others*** vs. ***State of Uttar Pradesh and others***, (2010) 3 SCC 545 have held that if person interested or his representative was not present when the award was made, and if he does not receive notice under section 12 (2) from Collector, he can make application within six months of the date on which he actually or constructively came to know about contents of the award. Their Lordships have held as under:

> **[28] The following position therefore emerges from the interpretation of the proviso to section 18 of the Act :**
>
> **(i) If the award is made in the presence of the person interested (or his authorised representative), he has to make the application within six weeks from the date of the Collector's award itself.**
>
> **(ii) If the award is not made in the presence of the person interested (or his authorised representative), he has to make the application seeking reference within six weeks of the receipt of the notice from the Collector under section 12(2).**
>
> **(iii) If the person interested (or his representative) was not present when the award is made, and if he does not receive the notice under Section 12(2) from the Collector, he has to make the application within six months of the date on which he actually or constructively came to know about the contents of the award.**
>
> **(iv) If a person interested receives a notice under section 12(2) of the Act, after the expiry of six weeks from the date of receipt of such notice, he cannot claim the benefit of the provision for six months for making the application on the ground that the date of receipt of notice under section 12(2) of the Act was the date of knowledge of the contents of the award.**

23. Their Lordships of the Hon'ble Supreme in ***Raja Harish Chandra Raj Singh*** vs. ***The Deputy Land Acquisition Officer and another***, (2011) 6 SCC 47 have held that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. So the knowledge of the party affected by the award made by the Collector under section 12 of the Land Acquisition Act, 1894, either actual or constructive is an essential requirement of fair play and natural justice. Their Lordships have held as under:

> **[6] There is yet another point which leads to the same conclusion. If the award is treated as an administrative decision taken by the Collector in the matter of the valuation of the property sought to be acquired it is clear that the said decision ultimately affects the rights of the owner of the property and in that sense, like all decisions which affect person, it is essentially fair and just that the said decision should be communicated to the said party. The knowledge of the party affected by such a decision, either actual or constructive, is an essential element which must be satisfied before the decision can be brought into force. Thus considered the making of the award cannot, consist merely in the physical act of writing the award or signing it or even filing it in the office of the Collector : it must involve the communication of the said award to the party concerned either actually or constructively. If the award is pronounced in the presence of the party whose rights are affected by it, it can be said to be**

made when pronounced. If the date for the pronouncement of the award is communicated to the party and it is accordingly pronounced on the date previously announced the award is said to be communicated to the said party even if the said party is not actually present on the date of its pronouncement. Similarly if without notice of the date of its pronouncement an award is pronounced and a party is not present the award can be said to be made when it is communicated to the party later. The knowledge of the party affected by the award, either actual or constructive, being an essential requirement of fairplay and natural justice the expression "the date of the award" used in the proviso must mean the date when the award is either communicated to the party or is known by him either actually or constructively. In our opinion, therefore, it would be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to S. 18 in a literal or mechanical way.

[11] A similar question arose before the Madras High Court in Annamalai Chetti v. Col. J. G. Cloete, ILR 6 Mad 189, Section 25 of the Madras Boundary Act XXVIII of 1860 limited the time within which a suit may be brought to set aside the decision of the settlement officer to two months from the date of the award, and so the question arose as to when the time would begin to run. The High Court held that the time can begin to run only from the date on which the decision is communicated to the parties. "If there was any decision at all in the sense of the Act", says the judgment, "it could not date earlier than the date of the communication of it to the parties; otherwise they might be barred of their right of appeal without any knowledge of the having been passed". Adopting the same principle a similar construction has been placed by the Madras High Court in Swaminathan v. Lakshmanan Chettiar, ILR 53 Mad 491 : (AIR 1930 Mad 490) on the limitation provisions contained in Ss. 73 (1) and 77(1) of the Indian Registration Act XVI of 1908. It was held that in a case where an order was not passed in the presence of the parties or after notice to them of the date when the order would be passed the expression "within thirty days after the making of the order" used in the said sections means within thirty days after the date on which the communication of the order reached the parties affected by it. These decisions show that where the rights of a person are affected by any order and limitation is prescribed for the enforcement of the remedy by the person aggrieved against the said order by reference to the making of the said order, the making of the order must mean either actual or constructive communication of the said order to the party concerned. Therefore, we are satisfied that the High Court of Allahabad was in error in coming to the conclusion that the application made by the appellant in the present proceedings was barred under the proviso to S. 18 of the Act.

24. Their Lordships of the Hon'ble Supreme Court in ***Premji Nathu*** vs. ***State of Gujarat and another***, (2012) 5 SCC 250 have held that the landowner who is not present or is not represented before Collector at the time of making of award should be supplied with a copy of award so that he may effectively exercise his right of reference under section 18 (1) of the Limitation Act. Their Lordships have held as under:

[10] An analysis of the above reproduced provisions shows that by virtue of Section 12(1), an award made by the Collector is treated final and conclusive evidence of the true area and value of the land and apportionment of the compensation among the persons interested. In terms of Section 12(2), the Collector is required to give notice of his award to the interested persons who

are not present either personally or through their representatives at the time of making of award.

13. Section 18(1) provides for making of reference by the Collector to the Court for the determination of the amount of compensation etc. Section 18(2) lays down that an application for reference shall be made within six weeks from the date of the Collector's award, if at the time of making of award the person seeking reference was present or was represented before the Collector. If the person is not present or is not represented before the Collector, then the application for reference has to be made within six weeks of the receipt of notice under Section 12(2) or within six months from the date of the Collector's award, whichever period shall first expire.

25. Their Lordships of the Hon'ble Supreme Court in ***Madan and another*** vs. ***State of Maharashtra***, (2014) 2 SCC 720, have held that the date of the Collector's award used in proviso (b) to section 18 (2) must be understood to mean the date when award is either communicated to party or is known by him either actually or constructively. Their Lordships have held as under:

[9] From the order dated 29.10.1993 passed in L.A.R. No. 75/1992, it is, inter alia, clear that there was a dispute amongst the land owners (the appellants are one set of such land owners) in respect of their respective shares in the acquired land on account of which no apportionment of compensation was made by the Collector who made a Reference under Section 30 of the Act to the court. Further, in the order dated 29.10.1993 it is recorded that the appellants had no knowledge of the Award till the order dated 4.9.1991 came to be passed in the Reference under Section 30. In Raja Harish Chandra Raj Singh this Court has held that the expression "the date of the award" used in proviso (b) to Section 18(2) of the Act must be understood to mean the date when the award is either communicated to the party or is known by him either actually or constructively. It was further held by this Court that it will be unreasonable to construe the words "from the date of the Collector's award" used in the proviso to Section 18 in a literal or mechanical way. In the present case, it has already been noticed that a finding has been recorded by the Reference Court in its order dated 29.10.1993 that "the petitioners had no knowledge about the passing of the award till the date of payment of compensation on 5.9.1991 because they were held entitled to receive the compensation after the decision of Reference under Section 30 dated 4.9.1991."

[10] What transpires from the above is that it is for the first time on 4.9.1991 (date of the order under Section 30 of the Act) that the appellants came to know that they were entitled to compensation and the quantum thereof. It is not in dispute that the Reference under Section 18 was made within 6 weeks from the said date i.e. 4.9.1991. In the above facts, it is difficult to subscribe to the view taken by the High Court to hold that the Reference under Section 18 was barred by limitation.

[13] For the reasons aforesaid, we hold that the High Court had erred in allowing the appeal filed by the State and reversing the order dated 29.10.1993 passed by the Second Additional District Judge, Beed. The award of compensation in the instant case having been made by the Collector as far back as in the year 1985 and the amount involved being exceedingly small we have considered the basis on which enhancement of compensation was made by the learned Reference Court in its order dated 29.10.1993. On such

scrutiny, we do not find any error in the view taken by the learned Reference Court. Therefore, in the peculiar facts of the case, while allowing this appeal and setting aside the order dated 09.09.2008 passed by the High Court we deem it proper to restore the order dated 29.10.1993 passed by the Second Additional District Judge in L.A.R. No.75 of 1995.

26. Their Lordships of the Hon'ble Supreme Court in ***Rajasthan Housing Board*** versus ***New Pink City Nirman Sahkari Samiti Limited and another***, (2015) 7 SCC 601 have held that the limitation period of six months from date of award for making reference to court commences from the date of actual or constructive knowledge of award. Their Lordships have held as under:

[11] The provisions of Rajasthan Land Acquisition Act are in pari materia with the provisions of the Land Acquisition Act, 1894 and section 12 of the Act of 1953 is extracted hereinbelow :

"12. Award of Collector when to be final.-(1) Such award shall be filed in the Collector's officer and shall, except as hereinafter provided, be final and conclusive evidence, as between the Collector and the persons interested, whether they have respectively appeared before the Collector or not, of the true area and value of the land, and the apportionment of the compensation among the persons interested.

(2) The Collector shall give immediate notice of his award or the amendment thereof to such of the persons interested as are not present personally or by their representatives when the award or the amendment thereof is made."

Section 12(2) requires immediate notice to be given of the award to such of the persons interested as are not present personally or by their representative/s when the award is made. Section 18(2) of the Act of 1953 requires to file the objections within six weeks from the date of the award if the person or the representative was present when the award was made. In other cases, within six weeks of the receipt of notice from the Collector under section 12(2) or within six months from the date of the award whichever period shall first expire.

27. Accordingly, In view of the analysis and discussion made hereinabove, all the appeals and cross-objections fail and the same are dismissed. Pending application(s), if any, also stands disposed of. No costs.

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

Manish Kumar son of Tilak Raj and another. ....Petitioners.

Vs.

State of Himachal Pradesh and others. ...Non-petitioners.

Cr.MMO No. 344 of 2015.
Order reserved on: 30.3.2016.
Date of Order: April 6,2016

Code of Criminal Procedure, 1973- Section 482- Charge-sheet was filed against the accused for the commission of offences punishable under Sections 498A, 504 IPC read with

Section 34 of Indian Penal Code, 1860- complainant stated that matter was compromised between the parties- wife appeared in person and stated that she was residing with her husband and had no objection for allowing the petition- held, that matrimonial dispute can be compromised when the parties are living together in harmonious manner- it would be expedient in the interest of justice to compound the matter- petition allowed. (Para-5 and 6)

Case referred:
Narinder Singh and others Vs State of Punjab and another, JT 2014 (4) SC 573

For petitioners: Mr. Sanjeev K.Suri, Advocate.
For non-petitioners No.1, 2&4.: Mr.M.L.ChauhanAddl. Advocate General.
For non-petitioner No.3 complainant. In person.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed under Section 482 of the Code of Criminal Procedure 1973 read with Section 320 of code of criminal procedure for permission to compound criminal case No. 264-I-10/96-II/2010 title State of HP Vs. Nirmla Devi and others.

Brief facts of the case:

2. Complainant Kusum Lata @ Veena Kumari filed FIR No. 114 of 2010 dated 8.6.2010 under Sections 498A, 504 IPC read with Section 32 IPC against accused persons. Matter was investigated by investigating agency and investigation report under Section 173 Cr.PC filed before competent court of law. Thereafter competent court of law framed charge against accused persons under Sections 498A, 504 IPC read with Section 34 IPC and listed the case for prosecution evidence. Thereafter accused persons filed present petition.

3. Court heard learned Advocate appearing on behalf of petitioners and learned Additional Advocate General appearing on behalf of non-petitioners No.1,2&4. Court also heard complainant Kusum Lata @ Veena Kumari and also perused entire record carefully.

4. Following points arise for determination in present petition.

(1) Whether petition filed under Section 482 of the Code of Criminal Procedure 1973 read with Section 320 code of criminal procedure is liable to be accepted as mentioned in memorandum of grounds of petition?.

(2) Final Order.

Finding upon point No.1 with reasons.

5. Submission of learned Advocate appearing on behalf of petitioners that permission to compound present case while exercising inherent powers be granted in the ends of justice is accepted for the reasons hereinafter mentioned. Complainant Smt. Kusum Lata appeared before the Court and her statement recorded. Smt. Kusum Lata complainant has stated in positive manner that as of today she is residing with her husband Manish Kumar accused and she has no objection if petition is allowed. Statement of co-accused Manish Kumar also recorded. Co-accused Manish Kumar has stated that complainant Smt. Kusum Lata is his wife and she is residing with him and they have compromised the matter in order to keep cordial relations.

6. It was held in case reported in JT 2014 (4) SC 573 title Narinder Singh and others Vs State of Punjab and another that following criminal cases should not be allowed to

be compromised on the basis of out of court settlement while exercising inherent powers under Section 482 code of criminal procedure (1) Murder case (2) Rape case (3) Dacoity case (4) Prevention of Corruption Act case (5) 307 IPC case It was further held that following criminal cases should be allowed to be compromised on the basis of out of court settlement while exercising inherent powers under section 482 code of criminal procedure. (1) Commercial transaction case (2) Matrimonial disputes case (3) Family disputes case. Court is of the opinion that present dispute inter se parties is matrimonial dispute. Complainant Smt. Kusum Lata has herself appeared before Court and she has stated that she is residing with co-accused Manish Kumar as of today. Statement of Smt. Kusum Lata is also corroborated by co-accused Manish Kumar. In view of the fact that complainant Smt. Kusum Lata and co-accused Manish Kumar are living peacefully in harmonious manner as husband and wife court is of the opinion that it is expedient in the ends of justice to allow present petition. Point No.1 is answered in affirmative.

Point No.2(Final Order).

7. In view of findings on point No.1 permission to compound criminal case No. 264-I-10/96-II-10 registered under Section 498A, 504 read with Section 34 IPC is granted while exercising inherent powers under Section 482 read with section 320 code of criminal procedure in the ends of justice. Proceedings of criminal case No. 264-I-10/96-II-10 title State of HP Vs. Nirmla Devi and others quashed and accused persons are acquitted qua criminal offence punishable under Section 498A, 504 read with Section 34 IPC. Statement of complainant Smt. Kusum Lata and statement of co-accused Manish Kumar placed on record will form part and parcel of order. File of learned trial Court along with certify copy of the order be sent back forthwith. Cr.MMO No. 344 of 2015 is disposed of. All pending application(s) if any are also disposed of.

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

Roshan Lal (In jail) son of Shri Dhani Ram ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 180 of 2016
Order Reserved on 30.3.2016
Date of Order 6th April 2016

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 302, 452, 323, 506 IPC- petitioner pleaded that he has been falsely implicated- no recovery is to be effected from him- he will not temper with the prosecution witnesses and will join investigation as and when directed to do so- held that the fact that petitioner is innocent or not cannot be determined at this stage but will be determined at the conclusion of trial- 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 heinous and grave in nature qua the commission of culpable homicide amounting to murder- if bail is granted to the petitioner, he will threaten the

prosecution witnesses and trial will be adversely effected- in these circumstances, bail cannot be granted to the petitioner- petition dismissed. (Para-6 to 8)

Cases referred:

Gurcharan Singh and others Vs. State (Delhi Administration), AIR 1978 SC 179
The State Vs. Captain Jagjit Singh, AIR 1962 SC 253

For the Petitioner:	Mr. S.K. Banyal, Advocate.
For the Non-petitioner:	Mr. M.L. Chauhan and Mr.Rupinder Singh Additional Advocates General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present bail application is filed under Section 439 of the Code of Criminal Procedure 1973 for grant of bail relating to FIR No. 286 of 2014 dated 15.11.2014 registered under Sections 302, 452, 323, 506 IPC at P.S. Sunder Nagar District Mandi (H.P.)

2. It is pleaded that petitioner is implicated in present case falsely. It is pleaded that no recovery is to be effected from the petitioner. It is pleaded that petitioner will not tamper with prosecution witnesses and will join investigation and trial regularly and will not leave India without permission of Court. It is pleaded that any condition imposed by Court will be binding upon the petitioner. Prayer for acceptance of bail application sought.

3. Per contra police report filed. As per police report on 14.11.2014 at about 6.30 PM Smt. Champa Devi telephoned the deceased and thereafter deceased informed that he would come to residential house. There is further recital in police report that at about 7.30 night when Smt. Champa Devi was in her residential house she heard cries of deceased from fields and when Champa Devi reached the field she saw that accused Roshan Lal who is uncle of deceased caught the deceased from neck and when complainant raised hue and cry then accused left the deceased in critical condition. There is further recital in police report that thereafter deceased was brought to hospital for his medical treatment but deceased was declared dead by medical officer. There is further recital in police report that there is dispute between accused and deceased relating to immovable land. There is recital in police report that after registration of FIR site plan prepared and photographs obtained and blood clotted soil and control samples took into possession and statements of witnesses recorded. As per post mortem report deceased had died due to blunt trauma. There is recital in police report that petitioner will threat the prosecution witnesses in case petitioner is released on bail. 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 non-petitioner and also perused the record.

5. Following points arise for determination in present bail application:-

1. Whether bail application filed under Section 439 Cr.P.C. by petitioner is liable to be accepted as mentioned in memorandum of grounds of 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 on this ground bail application be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Facts whether petitioner is innocent or not cannot be decided at this stage. Same fact will be decided by learned trial Court after giving due opportunities to both the parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of petitioner that investigation is completed and investigation report under Section 173 of Code of Criminal Procedure already filed in competent Court of law and any condition imposed by Court will be binding upon the petitioner and on these grounds 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) Character of 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 title Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 title The State Vs. Captain Jagjit Singh.*** In present case allegations against the petitioner are very heinous and grave in nature qua commission of culpable homicide amounting to murder. Court is of the opinion that if petitioner is released on bail at this stage then trial of case will be adversely effected and interest of State and general public will also be adversely effected.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that allegations against the petitioner are very heinous and grave in nature qua commission of culpable homicide amounting to murder and if bail is granted to petitioner then petitioner will threat the prosecution witnesses and trial will also be adversely effected and on these grounds bail application be declined is accepted for the reasons hereinafter mentioned. There is apprehension in the mind of Court that if petitioner is released on bail then petitioner will threat and induce the prosecution witnesses. Court is of the opinion that in view of grave allegations of culpable homicide amounting to murder against the petitioner it is not expedient in the ends of justice to release the petitioner on bail at this stage. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final order)

9. In view of my findings on point No.1 bail application filed by petitioner under Section 439 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 439 of Code of Criminal Procedure 1973. Bail petition filed under Section 439 of Code of Criminal Procedure stands disposed of. All pending application(s) if any also disposed of.

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

State of Himachal Pradesh .....Appellant.

Versus

Neetu Devi & ors. ....Respondents.

Cr. Appeal No. 241 of 2007
Reserved on: April 05, 2016.
Decided on: April 06, 2016.

Indian Penal Code, 1860- Section 147, 451, 323 and 506 read with Section 149- accused came to the house of the complainant and uprooted the fencing of her house - when the complainant objected, the accused gave beatings to her with sticks- she fell down- accused also gave beatings to mother-in-law and father-in-law of the complainant- accused were tried and acquitted by the trial Court- held, in appeal that prosecution had not examined any witnes from the neighbourhood- dispute is regarding the user of the passage- there are exaggerations in the statements of the prosecution witnesses- statements of closely related witnesses did not inspire confidence- litigation is pending between the parties- cause of quarrel was not established – in these circumstances, view taken by the trial Court was plausible-appeal dismissed. (Para-12 to 14)

For the appellant: Mr. Parmod Thakur, Addl. AG.
For the respondents: Mr. Chander Shekhar Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 19.10.2005, rendered by the learned Chief Judicial Magistrate, Kinnaur at Reckong Peo, Camp at Rampur Bushahr, Distt. Shimla, H.P. in Criminal Case No. 168-2 of 2003, whereby the respondents-accused (hereinafter referred to as accused), who were charged with and tried for offences punishable under Sections 147, 451, 323 and 506 IPC read with Section 149 IPC, have been acquitted.

2. The case of the prosecution, in a nut shell, is that Dropti Devi PW-1 is the complainant. According to her at about 10:00 AM when she was present in her house, the accused persons, namely, Marchi Devi, Jiwani Devi, Neetu Devi, Laxmi Devi and Kaushalya Devi came from the passage by the side of the house of the complainant. They uprooted the fencing of the house of the complainant. When the complainant objected, these persons gave beatings to her with dandas. She fell down from the wall (danga). She raised hue and cry. Her mother-in-law Seema Devi reached the spot. She rescued her. Thereafter, complainant reached in her courtyard but her mother-in-law was caught by the accused and she was also beaten up with the dandas. In the meantime, father-in-law of the complainant, namely, Rama Nand, reached at the spot. When he tried to intervene, accused persons, namely, Kedar Nath, Naresh, Chaman Lal and Shiv Ram also reached there with dandas in their hands. He was able to rescue himself by confining himself in a room. Thereafter, the accused came to the courtyard of the complainant and threatened that they would kill the complainant and her family members. The complainant reported the matter to the police, which led to the registration of FIR Ext. PW-1/A. The complainant and her mother-in-law were got medically examined. The accused were summoned by the SDJM, Rampur. Notice of accusation was put to them for the offences. They pleaded not guilty. Thereafter, the case was fixed for the prosecution evidence.

3. The prosecution, in order to prove its case, has examined as many as 6 witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Parmod Thakur, Addl. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved the case against the accused

persons. On the other hand, Mr. Chander Shekhar Sharma, Advocate has supported the judgment of the trial Court dated 19.10.2005.

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

6. PW-1 Dropti Devi testified that on 4.7.2003, she was present in her house. In the meantime, Marchi Devi, Jiwani Devi, Neetu Devi, Laxmi Devi, Kaushalya Devi, Kedar Nath, Naresh, Chaman Lal and Shiv Ram gave beatings to her. They were carrying dandas in their hands. She cried for help. Her mother-in-law Smt. Seema Devi came and tried to save her. Thereafter, her father-in-law also came to the spot. He was also beaten up when he tried to rescue them. He received injuries on his legs and waist. Thereafter, FIR Ext. PW-1/A was registered.

7. PW-2 Rama Nand is the father-in-law of the complainant PW-1 Dropti Devi. According to him, the incident has taken place on 4.7.2003. He was working in the fields at 10:00 AM. He heard the cries and rushed to his house. Five women, namely, Marchi Devi, Jiwani Devi, Neetu Devi, Laxmi Devi and Kaushalya Devi were giving beatings to PW-1 Dropti Devi with dandas. When he tried to save his daughter-in-law, the accused also attacked him. They threatened him to kill him. Her daughter-in-law was pushed down. They also started beating Seema Devi.

8. PW-3 Seema Devi deposed that on 4.7.2003, she was working in the fields when she heard cries in her house. Thereafter, she rushed to her house and found that the accused were giving beatings to Dropti Devi. She was also given beatings. She identified dandas Ext. P-1 to P-5.

9. PW-4 ASI Sada Nand Sharma has taken PW-1 Dropti Devi and PW-3 Seema Devi for medical examination to CHC Kumarsain. He prepared the spot map Ext. PW-4/A. The accused were arrested. In his cross-examination, he deposed that the path in question is being used by the parties.

10. PW-5 Dr. Ramesh Chand Guleria has medically examined PW-1 Dropti Devi and PW-3 Seema Devi and issued MLCs Ext. PW-5/A and PW-5/B, respectively. The nature of the injuries was found to be simple and caused by blunt weapon.

11. PW-6 Chander Mehta deposed that in his presence, the accused has produced dandas, regarding which memo Ext. PW-4/B was prepared by the police.

12. The prosecution has not examined any witness from the neighbourhood. It is apparent from the record that the dispute is with regard to use of the passage. According to the prosecution, PW-1 Dropti Devi and PW-3 Seema Devi were beaten up with dandas. However, according to the MLCs Ext. PW-5/A and PW-5/B, the nature of the injuries is simple. There are exaggerations in the statements made by PW-1 Dropti Devi and PW-3 Seema Devi. According to PW-1 Dropti Devi, Rama Nand (PW-2) also received injuries. However, he has not been medically examined. The prosecution ought to have examined independent witnesses in this case. The statements of the closely related witnesses do not inspire confidence.

13. In case the accused were administered beatings with dandas Ext. P-1 to P-5, PW-1 Dropti Devi, PW-2 Rama Nand and PW-3 Seema Devi would have received serious injuries. It has also come on record that the litigation is going on between the parties because of use of passage in question. None of the witnesses have deposed about the cause of quarrel. The land of both the parties abuts each other and common passage, as noticed hereinabove, is used by the complainant as well as the accused and other co-villagers. It

appears that the complainant party does not want the path to be used by the accused and other co-villagers by fencing the passage in question.

14. The prosecution has failed to prove the case against the accused. Thus, there is no occasion for this Court to interfere with the well reasoned judgment of the learned trial Court dated 19.10.2005.

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

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

State of Himachal Pradesh .....Appellant.
Versus
Sanjay Kumar .....Respondent.

Cr. Appeal No.196 of 2010.
Reserved on: 23.03.2016.
Date of Decision : 06th April, 2016.

Indian Penal Code, 1860- Section 302, 392 and 201- Accused had committed murder of 'C'- he had also committed robbery and had caused disappearance of evidence to save himself from legal punishment- accused was tried and acquitted by the trial court- held, in appeal that case against the accused is based upon circumstantial evidence- prosecution has relied upon the fact that the accused was last seen with the deceased- however, this fact was not satisfactorily established- no test identification parade was held to test the power of the eye witnesses to identify the accused- recovery of earring and sandals of the deceased was also not established satisfactorily- disclosure statement was not proved- finger impressions on the bruises were not matched with the finger impressions of the accused- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed.

(Para-5 to 12)

For the Appellant: Mr. M.A.Khan, Additional Advocate General.
For the Respondent: None.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the judgment of the learned Sessions Judge, Kangra at Dharamshala, Himachal Pradesh, rendered on 22.01.2010, in Session Case No.21-P/VII-2009, whereby the learned trial Court acquitted the accused for committing offences punishable under Sections 302, 392 and 201 IPC of the Indian Penal Code.

2. The facts relevant to adjudicate the instant appeal are that on 17.3.2009 at about 5.15 p.m. in Dodra Forest the accused intentionally and voluntarily committed murder of Chameli Devi. It is further alleged that on the same date time and place the accused intentionally and voluntarily committed robbery and also caused disappearance of

the evidence with the intention to screen himself from legal punishment. On conclusion of investigations into the offences allegedly committed by the accused a report under Section 173 of the Code of Criminal Procedure stood prepared and presented in the competent Court.

3. Accused/respondent stood charged by the learned trial Court for committing offences punishable under Sections 302, 392 and 201 of the Indian Penal Code. In proof of the prosecution case, the prosecution examined 14 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 yet he chose not to lead any evidence in defence.

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

5. The appellant/State stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concerted to vigorously contend qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

6. The prosecution case against the accused/respondent in its entirety rests upon circumstantial evidence. In a prosecution case anvilled upon circumstantial evidence, the prosecution is under a solemn legal obligation to clinchingly prove by efficacious evidence of probative worth each of the links in the chain of circumstances as stand constituted by it in exemplification of the inculpation of the accused/respondent for the offence for which he stood charged with, tried and acquitted. The prosecution in making an espousal qua the guilt of the accused standing clinched has pressed into service evidence of the accused standing last seen in proximity to the recovery of the body of the deceased by the Investigating Officer from Dodra Forest near Neugal Bridge evidence whereof stands embedded in the testimony of PW-3. Nonetheless any reliance upon his testimony for concluding of its constituting firm inculpatory evidence in proof of the link aforesaid in the chain of circumstances constructed by the prosecution against the accused would be neither apt nor the said link acquires any tenacity arising from the factum of (a) his deposing in his examination-in-chief of his identifying the accused in police custody 3 to 4 days subsequent to the body of the deceased standing recovered by the investigating Officer from a site in close vicinity to the place where PW-3 purportedly last saw the accused some time prior to the recovery of the body of the deceased renders both the factum of his last seeing the accused in proximity to the site of recovery of the body of the deceased besides as a corollary renders frail the factum of PW-3 last seeing the accused some time prior in proximity to the place of recovery of the body of the deceased, especially when neither in his previous statement recorded in writing nor in his recorded deposition on oath he has unraveled therein the key identifying features or traits of the accused as thereat gathered by him. The revelation of the key identifying features of the accused by PW-3 both in his previous statement recorded in writing besides in his recorded deposition on oath, was imperative, as he prior to the occurrence was unaware of both the name as well as the identity of the accused. His being unfamiliar with the name and identity of the accused prior to the ill fated occurrence enjoined upon him, for facilitating the holding of a test identification parade in accordance with law whereat his identifying the accused may have constituted a formidable piece of evidence against the accused, to prior thereto unfold to the police in his

previous statement recorded in writing the key identifying features borne by the accused when he purportedly last saw him some time prior in proximity to the site where the recovery of the body of the deceased stood effectuated by the Investigating Officer. Even though the non-holding of a test identification parade would not be fatal to the prosecution case nor would it render the identification in Court of the accused for the first time by PW-3 to be both fragile besides tenuous in evidentiary worth. Nonetheless the empowerment of PW-3 to proceed to identify the accused for the first time in Court would rest upon a formidable evidentiary pedestal only if he had prior to his proceeding to do so had unfolded to the Investigating Officer in his previous statement recorded in writing the key features borne by the accused when he purportedly last saw him some time prior, in proximity to the site where the recovery of the body of the deceased stood effectuated by the Investigating Officer. Reinforcingly, in the absence of unfoldment by PW-3 either in his previous statement recorded in writing or in his recorded deposition on oath of the key identifying features borne by the accused would not lend any evidentiary value to both the factum of his purportedly last seeing the accused some time prior to the recovery of the body of the deceased by the Investigating Officer nor hence his identifying the accused in Court would stand on any sacrosanct pedestal especially when he had previous thereto at the behest of the Investigating Officer identified the accused when he was undergoing police incarceration, the identification whereof by him appears to have led him to identify him in Court. In sequel, the identification of the accused by PW-3 when he was undergoing police incarceration whereupon he proceeded to subsequently identify him in Court to be the person purportedly last seen by him some time prior in proximity to the site where the recovery of the body of the deceased stood effectuated by the Investigating Officer appears to be a contrived feeble link in the chain of circumstances invented by the Investigating Officer with the complicity of PW-3. In sequel for reasons aforesaid, anvilled upon the lack of revelation by PW-3 to the Investigating Officer in his previous statement recorded in writing or in his recorded deposition on oath of the key identifying features borne by the accused when he purportedly last saw him some time prior in proximity to the site where the recovery of the body of the deceased stood effectuated by the Investigating Officer renders not only the identification by him of the accused in police incarceration 3 to 4 days after the recovery of the body of the deceased to be of the very same person purportedly last seen by him in close proximity to the place where the recovery of the body stood effectuated to be tainted besides his identifying him in Court also acquires no probative worth predominantly when such identification especially when he identified the accused prior thereto in police custody stands spurred by a machination on the part of the Investigating Officer in collusion with PW-3. For reiteration, the evidence of the purported last seeing of the accused by PW-3 some time prior in proximity to the site where the recovery of the body of the deceased stood effectuated by the Investigating Officer hence gets shattered. In aftermath, the aforesaid link constituted by the prosecution against the accused gets dismembered.

7. Another link in the chain of circumstances constituted against the accused is comprised in the recovery of ear-rings and sandals of the deceased effectuated at the instance of the accused by the Investigating Officer. However, any reliance thereupon by the prosecution to canvass qua the inculpatory role ascribed by it to him standing clinched, is unworthy of acceptance arising from the factum of PW-1 the witness to recovery thereof recording in his deposition comprised in his examination-in-chief of his relative prior to recoveries thereof in purported vicinity to the body of the deceased unraveling to him of theirs not existing in or around the body of the deceased whereupon an inference stands aroused of the items aforesaid recovered under Memo Ext.PW-1/C in close vicinity of the body of the deceased standing planted thereon by the Investigating Officer. A planted recovery by the Investigating Officer cannot be either efficacious nor would it carry any evidentiary worth.

8. Apart there-from, with PW-1 omitting to categorically depose in his deposition comprised in his examination-in-chief qua the place where the accused recorded his disclosure statement comprised in Ext.PW-1/B in sequel whereto recovery of items comprised therein stood recovered under Memo Ext.PW-1/C beclouds with suspicion the deposition of PW-14 the Investigating Officer of PW-1/B standing recorded by him at the Police Station whereupon a deduction stands aroused of the disclosure statement of the accused comprised in Ext.PW-1/B in sequel whereto recovery of the items disclosed therein stood recovered at the instance of the accused by the Investigating Officer under Ext.PW-1/B rather standing recorded at the place where the body of the deceased stood recovered besides an inference arises of the Investigating Officer planting thereat the items comprised in Ext.PW-1/C for falsely implicating the accused. Moreover, the depositions of both PW-6 and PW-7 in proof of both Ext.PW-1/B and PW-1/C lose their respective creditworthiness in the face of their respective versions qua recoveries thereunder of the items recited therein for reasons afore-stated standing beclouded with an aura of suspicion, predominantly for reiteration spurred by the factum of the site of occurrence standing previously visited by the relations of PW-1 who thereupon as deposed by PW-1 apprised him of the items detailed in Ext.PW-1/C standing not lying or existing at or near or in the vicinity of the body of the deceased. With both Ext.PW-1/B and Ext.PW-1/C losing their probative worth, an inference which stands aroused there-from is of the motive which stands ascribed to the accused of his murdering the deceased for depriving her of her ear rings and nose pin also stands relegated in the limbo of oblivion. In face thereof, the motive ascribed to the accused by the prosecution for murdering the deceased when for reasons afore-stated remains unproven besides unsubstantiated by clinching evidence, a potent link in the chain of circumstances gets severed.

9. PW-9 (Dr.K.L.Kapoor) who conducted post mortem examination on the body of the deceased and proved his report Ext.PW-9/C, has underlined therein the factum of bruises occurring on the neck of the deceased standing sequelled by user of fingers thereon. However, the Investigating Officer neither collected the finger impressions borne on the bruises existing on the body of the deceased nor collected the finger prints of the accused for facilitating on comparison of both an opinion by the Finger Prints Expert of both belonging to accused. For the aforesaid omissions on the part of the Investigating Officer the clinching evidence comprised in the report of the Finger Prints Expert portraying therein of the bruises on the neck of the deceased on their comparison with the finger prints of the accused both belonging to the accused has remained unelicited besides obviously has remained un-adduced. For the aforesaid omission of the Investigating Officer, the Finger Prints Expert has been disabled to render a clinching report qua the facet aforesaid, constraining this Court to conclude of the demise of the deceased opined by PW-9 to stand sequelled by strangulation or by throttling being not attributable to the accused.

10. 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 renders it to be suspect. Consequently, benefit of doubt ought to go to the accused.

11. 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.

12. 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.

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

Suresh Kumar .....Appellant.

Versus

State of Himachal Pradesh .....Respondent.

Cr. Appeal No. 529 of 2015.
Reserved on: 23.03.2016
Date of Decision : 06th April, 2016.

Indian Penal Code, 1860- Section 302, 120B and 201- Accused had hired taxi of A- A did not return- the taxi was found parked and the shoes of the deceased were found lying in the Taxi- it was found during investigation that accused had an altercation with the deceased- they had cut his neck with the knife and had thrown his dead body- accused was tried and convicted by the Court, whereas, co-accused was acquitted- held in appeal that case is based upon circumstantial evidence - theory of last seen was not proved satisfactorily- recovery of dead body at the instance of the accused was not believable as the body was visible from the edge of the road – no disclosure statement was made by the accused – recovery of knife was also not proved- it was also not established that injuries were sustained by the use of knife- motive was also not sufficient to commit murder – prosecution was not proved beyond reasonable doubt-accused acquitted. (Para-8 to 16)

For the Appellant: Mr. S.D.Gill, Advocate.
For the Respondent: Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the judgment of the learned Additional Sessions Judge (II), Kangra at Dharamshala, District Kangra, Himachal Pradesh, rendered on 26.10.2015 in Sessions Trial No. 27-D/VII/2013 whereby the learned trial Court convicted accused Suresh for committing offences punishable under Sections 302, 120B and 201 of the Indian Penal Code. The learned Trial Court imposed upon accused Suresh the following sentence:-

> ***Section 302 IPC****: To undergo imprisonment for life and to pay fine of Rs.10,000/- and in default of payment of fine sentenced him to suffer rigorous imprisonment for one year.*
>
> ***Section 120B IPC****: To undergo imprisonment for life and to pay fine of Rs.10,000/- and in default of payment of fine sentenced him to suffer rigorous imprisonment for one year.*

***Section 201 IPC**: To undergo rigorous imprisonment for a period of three years and to pay fine of Rs. 2,000/- and in default of payment of fine sentenced him to suffer rigorous imprisonment for six months.*

All the sentences were ordered to run concurrently. However, accused Jyoti Devi stands acquitted qua the offences for which she stood charged.

2. The facts relevant to decide the instant case are that on 25.2.2013 around 7.15/7.30 p.m accused Suresh Kumar alongwith absconder accused Mohinder Singh went to taxi stand Shahpur and hired a taxi from Ashok Kumar to visit Boh Dharini. At that time Sachin, Anil Kumar and Arun Kumar were present there and had seen the accused Suresh, alongwith absconding accused Mohinder, leaving Shahpur to Boh Darini with Ashok Kumar. Around 8.30 p.m Sachin had a telephonic conversation with the deceased on which deceased told him that he will come late in the night. As the deceased did not return home on 25.2.2013 his son Sachin went to the owner of taxi to inquire about his father. On the next day around 8.30 a.m the aforesaid taxi was found parked at place 32 mile and the shoes of the deceased were lying in the Taxi. Thereafter, a missing report of the deceased was made. On 2.3.2013 son of the deceased came to know that accused Suresh and accused Mohinder have killed his father and thrown the dead body from a cliff. By the side another significant development took place that accused Jyoti Devi was found missing from her house as such her father Prithi Chand lodged her missing report. Pursuant to this missing report uncle of accused took the accused Suresh and Jyoti to P.S.Shahpur where accused Suresh disclosed that he and absconding accused Mohinder killed Ashok Kumar and thrown the dead body from a cliff at place Maned Nallah. In the investigation, it was also revealed that accused Suresh Kumar and absconding accused Mohinder had drinks with the deceased and they insisted the deceased to take the accused Jyoti alongwith them in his taxi to which deceased refused as such firstly the accused persons strangulated the deceased and then cut his neck with the knife and thrown the dead body in the khad at Maned Nallah. On conclusion of investigations into the offences allegedly committed by the accused a report under Section 173 of the Code of Criminal Procedure stood prepared and filed in the competent Court.

3. The accused stood charged by the learned trial Court for theirs committing offences punishable under Sections 302, 201 & 120-B read with Section 34 IPC to which they pleaded not guilty and claimed trial. In proof of the prosecution case, the prosecution examined 29 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the Court, in which the accused claimed innocence and pleaded false implication. In defence, the accused chose to lead evidence and examined one witness as DW-1.

4. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against accused/appellant Suresh Kumar whereas it acquitted accused Jyoti Devi.

5. The convict/appellant stands aggrieved by the judgment of conviction recorded against him by the learned trial Court. The learned defence counsel has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record rather theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court in the exercise of its appellate jurisdiction and being replaced by findings of acquittal.

6. On the other hand, the learned Deputy Advocate General has with considerable force and vigour, contended qua the findings of conviction recorded by the Court below standing based on a mature and balanced appreciation of evidence on record and theirs not necessitating any interference, rather theirs 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 instant case is a case resting upon circumstantial evidence. It is settled law propounded in a plethora of judgments rendered by the Hon'ble Apex Court that a case founded upon circumstantial evidence the prosecution is under a bounden legal obligation to unfailingly and unflinchingly prove each of the links in the chain of circumstances and in the event of even one of the links in the chain of circumstances getting severed the entire chain gets broken and benefit of doubt ought to be given to the accused. It is also well settled that, in, a case of circumstantial evidence, the, motive which drove or goaded the accused to commit the crime, necessitates substantiation by cogent and potent evidence standing adduced on record by the prosecution.

9. The primary link in the chain of circumstances constituted by the prosecution against the accused is of both accused Suresh Kumar and absconding accused Mohinder standing last seen together with the deceased. The link aforesaid stands embedded in the testimonies of PW-1 and PW-14. PW-1 and PW-14 both unanimously depose of both the accused aforesaid standing last seen with the deceased on 25.02.2013 at about 6.45 p.m and around 8.00 p.m respectively at Shahpur Bazar and Boh Dharini. For testing the veracity of their respective testimonies, it is imperative to incisively scan their respective depositions on oath. Even though in Ext.PW-1/A, PW-1 has unfolded therein the factum of on 25.2.2013 two boys at about 7.15 p.m at Shahpur Bazar, whose names remained unrevealed therein, in his presence holding a conversation with his father for engaging his cab for carrying them to Boh Dharini, which request stood acceded to by his deceased father. However, though therein he omits to disclose their names, he unravels therein of his being familiar with their faces yet has omitted to delineate therein the key characteristic features borne by each of them. However, in gross digression thereto he proceeds to in his recorded deposition on oath comprised in his examination-in-chief graphically communicate the factum of accused Suresh Kumar and absconding accused Mohinder being the persons sighted by him to hold a conversation with his deceased father on 25.2.2013 at about 6.45 p.m in the evening at Shahpur Bazar for carrying them to Boh Dharini, which request stood acceded to by his deceased father. The explication for his in his deposition comprised in his examination in chief unfolding therein the names of accused Suresh Kumar and absconding accused Mohinder though names whereof remained unrevealed in Ext.PW-1/A stands embedded in the factum of his in his cross-examination admitting the truthfulness of the suggestion put to him by the learned defence counsel of both accused Suresh Kumar and absconding accused Mohinder standing sighted by him for the first time at the Police Station whereupon he obviously acquired knowledge of their identity. Furthermore, the effect of PW-1 acquiescing to the suggestion put to him by the learned defense counsel of both accused Suresh Kumar and absconding accused Mohinder standing seen by him for the first time in the police station erodes the effect of the factum embedded in his examination in chief of his on 25.02.2013 at about 6.45 p.m identifying accused Suresh Kumar and absconding accused Mohinder to be the two unnamed persons sighted by him to hold a conversation with his deceased father for engaging his cab for carrying them to Boh Dharini cumulatively even though the aforesaid deposition on oath of PW-1 comprised in his examination in chief is in gross detraction to his previous statement comprised in Ext.PW-1/A wherein he omits to name Suresh Kumar and absconding accused

Mohinder to stand sighted by him at Shahpur Bazar to hold a conversation with his deceased father for carrying them in his father's cab, hence underlining a stark improvement thereupon apart therefrom its standing for occurrence of an improvement therein vis.a.vis his previous statement recorded in writing to be tainted it also loses its tenacity in the face of his acquiescing to the suggestion put to him in his cross-examination by the learned defence counsel of his seeing the accused persons for the first time in the police station whereupon an obvious deduction stands filliped of his not sighting or seeing both the accused earlier thereto. The effect of the erosion suffered for reasons afore-stated to the communication made by PW-1 in his recorded deposition comprised in his examination in chief qua his last seeing the accused in the company of the deceased on 25.02.2013 at Shahpur Bazar at about 6.45 p.m rendered unnecessary the holding of both the test identification parade in accordance with law by the Investigating Officer it also renders unworthy of credit the identification of accused Suresh Kumar in Court by PW-1 during the course of the recording of his testimony comprised in his examination-in-chief. Furthermore, with Ext.PW-1/A PW-1 omitting to communicate therein the factum of accused Jyoti standing last seen by him on 25.2.2013 at Shahpur Bazar in the company of accused Suresh Kumar and absconding accused Mohinder in its entirety negates the effect if any of the identification of accused Jyoti in Court by PW-1. Even the testimony of PW-14 pressed into service by the prosecution to sustain its link of the deceased standing last seen on 25.2.2013 at 8 p.m at Darini is bereft of any probative vigour rather loses its credibility in the face of his in his cross examination deposing of his seeing the accused at the police station whereafter he in the company of the Investigating Officer and the accused proceeded to Dharini Bazar. Further impetus qua hence his testimony comprised in his examination in chief wherein he has made a graphic communication of on 25.2.2013 at about 8 p.m his sighting accused Suresh Kumar and absconding accused Mohinder in the company of the deceased standing belied, is lent by his in his cross examination admitting the suggestion put to him by the learned defence counsel of on the relevant day neither the deceased nor the accused present in Court arriving in his shop. Though, he has tried to wriggle out the effect of the aforesaid admission qua the aforesaid fact comprised in his cross examination by deposing of his on the relevant day holding a brief talk with deceased Ashok Kumar nonetheless the said concert is a blatant improvement arising from the factum of his omitting to record the aforesaid fact in his previous statement recorded in writing rendering it to be unworthy of credence besides of no reliance being imputable thereto. In aftermath, the link of last seen constituted against the accused by PW-14 in his examination in chief besides his identifying the accused in Court carries no legal weight. As a corollary an incisive reading of the testimonies of PW-1 and PW-14 omit to carry forward the espousal of the prosecution of theirs proving the factum of accused Suresh Kumar and absconding accused Mohinder and accused Jayoti standing respectively last seen in the company of the deceased at Shahpur Bazar on 25.2.2013 at 6.45 p.m and at Boh Dharini at 8.00 p.m. on the very same day with the concomitant effect of the said link in the chain of circumstances constructed by the prosecution against the accused standing severed.

10. With the peeling of the link of last seen of accused Suresh and absconding accused Mohinder in the company of deceased in the evening of 25.2.2013 at Shahpur Bazar besides at Boh Dharini on 25.2.2013 at 8.00 p.m, the evidentiary value of the recovery of the body of the deceased at the instance of accused by the Investigating Officer from a gorge in Maler Nala too wanes and is rendered to be an obscurantist piece of evidence. The waning of potency of the evidentiary value of the recovery of body of the deceased at the instance of the accused by the Investigating Officer gets accentuated impetus from the factum of the body of the deceased standing recovered on 2.3.2013, hence at a time remotely distant from the deceased purportedly standing last sighted together by both PW-1 and PW-14 in the company of accused Suresh Kumar and absconding accused

Mohinder at Shahpur Bazar and at Boh Darini on 25.2.2013 respectively at 6.45 p.m and at 8.00 p.m. Furthermore, with PW-14 in his deposition comprised in his cross examination deposing of the body of the deceased being visible from the edge of the road easily facilitated its standing sighted by any person as also by the Investigating Officer earlier to its identification by the accused before the Investigating Officer in sequel whereto site plan comprised in Ext.PW-26/C stood prepared on 8.3.2013. The preparation of site plan Ext.PW-26/C by the Investigating Officer at the instance of the accused loses its sinew in making any communication qua its constituting a potent inculpatory piece of evidence against the accused in the offences allegedly committed by him rather its effect stands emaciated for the reasons (a) inquest papers comprised in Ext.PW-24/B accompanied by a site plan standing prepared previous to it, bespeaking of the awareness or knowledge of the Investigating Officer qua the location of the body of the deceased at the place reflected in the site plan appended to the inquest papers. Consequently, with the preparation of inquest papers accompanied by site plan whereat the body of the deceased stood located by the Investigating Officer from a site as deposed by PW-14 in his cross-examination being visible from the edge of the road negates any inference of the accused holding exclusive knowledge of its occurrence thereat. As a sequitur with lack of exclusive knowledge of the accused qua its occurrence at the spot reflected in site plan Ext.PW-26/C prepared subsequent to the preparation of inquest papers by the Investigating Officer accompanied by a site plan, constrains a conclusion of the preparation of Ext.PW-26/C by the Investigating Officer at the instance of the accused to be a stratagem employed by him to invent its location thereat on its purported identification by the accused (b) the preparation of Ext.PW-26/C stood un-preceded by the making of by the accused of any disclosure statement before the Investigating Officer besides remained unpreceded by the making of by the accused of an apposite recovery memo by the Investigating Officer at his instance. The lack of Ext.PW-26/C remaining unpreceded by making of at the instance of the accused the aforesaid memos by the Investigating Officer too renders the preparation of Ext.PW-26/C to be a highly contrived stratagem on the part of the Investigating Officer to falsely inculpate the accused. In sequel the link aforesaid in the chain of circumstances constructed by the prosecution against the accused becomes frail.

11. Even though PW-24 has in her post mortem report comprised in Ext.PW-24/C portrayed therein of the demise of the deceased occurring within 48 hours to seven days prior to hers subjecting his body to post mortem examination whereupon the prosecution concerts of the identification of the body of the deceased by the accused to the Investigating Officer in sequel whereto Ext.PW-26/C stood prepared which exhibit for reasons aforesaid is devoid of any probative vigour, cumulatively besides when the evidence comprised in the testimonies of PW-1 and PW-14 of the deceased standing last sighted in the company of the accused on 25.2.2013 at Shahpur Bazar at 6.45 p.m and at Boh Darini at 8.00 p.m on the very same day is too for reasons aforesaid a feeble piece of evidence, concomitantly hence renders frail any submission before this Court by the prosecution of with an occurrence of co-relatibility intra se the timing of demise of deceased unfolded in Ext.PW-24/C viz.a.viz his standing last sighted in the company of both accused at the afore referred places at the afore referred times on 25.2.2013 this Court ought to return findings of conviction against the accused. Moreover, the said propagation addressed before this Court by the prosecution is of no avail to it in the face of this Court discounting the probative worth of the testimonies of PW-1 and PW-14 especially when the effect of the aforesaid pieces of evidence pressed into service by the prosecution stands concluded for reasons referred to hereinbefore to be having no evidentiary value.

12. Knife Ext.P-4 recovered under memo Ext.PW-7/B is contented to constitute proof of a potent link in the chain of circumstances built by the prosecution against the

accused. However, recovery thereof by the Investigating Officer at the instance of the accused under Memo Ext.PW-7/B is also an unproven link in the chain of circumstances nor it can be construed to be the weapon if any used by the accused to inflict any of the injuries noticed by PW-24 in her post mortem report to be occurring around the neck of the deceased especially when (1) it has been unfolded by PW-24 in her deposition comprised in her cross-examination of the weapon of offence knife Ext.P-4 not standing shown to her by the public prosecutor during the course of hers recording her testimony comprised in her examination in chief besides its standing not showing to her by the Investigating Officer during the course of hers subjecting the body of the deceased to post mortem examination, for evincing an opinion from her qua its standing used by the accused to inflict the bruises found by her to be occurring around the neck of the deceased during hers subjecting his body to a post mortem examination, fosters an inference of there being no formidable evidence adduced by the prosecution of knife Ext.P-4 standing used by the accused to inflict the injuries occurring around the neck of the deceased as noticed in Ext.PW-24/C by PW-24. (2) both PW-3 and PW-18 unanimously in their respective cross-examinations underscore therein of the body of the deceased standing located on the bed of a steep dhank. The distance of the location of the body of the deceased thereat from the edge of the road has been deposed to be 15 to 20 feet. PW-3 further deposes in his cross-examination of sharp edge stones occurring throughout the run of the steep dhank from the edge of the road upto its bed whereat the body of the deceased stood located at a distance of 15 to 20 feet therefrom. Though a keen discernment of the aforesaid rears a conclusion of the injuries begotten around the neck of the deceased as unraveled in Ext.PW-24/C being sequelable by the sharp edged stones occurring throughout the run of the steep dhank from the edge of the road upto its bed whereat the body of the deceased stood located at a distance of 15 to 20 feet therefrom yet PW-24 appears to for no worthy reasons discount the factum of the occurrence of injuries thereat on the body of the deceased being sequelable by the factum aforesaid rather hers dispelling the occurrence of injuries found around the neck of the deceased to those portion striking the sharp edged stones occurring along the steep dhank along whose entire run from the edge of the road upto 15 to 20 feet whereto the body of the deceased stood located appears to stand engendered by no *raison detre* rather appears to hence sprouted by tutorings standing meted to her by the Investigating Officer or its formation being at the behest of the investigating officer whereupon no reliance is imputable. The inference of hers dispelling the aforesaid factum of bruises found around the neck of the deceased standing aroused on account of tutorings meted to her by the Investigating Officer gets a boost from the factum of the public prosecutor omitting to during the course of the recording of her deposition comprised in her examination in chief show to her knife Ext.P-4 for evincing a firm opinion from her qua it being the weapon of offence which stood used by the accused for inflicting the bruises around the neck of the deceased. The effect of the omissions aforesaid cumulatively construed entwinement with no *raison detre* standing afforded by PW-24 for dispelling the factum of occurrence of injuries existing around the neck of the deceased standing begotten by the sharp edged stones occurring throughout the run of the dhank all through whose course the body of the deceased rolled from the edge of the road up to 15 to 20 feet whereat it stood located renders it too to not firmly prove the prosecution case of knife Ext.P-4 standing used by any of the accused to inflict injuries aforesaid found on the neck of the deceased. The inference aforesaid ousting the user of knife Ext.P-4 by the accused in begetting injuries around the neck of the deceased has its effect in repelling the probative worth of recovery of weapon of offence under memo Ext.PW-7/B besides it repulses the effect of the testimony of PW-12 (Nitin Kaushal) who in his examination-in-chief has proven the factum of accused Suresh Kumar purchasing from his shop knife Ext.P-4 yet the effect of his deposition aforesaid comprised in his examination in chief is rendered prevaricated especially when he in his cross-

examination deposes of his on each day selling 8 to 10 knives and his omitting to with aplomb depose with categoricality qua the accused purchasing it from his shop.

13. The FSL report comprised in Ext.PC though has opined therein of the blood stains on the jacket of the accused being co-relatable with the blood group of deceased yet existence of blood stains on the clothes of the accused recovered under Memo Ext.PW-8/A cannot constitute proof of any overwhelming link in the chain of circumstances, as its effect stands faded rather contrarily recovery thereof with its carrying blood stains/marks appears to be a sequel to the Investigating Officer on collecting the blood of the deceased from PW-24 at the time she subjected his body to post mortem examination hence therewith staining the clothes of the accused recovered under Memo Ext.PW-8/A especially when PW-8 the witness to the aforesaid recovery memo whereunder clothes of the accused Suresh Kumar stood handed over by his mother Satya Devi to the police has in her deposition comprised in her cross examination denied the factum of the mother of the accused Satya Devi handing over in her presence the clothes of her son accused Suresh Kumar to the Investigating Officer besides hers deposing of Satya Devi the mother of accused Suresh Kumar not disclosing to the police in her presence of accused Suresh Kumar on 25.2.2013 wearing the clothes which stood recovered by the Investigating Officer on their purported production before him by the mother of accused Suresh Kumar belies the propagation of the prosecution of the clothes purportedly belonging to Suresh Kumar comprised in Ext.PW-8/A standing worn by him at the time contemporaneous to the occurrence. With PW-28 another witness to recovery memo Ext.PW-8/A whereunder clothes of the accused stood taken into possession, omitting to categorically disclose in his deposition of the purported clothes of Suresh Kumar belonging to him besides his omitting to also categorically depose of blood stains occurring on any of the clothes, purportedly belonging to accused Suresh Kumar recovered under memo Ext.PW-8/A standing carried thereon, at the time of their standing handed over to the Investigating Officer by the mother of the accused, exemplifies the factum of the Investigating Officer on collecting the blood of the deceased from PW-24 at the time the latter subjected him to post mortem examination daubing therewith clothes Ext.PW-8/A purportedly worn by the accused at the time contemporaneous to the occurrence whereas they for reasons aforesaid did not belong to accused. In consequence report of the FSL comprised in Ext.PC with a disclosure therein of blood stains occurring on jacket Ext.1b purportedly belonging to the accused on comparison with the blood group of the deceased, belonging to the deceased, for hence constraining an inference of the inculpatory role fastened by the prosecution to accused Suresh Kumar standing clinched, gets negated besides ousted. In aftermath the aforesaid link also gets severed.

14. The recovery of Driving License, of the deceased under memo Ext.PW-10/B from PW-13, to whom accused Suresh Kumar stood related being brother in law of his elder brother handed them over on 1.3.2013 though stands proven by PW-13 in his deposition comprised in his examination in chief, nonetheless the effect of his deposition qua its purportedly lending proof of its recovery from his person under Ext.PW-10/B also its constituting proof of a link in the chain of circumstances built by the prosecution against the accused, pales into oblivion rather stands enfeebled in the face of his, in his cross examination conceding to the suggestion put to him by the learned defence counsel of his divulging to the Investigating Officer the factum of accused Suresh Kumar visiting him at his home and returning therefrom in the evening, whereas with the said fact not occurring in his previous statement recorded in writing rears an inference of his deposition in his examination in chief of accused Suresh Kumar on visiting his home on 1.3.2013 whereat he handed over the Driving License of the deceased to him, to be an embellishment over his previous statement recorded in writing besides the factum of recovery of Driving License Ext.PW-10/A under Memo Ext.PW-10/B from his house is also rendered to be a tainted

piece of evidence. Moreover, Driving License of the deceased Ext.PW-10/A recovered under memo Ext.PW-10/B appears to be an invention on the part of the Investigating Officer especially in the face of one Sanju belonging to village of PW-13 signing Ext.PW-10/B as witness. However, the said Sanju remained neither cited as a witness to give succor to the factum recorded in Ext.PW-10/A of it standing recovered by the police from PW-13. In sequel, especially when also no witnesses of the locality stood associated by the Investigating Officer at the time of preparation of Ext.PW-10/B whereunder the Driving License of the deceased stood recovered by the Investigating Officer from PW-13 hence renders its recovery therefrom to be tainted.

15. In a case anvilled upon circumstantial evidence, it is imperative for the prosecution to prove the motive reared by the accused to murder the deceased. The motive as stands ascribed to the accused by the prosecution is encompassed in the factum of the deceased refusing to permit the accused Suresh Kumar and absconding accused Mohinder to embark his cab, theirs murdering the deceased whereafter theirs keeping his body therein, drove his cab and only on its axel standing broken theirs abandoning it at 32 miles. Recovery of the cab with the aforesaid defect is canvassed to strengthen the factum of the accused after murdering the deceased, driving his cab with his body therein and on its developing a defect theirs abandoning it. However, the aforesaid motive as stands ascribed to the accused by the prosecution to murder the deceased is rendered emaciated with PW-5 father of accused Jyoti deposing of his daughter taking to the company of the accused Suresh Kumar with his consent with an intention to perform marriage with him. In sequel hence there was no occasion for the accused to murder the deceased on his purportedly concerting to frustrate accused Suresh Kumar to perform marriage with accused Jyoti by not permitting them to embark his cab at Shahpur Bazar especially when the father of accused Jyoti was not an obstacle to hers performing marriage with accused Suresh. Even otherwise with evidence afore-referred portraying the factum of no credence being imputable to the testimonies of both PW-1 and PW-14 qua the factum of theirs last seeing accused Suresh Kumar and absconding accused Mohinder in the company of the deceased on 25.02.2013 respectively at Shahpur Bazar at 6.45 p.m and Boh Dharini at 8.00 p.m the effect thereof is of with no concert standing assayed to by accused Suresh Kumar and absconding accused Mohinder to hire the cab of the deceased, as a corollary, it cannot also be concluded of the accused Suresh Kumar and absconding accused Mohinder on the deceased on 25.02.2013 at Shahpur Bazar refusing to accede to their request of carrying them to Boh Dharini the accused after murdering him taking his vehicle with his body kept therein and on its developing a defect theirs abandoning it. Even otherwise, the evidence adduced by PW-1 and PW-14 is contrary to the factum espoused by the prosecution of both accused Suresh Kumar and absconding accused Mohinder on the deceased refusing to accede to their request of carrying them to Boh Dharini, murdering him whereafter they carried his vehicle with the body of the deceased lodged therein and theirs abandoning it at 32 miles. Furthermore with PW-1 and PW-14 deposing of accused Jyoti standing not ever sighted in the company of accused either at Shahpur Bazar on 25.02.2013 at about 6.45 pm and around 8.00 pm at Boh Dharini, dismantles the propagation of the prosecution of the accused to benumb the assay of the deceased to frustrate accused Suresh Kumar performing marriage with accused Jyoti by refusing to accede to their request to carry them in his cab murdered him whereafter they drove his vehicle with his body lodged therein and on its developing a defect theirs abandoning it at 32 miles. With an important link in the chain of circumstances getting broken the entire edifice of the prosecution case gets torpedoed.

16. 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.

17. In view of the above discussion, 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 forthwith.

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

Commissioner, Central Excise Chandigarh ...Appellant.

Versus

M/s Valley Iron & Steel Co. Ltd. ...Respondent.

CEA No. 6 of 2010
Decided on: 07.04.2016

Constitution of India, 1950- Article 226- Learned Counsel for the applicant states that question determined in the appeal has already been determined by the High Court of Gujarat- every High Court must give due deference to the law laid down by other High Courts- since, matter is covered by the judgment of Gujarat High Court, therefore, appeal disposed of in terms of the judgment of Gujarat High Court. (Para-2 to 4)

Cases referred:

Commissioner of C. Ex. & Customs versus Saurashtra Cement Ltd., 2010 (260) E.L.T. 71 (Guj.).

Neon Laboratories Limited versus Medical Technologies Limited and others, (2016) 2 Supreme Court Cases 672

For the appellant: Mr. Rajiv Jiwan, Advocate.

For the respondent: Mr. Prince Chauhan, Advocate, vice Mr. Rahul Mahajan, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Mr. Rajiv Jiwan, learned counsel for the appellant, stated at the Bar that the question involved in this appeal has already been determined by the High Court of Gujarat at Ahmedabad in the case titled as **Commissioner of C. Ex. & Customs versus Saurashtra Cement Ltd.,** reported in **2010 (260) E.L.T. 71 (Guj.).** His statement is taken on record. He has also made available copy of the judgment (supra), made part of the file.

2. We have gone through the judgment (supra) and the issue involved in the instant appeal and are of the considered view that the issue involved in this appeal is covered by the judgment (supra).

3. It is apt to record herein that the Apex Court in a latest judgment in the case titled as **Neon Laboratories Limited versus Medical Technologies Limited and others,** reported in **(2016) 2 Supreme Court Cases 672,** has directed that every High Court must give due deference to the law laid down by other High Courts. It is profitable to reproduce para 7 of the judgment herein:

> *"7. The primary argument of the Defendant-Appellant is that it had received registration for its trademark ROFOL in Class V on 14.9.2001 relating back to the date of its application viz. 19.10.1992. It contends that the circumstances as on the date of its application are relevant, and on that date, the Plaintiff-Respondents were not entities on the market. However, the Defendant-Appellant has conceded that it commenced user of the trademark ROFOL only from 16.10.2004 onwards. Furthermore, it is important to note that litigation was initiated by Plaintiff-Respondents, not Defendant-Appellant, even though the latter could have raised issue to Plaintiff-Respondents using a similar mark to the one for which it had filed an application for registration as early as in 1992. The Defendant- Appellant finally filed a Notice of Motion in the Bombay High Court as late as 14.12.2005, in which it was successful in being granted an injunction as recently as on 31.3.2012. We may reiterate that every High Court must give due deference to the enunciation of law made by another High Court even though it is free to charter a divergent direction. However, this elasticity in consideration is not available where the litigants are the same, since Sections 10 and 11 of the CPC would come into play. Unless restraint is displayed, judicial bedlam and curial consternation would inexorably erupt since an unsuccessful litigant in one State would rush to another State in the endeavour to obtain an inconsistent or contradictory order. Anarchy would be loosed on the Indian Court system. Since the Division Bench of the Bombay High Court is in seisin of the dispute, we refrain from saying anything more. The Plaintiff-Respondents filed an appeal against the Order dated 31.3.2012 and the Division Bench has, by its Order dated 30.4.2012, stayed its operation." (Emphasis added)*

4. In view of the above, the appeal is disposed of in view of the judgment made by the High Court of Gujarat at Ahmedabad in **Saurashtra's case (supra),** shall form part of this judgment also. Pending applications, if any, are also disposed of accordingly.

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

M/s Caplin Point Laboratories Ltd. and others .....Petitioners.

Versus

Union of India and another ..... Respondents.

Cr.MMO No.304 of 2015.
Judgment reserved on :31.03.2016.
Date of decision: April 7th ,2016.

Drugs and Cosmetics Act, 1940- Section 18(a)(i) read with Section 27(d)- A complaint was filed against the petitioner on the basis of the report declaring Diclofenac Sodium Gel as "not of standard quality" by the Government Analyst, RDTL, Chandigarh- it was contended that Gel was made for export purpose and was found to be conforming to the standards by laboratories of the countries, where it was to be exported- held, that petitioners have failed to place on record any material to show that they are exempted from manufacturing the Gel as per standard laid down in the Indian Pharmacopoeia and are only required to comply with the standards laid down in the Pharmacopoeia applicable to the country exporting the Gel from the petitioners- petition dismissed. (Para-7 to 9)

Case referred:
Amit Kapoor versus Ramesh Chander and another (2012) 9 SCC 460

For the Petitioners	:	Mr.Chandranarayana Singh, Advocate.
For the Respondents	:	Mr.Ashok Sharma, Assistant Solicitor General of India, with Mr.Angrez Kapoor, Advocate, for respondent No.1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Section 482 of the Code of Criminal Procedure seeks quashing of complaint instituted against the petitioners under the Drugs and Cosmetics Act, 1940 (for short the 'Act') and further seeks quashing of the orders passed by the learned trial Magistrate on 23.07.2015 and 04.09.2015.

2. The case of the petitioners is that it is a public limited company manufacturing wide range of products which are entirely meant for export. The petitioners came to know that respondent No.1 had instituted a complaint against it under Section 18(a)(i) readwith Section 27(d) of the Act before the learned Judicial Magistrate at Nalagarh and after obtaining the certified copies of the proceedings, they put in appearance before the learned Court below. It was then that the petitioners learnt that the Court had already issued process against them and have, therefore, prayed for quashing of these proceedings on the ground that they are sought to be prosecuted on the basis of the report regarding Diclofenac Sodium Gel 1% (for short 'Gel') which was declared as "not of standard quality" by the Government Analyst, RDTL, Chandigarh, ignoring the fact that the said Gel was only for export purpose and not for domestic sale. It is further contended that the laboratories of the countries to which the aforesaid Gel is exported had found the Gel to be conforming to the standards as laid down by such countries and, therefore, in such circumstances, the proceedings cannot be permitted to continue as the same would only amount to abuse of process of law.

3. Shri Chandranarayana Singh, learned counsel for the petitioners has vehemently argued that the Gel in question is a proprietary medicine and not a Pharmacopoeia specification to which the provisions of the Act could be held to be applicable. The petitioners were only required to comply with the standards laid down by the countries to which the product was to be exported and, therefore, the standards as laid down in the Indian Pharmacopoeia would not be applicable to the Gel since it had been manufactured under the standards laid down in the British Pharmacopoeia.

4. Shri Ashok Sharma, learned Assistant Solicitor General of India, on the other hand, has argued that once the Gel in question is manufactured by the petitioners in India, then they are required to comply with the standards as laid down by the Indian Pharmacopoeia unless so exempted by any order to this effect. Therefore, even if, it is assumed that the Gel in question complies with the standards laid down in the British Pharmacopoeia, the same is of no avail.

5. It is well settled that the inherent power of the High Court under Section 482 Cr.P.C. should be sparingly exercised in rare cases only when the Court comes to the conclusion that there would be manifest injustice or there would be abuse of the process of Court, if such power is not exercised and the Court would then quash the proceedings. The legal position is well settled that when the prosecution at the initial stage is asked to be quashed, the test to be applied by the Court is, as to whether the uncontroverted allegations as made in the complaint establish the offence. The High Court being superior Court of the State should refrain from analyzing the materials which are yet to be adduced and seen in their true perspective. However, quashing of complaint and criminal proceedings would still depend upon the facts and circumstances of each case.

6. The 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. or together, as the case may be, have been summarized by the Hon'ble Supreme Court in ***Amit Kapoor*** *versus* ***Ramesh Chander and another (2012) 9 SCC 460***, as follows:-

> "1. Though there are no limits of the powers of the Court under Section 482 of the Code but the more the power, the more due care
>
> and caution is to be exercised in invoking these powers. The power of quashing criminal proceedings, particularly, the charge framed in terms of Section 228 of the Code should be exercised very sparingly and with circumspection and that too in the rarest of rare cases.
>
> 2. The Court should apply the test as to whether the uncontroverted allegations as made from the record of the case and the documents submitted therewith prima facie establish the offence or not. If the allegations are so patently absurd and inherently improbable that no prudent person can ever reach such a conclusion and where the basic ingredients of a criminal offence are not satisfied then the Court may interfere.
>
> 3. The High Court should not unduly interfere. No meticulous examination of the evidence is needed for considering whether the case would end in conviction or not at the stage of framing of charge or quashing of charge.
>
> 4. Where the exercise of such power is absolutely essential to prevent patent miscarriage of justice and for correcting some grave error that might be committed by the subordinate courts even in such cases, the High Court should be loath to interfere, at the threshold, to throttle the prosecution in exercise of its inherent powers.
>
> 5. Where there is an express legal bar enacted in any of the provisions of the Code or any specific law in force to the very initiation or institution and continuance of such criminal proceedings, such a bar is intended to provide specific protection to
>
> an accused.

6. The Court has a duty to balance the freedom of a person and the right of the complainant or prosecution to investigate and prosecute the offender.

7. The process of the Court cannot be permitted to be used for an oblique or ultimate/ulterior purpose.

8. Where the allegations made and as they appeared from the record and documents annexed therewith to predominantly give rise and constitute a 'civil wrong' with no 'element of criminality' and

does not satisfy the basic ingredients of a criminal offence, the Court may be justified in quashing the charge. Even in such cases, the Court would not embark upon the critical analysis of the evidence.

9. Another very significant caution that the courts have to observe is that it cannot examine the facts, evidence and materials on record to determine whether there is sufficient material on the basis of which the case would end in a conviction, the Court is concerned primarily with the allegations taken as a whole whether they will constitute an offence and, if so, is it an abuse of the process of court leading to injustice.

10. It is neither necessary nor is the court called upon to hold a full-fledged enquiry or to appreciate evidence collected by the investigating agencies to find out whether it is a case of acquittal or

conviction.

11. Where allegations give rise to a civil claim and also amount to an offence, merely because a civil claim is maintainable, does not mean that a criminal complaint cannot be maintained.

12. In exercise of its jurisdiction under Section 228 and/or under Section 482, the Court cannot take into consideration external materials given by an accused for reaching the conclusion that no offence was disclosed or that there was possibility of his acquittal. The Court has to consider the record and documents annexed therewith by the prosecution.

13. Quashing of a charge is an exception to the rule of continuous prosecution. Where the offence is even broadly satisfied, the Court should be more inclined to permit continuation of prosecution rather than its quashing at that initial stage. The Court is not expected to marshal the records with a view to decide admissibility and reliability of the documents or records but is an opinion formed prima facie.

14. Where the charge-sheet, report under Section 173(2) of the Code, suffers from fundamental legal defects, the Court may be well within its jurisdiction to frame a charge.

15. Coupled with any or all of the above, where the Court finds that it would amount to abuse of process of the Code or that interest of justice favours, otherwise it may quash the charge. The power is to be exercised ex debito justitiae, i.e. to do real and substantial justice for administration of which alone, the courts exist.

{Ref. State of West Bengal & Ors. v. Swapan Kumar Guha & Ors. [AIR 1982 SC 949]; Madhavrao Jiwaji Rao Scindia & Anr. v. Sambhajirao Chandrojirao Angre & Ors. [AIR 1988 SC 709]; Janata Dal v. H.S. Chowdhary & Ors. [AIR 1993 SC 892]; Mrs. Rupan Deol Bajaj & Anr. v. Kanwar Pal Singh Gill & Ors. [AIR 1996 SC 309; G. Sagar Suri & Anr. v. State of U.P. & Ors. [AIR 2000 SC 754]; Ajay Mitra v. State of

M.P. [AIR 2003 SC 1069]; M/s. Pepsi Foods Ltd. & Anr. v. Special Judicial Magistrate & Ors. [AIR 1988 SC 128]; State of U.P. v. O.P. Sharma [(1996) 7 SCC 705]; Ganesh Narayan Hegde v. s. Bangarappa & Ors. [(1995) 4 SCC 41]; Zundu Pharmaceutical Works Ltd. v. Mohd. Sharaful Haque & Ors. [AIR 2005 SC 9]; M/s. Medchl Chemicals & Pharma (P) Ltd. v. M/s. Biological E. Ltd. & Ors. [AIR 2000 SC 1869]; Shakson Belthissor v. State of Kerala & Anr. [(2009) 14 SCC 466]; V.V.S. Rama Sharma & Ors. v. State of U.P. & Ors. [(2009) 7 SCC 234]; Chunduru Siva Ram Krishna & Anr. v. Peddi Ravindra Babu & Anr. [(2009) 11 SCC 203]; Sheo Nandan Paswan v. State of Bihar & Ors. [AIR 1987 SC 877]; State of Bihar & Anr. v. P.P. Sharma & Anr. [AIR 1991 SC 1260]; Lalmuni Devi (Smt.) v. State of Bihar & Ors. [(2001) 2 SCC 17]; M. Krishnan v. Vijay Singh & Anr. [(2001) 8 SCC 645]; Savita v. State of Rajasthan [(2005) 12 SCC 338]; and S.M. Datta v. State of Gujarat & Anr. [(2001) 7 SCC 659]}.

16. These are the principles which individually and preferably cumulatively (one or more) be taken into consideration as precepts to exercise of extraordinary and wide plenitude and jurisdiction under Section 482 of the Code by the High Court. Where the factual foundation for an offence has been laid down, the courts should be reluctant and should not hasten to quash the proceedings even on the premise that one or two ingredients have not been stated or do not appear to be satisfied if there is substantial compliance to the requirements of the offence."

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

7. At the outset, it may be observed that the petitioners have failed to place on record any material which may even remotely suggest that they are exempted from manufacturing the Gel as per the standards laid down in the Indian Pharmacopoeia. Therefore, even if, it is momentarily conceded that the Gel conforms to the standards of the British Pharmacopoeia, even then the same would be of no consequence as the petitioners were required to specifically not only indicate but produce on record tangible material which could suggest that in matters of export, the petitioners need not comply with the standards laid down by the Indian Pharmacopoeia, so long as they comply with the standards laid down in the British Pharmacopoeia.

8. At this stage, it would be relevant to refer to the certificate of the analysis, the relevant portion whereof reads as under:-

"ASSAY : Each gram on an average contains:

Content of	: Obtainedmg	Claimmg	Obtained	Limits	Protocol
Diclofenac Diethylamine calculated as Diclofenac Sodium	: 6.63 mg	10.00mg	66.30%	95% to 105%	RDTL/MS/220

In the opinion of the undersigned the sample referred to above is **not of standard quality** as defined in the Drugs and Cosmetics Act, 1940, and Rules there under for the reasons given below:-

The sample does not conforms to claim as per Patent & Proprietary in respect to the Assay of Diclofenac Diethylamine calculated as Diclofenac Sodium performed"

9. Evidently, as against the limits of 95% to 105% prescribed for the Diclofenac Diethylamine calculated as Diclofenac Sodium, the Gel in question was only found to be containing 66.30% of Diclofenac Diethylamine calculated as Diclofenac Sodium. Shri Chandranarayana Singh has though drawn my attention to certificate reports annexed with the petition as Annexures I and II to contend that the laboratories situate in the countries importing the Gel from the petitioners have after analysis found to be complying with all the parameters as per the specification. But, in absence of any material to even remotely suggest that the petitioners are exempted from standards as laid down under the Indian Pharmacopoeia and are only required to comply with the standards as laid down in the Pharmacopoeia applicable to the countries importing Gel from the petitioners, these reports are of no avail.

10. In view of the aforesaid discussion, the petitioners can take no exception to the summoning orders issued against them. Consequently, there is no merit in this petition and the same is accordingly dismissed. Pending application, if any, also stands disposed of. Interim order dated 16.10.2015 is ordered to be vacated.

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR.JUSTICE P.S. RANA, J.

Municipal Corporation, Shimla .....Appellant.

Versus

Ramesh Chand Thakur .....Respondent.

LPA No.55 of 2015

Decided on: April 07, 2016.

Constitution of India, 1950- Article 226- Writ petitioner was held entitled to regularization subject to availability of a vacancy- earlier orders of regularization passed in respect of similar persons were upheld by the Division Bench - Special Leave Petitions were dismissed- hence, order passed by the Writ Court upheld- however, payment of arrears restricted to three years prior to filing of the writ petition. (Para-2 to 4)

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

For the Appellant: Mr.Hamender Chandel, Advocate.

For the Respondent: Ms.Ranjana Parmar, Senior Advocate, with Mr.Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, C.J. (Oral)

This appeal is directed against the judgment, dated 18th September, 2014, passed in CWP No.2521 of 2012, titled Ramesh Chand Thakur vs. Municipal Corporation,

whereby the writ petition filed by the petitioner (respondent herein) was allowed. The operative portion of the judgment is reproduced hereinbelow:

> *".....Consequently, the submission made by the learned counsel for the respondent-corporation is rejected. It is ordered that in case on 31.03.2004 or earlier the petitioner has completed the requisite period of qualifying service, he is held accordingly entitled for regularization subject to availability of a vacancy. Consequential benefits, if any, within the parameters as accruable shall be given to the petitioner within three months."*

2. During the hearing of the case, the learned Senior Counsel appearing for the respondent/writ petitioner stated that similar writ petition was allowed by a learned Single Judge of this Court vide judgment, dated 31st July, 2014, passed in CWP No.2415 of 2012, titled Mathu Ram vs. Municipal Corporation and others, copy of which has already been placed on the writ record by the respondent/writ petitioner. The said judgment was the subject matter of the Letters Patent Appeal (LPA No.44 of 2015), which was also dismissed, vide judgment dated 13th October, 2015, and the judgment of the learned Single Judge was upheld. It is stated that the appellant-Corporation questioned the judgment of this Court passed in Letters Patent Appeal before the Apex Court by way of Special Leave Petition, which also stands dismissed. Thus, the judgment rendered by the learned Single Judge in Mathu Ram's case (supra) has attained finality.

3. Viewed thus, there is no illegality in the judgment impugned in the instant appeal and the same is upheld.

4. However, it is made clear that the payment of arrears is restricted for three years prior to filing of the writ petition, following the decisions of 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.**

5. The Letters Patent Appeal stands disposed of accordingly.

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

Nanak Chand .....Appellant

Versus

State of Himachal Pradesh .....Respondent

Cr. Appeal No. 21/2011
Reserved on: April 6, 2016
Decided on: April 7, 2016

N.D.P.S. Act, 1985- Section 20- Accused was found carrying a bag on his back- he was stopped and searched -9 kilogram of charas was found in the bag - he was tried and convicted by the trial Court- aggrieved from the judgment, appeal was preferred- held, in appeal that police had not associated owner/driver of the vehicle as independent witnesses- PW-1 had not supported the prosecution version- there were material contradictions in the testimonies of the prosecution witnesses- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case

property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- accused had given consent for the search of his bag but had not consented to his personal search- however, police had carried out personal search, which was violation of Section 50 of the N.D.P.S. Act- held, that in these circumstances, prosecution case was not proved beyond reasonable doubt- accused acquitted. (Para-14 to 26)

Cases referred:
State of Delhi v. Ram Avtar, (2011) 12 SCC 207
State of Rajasthan v. Parmanand, (2014) 5 SCC 345

For the appellant : Mr. B.R. Sharma, Advocate alongwith accused in person.
For the respondent : Mr. Ramesh Thakur, Deputy Advocate General.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

Present appeal has been filed against Judgment dated 5.1.2011 rendered by learned Additional Sessions Judge, Mandi, HP camp at Karsog in Sessions Trial No. 7 of 2010, 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 twelve years and to pay a fine of Rs.1,20,000/-, and, in default of payment of fine, to further undergo simple imprisonment, for two years.

2. Prosecution case, in a nutshell, is that PW-11 SI Amar Singh, PW-9, Constable Pitamber, PW-2 Constable Jitender, HC Jagdish, LC Neelam and HHC Bodh Raj were present at Dhurmu on 29.11.2009 at 5.15 PM. Accused came from Kelodhar side carrying a backpack (Ex. P2) on his back. He was stopped. A truck bearing registration NO. HR-37-A 5120 came from Kotlu, which was signalled to stop. Prem Singh was driving the said truck. Prem Singh was associated as a witness. Accused disclosed his name as Nanak Chand. Accused appeared to be frightened. PW-11 SI Amar Singh told the accused that he was suspecting possession of some narcotic and accused was having a right to be searched before a competent gazetted officer or a Magistrate. Accused gave his consent to be searched by the police. Memo Ext. PE was prepared. Witnesses Prem Singh and Jatinder gave their search to the accused. Backpack was checked. It was found containing one polythene bag (Ext. P3), which was containing another polythene bag (Ext. P4). Polythene bag was opened and it was found containing black coloured substance in the form of large and small spheres and small sticks. It was found to be charas. Charas was weighed. It weighed 9 kg. Charas was put back in the same polythene bag from which it was recovered. The polythene bag was put in another bag and this polythene bag was put in the backpack. Backpack was sealed in a parcel with 8 seals of impression 'H'. Seal impression was taken separately on a piece of cloth and one such impression is Ext. PD. NCB-I form (Ext. PR) was filled in triplicate. Seal impression was also taken on this form. Seal was handed over to Prem Chand after use. Seizure memo Ext. PE and Ext. PF were prepared. Rukka Ext. PS was prepared and sent to Police Station through constable Pitamber. FIR Ext. PK was registered

in the Police Station. Case file was sent to the spot through Constable Pitamber. Investigation was completed. Challan was put up in the Court after completing all codal formalities.

3. Prosecution examined as many as eleven witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He denied the case of the prosecution. Accused was convicted and sentenced as mentioned above. Hence, this appeal.

4. Mr. B.R. Sharma, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused.

5. Mr. Ramesh Thakur, Deputy Advocate General has supported the judgment of conviction dated 5.1.2011.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Prem Singh testified that on 29.11.2009, he was driving truck No. HR-37-A-5120 from Rampur to Churag. He proceeded from Rampur at about 1.30 or 2 PM. He reached Dhurmu near Kotlu at 3 PM. Police vehicle was found parked there. 4/5 Policemen were present there. One motor cycle was also parked there. He was signalled by the police to stop the truck. He stopped the truck. He showed the documents to the police. Nobody was present there except policemen. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that accused was found coming from Kelodhar side carrying bag on his back. He denied that accused was questioned by the police in his presence and he disclosed his name to be Nanak Chand. He further denied the suggestion that police suspected that accused Nank Chand was carrying contraband. He also denied the suggestion that the accused was apprised about his legal right to be searched in the presence of Magistrate or Gazetted Officer by SHO Amar Chand in his presence and accused consented to be searched by the police on the spot. He further denied the suggestion that consent memo Mark A was prepared in this connection by SHO Amar Chand which was signed by accused, him and constable Jatinder. He admitted his signatures on consent memo Mark A. However, he denied the suggestion that SHO Amar Chand gave his personal search to the accused in his presence. He further denied that on checking the bag, it was found containing polythene carry bag having inscription 'Mayur Shopping Bag'. He also denied the suggestion that on opening of this polythene bag, it was found containing another polythene bag in which black coloured substance had been kept. He admitted his signatures on Mark C. He denied that the Charas was weighed by SHO Amar Chand and it was found to be 9 kg. He denied the suggestion that recovered charas was put back in the same polythene carry bag and this polythene carry bag containing charas was put back in another polythene bag and then this polythene bag containing other polythene bag and recovered charas was also put back in the bag. He denied the suggestion that aforesaid articles were sealed in separate cloth parcel. He also denied that eight seal impressions of 'H' were affixed on this parcel. He denied that search and seizure memo mark E was prepared on the spot. He also denied that search and seizure memo Ext. E was prepared on the spot by SHO Amar Chand. He admitted his signatures on mark D. He admitted his signatures on sample of seal 'H' and mark F. He denied that NCB-1 form in triplicate had been filled on the spot by SHO Amar Chand. His signatures were obtained on various papers by SHO Amar Chand by stating that documents of the truck had been checked. He denied portion A to A, B to B, C to C and D to D of his statement mark H.

8. PW-2 Constable Jatinder Kumar deposed that at about 5 PM, they stopped at Dhurmu near Kotlu. One person came from Kelodhar side carrying bag on his back. He

was going towards Kotlu. In the meantime, a truck bearing No. HR-37A-5120 came from Kotlu side. The truck in question was being driven by Prem Singh. SHO Amar Chand signalled the truck to stop. The truck was stopped by Prem Singh. Prem Singh was asked to alight from the truck. SHO Amar Chand asked the accused about the contents of the bag. Amar Chand told the accused that he suspected that contraband was being carried in the bag. Amar Chand asked the accused whether he wanted to be searched by a gazetted officer or a Magistrate. Accused consented to be searched by the police. Consent memo Ext. PA was prepared, which was signed by him, Prem Singh and the accused Bag was searched. Charas was recovered in the shape of balls. He deposed that search and sealing proceedings were completed at the spot. Search and seizure memo Ext. PE was prepared at the spot by Amar Chand, which was signed by him, Prem Singh and accused. Case property was produced before the Court while examining PW-2 by the learned Public Prosecutor. In his cross-examination, he deposed that they had proceeded from Police Station, Karsog at about 1.30 or 2 PM and reached back at Police Station at about 11/12 midnight. All of them had returned back to the police station from the spot together. They had stayed at the spot for about 3 hours. No residential house was situated near the place of occurrence. Proceedings were conducted at the spot with the help of torch/search light. He did not remember how many vehicles had passed through the road during the course of conducting proceedings. Volunteered that 3-4 vehicles passed during this period. He also admitted that there was flow of traffic on the road. He did not remember who had scribed the search and seizure memo.

9. PW-4 HHC Jiwan Lal deposed that on 30.11.2009, MHC Gyan Chand handed over one sealed bulk parcel containing 9 kg of charas bearing eight seal impressions of 'H', sample of seal 'H', NCB-1 form in triplicate and docket with the direction to deposit the same at FSL Junga. He took the same to FSL Junga vide RC No. 146/209 and deposited the same at FSL Junga on the same day in intact position.

10. PW-6 Tilak Singh deposed that Rukka was received by him at Police Station Karsog on 29.11.2009 . FIR Ext. PK was registered.

11. PW-9 Constable Pitamber Lal deposed the manner in which accused was apprehended. Search, seizure and sealing proceedings were completed at the spot. He handed over Rukka to MHC, who recorded FIR and handed over the file to him. In his cross-examination, he has admitted that Sanarli was located at a distance of about 3 kms from Police Station. They started from Police Station at about 1.30 PM. They reached the spot at about 5.15 PM. He remained on the spot for about 1-2 hours. Few vehicles plied on the road where accused was apprehended. According to him, consent memo Ext. PA and Ext. PB were written by HC Jagdish. He did not remember who had filled in NCB form. He reached the Police Station at 8.15 PM.

12. PW-10 Gyan Chand deposed that Pitamber came to the police station with the Rukka on 29.11.2009, on the basis of which FIR Ext. PK was registered. Inspector Amar Chand handed over one parcel which was stated to be containing 9 kg of charas. It was sealed with 8 seal impressions of 'H'. Amar Chand also handed over NCB form, sample seal 'H' on 29.11.2009 at 9.05 PM. He deposited these in Malkhana and made entry in the Malkhana register. Copy of which is Ext. PP. He took out all these articles from Malkhana on 30.11.2009 and handed over to Jiwan Lal with the direction to carry it to FSL Junga vide RC No. 46/06.

13. PW-11 SHO Amar Singh also deposed the manner in which accused was apprehended, search, seizure and sealing proceedings were completed at the spot. He categorically admitted that Ext. PA, PB, PC and PE were not in his handwriting. These were

written by HC Jagdish as per his dictation. NCB form was in his handwriting. He also admitted that these documents did not bear signatures of Jagdish. He admitted that he only attested the documents. He also admitted that he has not referred in challan that these documents were written by HC Jagdish. He further admitted that Jagdish was not associated by him as witness. They reached the Police Station at about 5.30 PM.

14. It has come in the statement of PW-2 Jatinder Kumar that there was flow of traffic on the road. He also deposed that 3-4 vehicles passed on the road during this period. It was not a secluded place. Police should have associated the owners/drivers of the vehicles as independent witnesses to inspire confidence in the search, seizure and sampling proceedings. PW-1 Prem Singh has not supported the case of the prosecution. He has denied that the accused was found coming from Kelodhar and was carrying any backpack on his back. He denied that accused was apprised of his right to be searched in the presence of a Magistrate or a gazetted officer, by Amar Chand. He denied that on checking of bag, contraband /charas was recovered from it. He also denied the sealing proceedings on the spot. Though he has admitted his signatures on memo mark D, Mark G and parcel mark 1. PW-1 Perm Singh has denied portions A to A, B to B, C to C and D to D of his statement mark H. PW-2 Constable Jatinder Kumar deposed that they reached back at the Police Station Karsog at 11/12 midnight and all other returned back to Police Station from the spot together. PW-10 Gyan Chand deposed that Amar Chand handed over NCB form, sample seal 'H' on 29.11.2009 at 9.05 pm. PW-11 Amar Singh deposed that they reached in the Police Station at about 5.30 PM. There is inherent contradiction in the statements of PW-2 Jatinder Kumar, PW-11 Amar Singh about the arrival at Police Station. PW-2 Jatinder Kumar has deposed that they came back together to Police Station at about 11/12 mid night. PW-11 Amar Singh says that they came back to Police Station at 5.30 PM. PW-10 Gyan Chand stated that Amar Chand handed over NCB form and sample seal H on 29.11.2009 at 9.05 PM. PW-2 Jatinder Kumar deposed in his examination-in-chief that the consent memo Ext. PA was prepared by Amar Chand and was signed by him, Prem Singh and accused. However, PW-11 Amar Singh deposed that Ext. PA, PB, PC and PE were not in his handwriting. PW-9 Pitamber also deposed that consent memo Ext. PA and PB were written by HC Jagdish. PW-11 Amar Singh in his cross-examination, has admitted that these exhibits were written by HC Jagdish as per his dictation. He has also admitted that he has not referred in the challan that these documents were written by HC Jagdish and Jagdish Chand was not associated by him as witness. In case these documents were scribed by Jagdish, he was a material witness to prove Exts. PA, PB, PC and PE.

15. Case property was produced while recording statement of PW-2 Jatinder Kumar, 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. In Punjab Police Rules, also applicable to the State of Himachal Pradesh, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

17. 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.

18. Sub-rule (2) Rule 22.18 of Punjab Police Rules, reads as under:

(2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.

Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so.

19. Rule 27.18 of Punjab Police Rules, reads as under:

27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).

Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

> (4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.
>
> (5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable.

20. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

21. In Punjab Police Rules, also applicable to the State of Himachal Pradesh, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

22. In this case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior

police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts. We have already noticed that as per statement of PW-2 Jatinder Kumar they have come together to the Police Station at 11/12 midnight and in that eventuality, case property could not be deposited with the police at 9.05 pm.

23. In the consent memo Ext. PA, accused was apprised of his legal right that his personal search and search of bag could be conducted before a gazetted officer or a Magistrate. Accused has given in writing that “esa lqphr gqvk rFkk vius osx dh ryklh vki lMdk ij gkthj iqyhl dks nsus pkgkrk gqWa ukud pUn”. He has given in writing that his bag could be searched by the police. He has not consented for his personal search by the police. Though the personal search was not necessary since charas was recovered from the bag of the accused but despite that police carried out personal search of accused and of the bag as well. We have already noticed herein above that accused had not consented for his personal search before the police. Once the accused has not given his consent, written or oral, to be personally searched by the police, he should have been taken to nearest Magistrate or a gazetted officer. Thus, the police have not complied with Section 50 of the Act in its letter and spirit. Section 50 is mandatory.

24. Their Lordships of the Hon'ble Supreme Court in **State of Delhi v. Ram Avtar** reported in (2011) 12 SCC 207 have held that merely asking accused whether he wished to be searched by a Magistrate or a Gazetted Officer without informing that he enjoys a right in this behalf, is no compliance of Section 50 of the Narcotic Drugs & Psychotropic Substances Act. Their Lordships have held as under:

> “ 9. One of the earliest and significant judgments of this Court, on the issue before us is the case of State of Punjab v. Balbir Singh, [(1994) 3 SCC 299] where the Court considered an important question i.e., whether failure by the empowered or authorized officer to comply with the conditions laid down in Section 50 of the Act while conducting the search, affects the prosecution case. In para 16 of the said judgment, after referring to the words "if the person to be searched so desires", the Court came to the conclusion that a valuable right has been given to the person, to be searched in the presence of the Gazetted Officer or Magistrate if he so desires. Such a search would impart much more authenticity and creditworthiness to the proceedings, while equally providing an important safeguard to the accused. It was also held that to afford this opportunity to the person to be searched, such person must be fully aware of his right under Section 50 of the Act and that can be achieved only by the authorized officer explicitly informing him of the same. The statutory language is clear, and the provisions implicitly make it obligatory on the authorized officer to inform the person to be searched of this right. Recording its conclusion in para 25 of the judgment, the Court clearly held that non-compliance with Section 50 of the Act, which is mandatory, would affect the prosecution case and vitiate the trial. It also noticed that after being so informed, whether such person opted for exercising his right or not would be a question of fact, which obviously is to be determined on the facts of each case.
>
> 10. This view was followed by another Bench of this Court in the case of Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, [(1994) 6 SCC 569], wherein the Court stated that the searching officer was obliged to inform the

person to be searched of his rights. Further, the contraband seized in an illegal manner could hardly be relied on, to the advantage of the prosecution. Unlawful possession of the contraband is the sine qua non for conviction under the NDPS Act, and that factor has to be established beyond any reasonable doubt. The Court further indicated that articles recovered may be used for other purposes, but cannot be made a ground for a valid conviction under this Act.

11. In the case of Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat, [(1995) 3 SCC 510], the Court followed the principles stated in Balbir Singh's case (supra) and also clarified that the prosecution must prove that the accused was not only made aware of his right but also that the accused did not choose to be searched before a Gazetted Officer or a Magistrate.

12. Then the matter was examined by a Constitution Bench of this Court, in the case of State of Punjab v. Baldev Singh [(1999) 6 SCC 172], where the Court, after detailed discussion on various cases, including the cases referred by us above, recorded its conclusion in para 57 of the judgment . The relevant portions of this conclusion are as under:

> "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 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.
>
> XXX XXX XXX (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 official concerned 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 the judicial process may come under a 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 the 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 provided by Section 50 at the trial, would render the trial unfair.
>
> XXX XXX XXX (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 person concerned 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."

13. Still in the case of Ahmed v. State of Gujarat, [(2000) 7 SCC 477), a Bench of this Court followed the above cases including Baldev Singh's case (supra) and held that even where search is made by empowered officer who may be a Gazetted Officer, it remains obligatory for the prosecution to inform the person to be searched about his right to be taken to the nearest Gazetted Officer or Magistrate before search. In this case, the Court also noticed at sub-para (e) at page 482 of the judgment that the provisions of Section 50 of the Act, which afford minimum safeguard to the accused, provide that when a search is about to be made of a person under Section 41 or Section 42 or Section 43 of the Act, and if the person so requires, then the said person has to be taken to the nearest Gazetted Officer of any department mentioned in Section 42 of the Act or to the nearest Magistrate.

14. In the case of K. Mohanan v. State of Kerala, [(2010) 10 SCC 222] another Bench of this Court while following Baldev Singh's case (supra) stated in unambiguous terms that merely asking the accused whether he wished to be searched before a Gazetted Officer or a Magistrate, without informing him that he enjoyed a right under law in this behalf, would not satisfy the requirements of Section 50 of the Act.

15. We may also notice here that some precedents hold that though a right of the person to be searched existed under Section 50 of the Act, these provisions are capable of substantial compliance and compliance in absolute terms is not a requirement under law. Reference in this regard can be made to Joseph Fernandez v. State of Goa, [(2000) 1 SCC 707], Prabha Shankar Dubey v. State of Madhya Pradesh, [(2004) 2 SCC 56], Krishna Kanwar v. State of Rajasthan, [(2004) 2 SCC 608, Manohar Lal v. State of Rajasthan, [(1996) 11 SCC 391], Karnail Singh v. State of Haryana, [(2009) 8 SCC 539].

16. In the case of Prabha Shankar Dubey (supra), this Court while referring to Baldev Singh's case (supra) took the view that Section 50 of the Act in reality provides additional safeguards which are not elsewhere provided by the statute. As the stress is on the adoption of reasonable, fair and just procedure, no specific words are necessary to be used to convey the existence of this right. The notice served, in that case, upon the person to be searched was as follows:

> `By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by any gazetted officer or by a Magistrate?'

Keeping the afore-referred language in mind, the Court applied the principle of substantial compliance, and held that the plea of non- compliance with the requirements of Section 50 of the Act was without merit on the facts of that case.

17. The Court held as under:

> "12. The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the

> Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.
>
> 13. Above being the position, we find no substance in the plea that there was non-compliance with the requirements of Section 50 of the Act."

18. Similarly, in Manohar Lal's case (supra) the option provided to the accused, not to go to a Magistrate if so desired, was considered to imply requirement of mere substantial compliance; and that strict compliance was not necessary.

19. In the case of Union of India v. Satrohan, [(2008) 8 SCC 313] though the Court was not directly concerned with the interpretation of the provisions of Section 50 of the Act, the Court held that Section 42(2) of the Act was mandatory. It also held that search under Section 41(1) of the Act would not attract compliance to the provisions of Section 50 of the Act. To that extent this judgment was taking a view different from that taken by the equi-Bench in Ahmed's case (supra). This question to some extent has been dealt with by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja v. State of Gujarat [(2011) 1 SCC 609] (hereinafter referred to as `Vijaysinh Chandubha Jadeja'). As this question does not arise for consideration before us in the present case, we do not consider it necessary to deliberate on this aspect in any further detail.

20. In the case of Vijaysinh Chandubha Jadeja v. State of Gujarat, [(2007) 1 SCC 433], a three Judge Bench of this Court had taken the view that the accused must be informed of his right to be searched in presence of a Magistrate and/or a Gazetted Officer, but in light of some of the judgments we have mentioned above, a reference to the larger bench was made, resulting. Accordingly, a Constitution Bench was constituted and in the case of Vijaysinh Chandubha Jadeja (supra) of this Court, referring to the language of Section 50 of the Act, and after discussing the above-mentioned judgments of this Court, took the view that there was a right given to the person to be searched, which he may exercise at his option. The Bench further held that substantial compliance is not applicable to Section 50 of the Act as its requirements were imperative. The Court, however, refrained from specifically deciding whether the provisions were directory or mandatory.

21. It will be useful to refer the relevant parts of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra). In para 23, the Court said

> `In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh case'.

After further referring to the conclusions arrived at by the Constitution Bench in Baldev Singh's case (supra) (which have been referred by us in para 9 of this judgment) and reiterating the same the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) this case concluded as under:

> "31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph

> Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

22. An analysis of the above judgments clearly show that the scope of the provisions of Section 50 of the Act are no more res integra and stand concluded by the above judgments particularly the Constitution Bench judgments of this Court in the cases of Baldev Singh (supra) and Vijaysinh Chandubha Jadeja (supra).

23. In the present case, we are concerned with the provisions of Section 50 of the Act as it was, prior to amendments made by Amending Act 9 of 2001 w.e.f. 2.10.2001. In terms of the provisions, in force at the relevant time, the petitioner had a right to be informed of the choice available to him; making him aware of the existence of such a right was an obligation on the part of the searching officer. This duty cast upon the officer is imperative and failure to provide such an option, in accordance with the provisions of the Act, would render the recovery of the contraband or illicit substance illegal. Satisfaction of the requirements in terms of Section 50 of the Act is sine qua non prior to prosecution for possession of an unlawful narcotic substance.

24. In fact, the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), in para 25, has even taken a view that after the amendment to Section 50 of the Act and the insertion of sub-section 5, the mandate of Section 50(2) of the Act has not been nullified, and the obligation upon the searching officer to inform the person searched of his rights still remains. In other words, offering the option to take the person to be searched before a Gazetted Officer or a Magistrate as contemplated under the provisions of this Act, should be unambiguous and definite and should inform the suspect of his statutory safeguards.

25. Having stated the principles of law applicable to such cases, now we revert back to the facts of the case at hand. There is no dispute that the concerned officer had prior intimation, that the accused was carrying smack, and the same could be recovered if a raid was conducted. It is also undisputed that the police party consisting of ASI - Dasrath Singh, Head Constable- Narsingh, Constable - Manoj Kumar and lady constable-Nirmla had gone in a Government vehicle to conduct the raid. The vehicle was parked and the accused, who was coming on a scooter, had been stopped. He was informed of and a notice in writing was given to him of, the suspicions of the police, that he was carrying smack. They wanted to search him and, therefore, informed him of the option available to him in terms of Section 50 of the Act. The option was given to the accused and has been proved as Ex. PW-6/A, which is in vernacular. The High Court in the judgment under appeal has referred to it and we would prefer to reproduce the same, which reads as under :

> "Musami Ram Avtar urf Rama S/o late Sh. Mangat Ram R/o 71/144, Prem Nagar, Choti Subzi Mandi, Janakpuri, Delhi, apko is notice ke tehat suchit kiya jata hai ki hamare pas itla hai ki apko kabje me smack hai aur apki talashi amal mein laye jati hai. Agar ap

chahen to apki talashi ke liye kisi Gazetted officer ya Magistrate ka probandh kiya ja sakta hai."

26. The High Court while relying upon the judgment of this Court in the case of Baldev Singh (supra) and rejecting the theory of substantial compliance, which had been suggested in the case of Joseph Fernandez (supra), found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression `duly' used in Section 50 of the Act connotes not `substantial' but `exact and definite compliance'. Vide Ex.PW-6/A, the appellant was informed that a Gazetted Officer or a Magistrate could be arranged for taking his search, if he so required. This intimation could not be treated as communicating to the appellant that he had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

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."

25. 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."

26. In view of the discussion and analysis made herein above, the appeal is allowed. Judgment dated 5.1.2011 rendered by learned Additional Sessions Judge, Mandi, HP camp at Karsog in Sessions Trial No. 7 of 2010 is set aside. Accused is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. Fine amount, if any deposited by him in this case, be refunded to him. Accused is ordered to be released, if not required in any other case. Registry is directed to prepare and send the release warrant of the accused to the Superintendent of Jail concerned, forthwith.

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

Ratti Ram Sharma .....Appellant
Versus
Satya Devi .....Respondent

FAO(HMA) No. 178/2016
Decided on: April 7, 2016

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized on 8.7.1992- one son and one daughter were born from the wedlock- wife brought her two brothers and five sisters to live with the appellant and completely devoted herself to their education, upbringing and other responsibilities towards them and she started shirking from her matrimonial duties -she avoided to look after her children and refused to perform any of the duties towards her children- she stopped fulfilling her conjugal duties since the year 2000- she used to abuse her husband- she left matrimonial home and started living separately at Mashobra- hence, divorce was sought- wife denied the contents of the petition- petition for divorce was dismissed by the trial Court- held in appeal, allegations of cruelty were not proved- son and daughter were not cited as witnesses- incidents narrated by husband are not grave rather ordinary wear and tear of the married life- parties were residing under one roof in US Club- wife was thrown out of the house by the husband- he cannot be permitted to take advantage of his own wrongs- petition was rightly dismissed by the trial Court- appeal dismissed. (Para-14 to 18)

Cases referred:

Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476
Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176

For the Appellant : Mr. Adarsh K. Vashista, Advocate.
For the Respondent : Nemo

The following judgment of the Court was delivered:

Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 1.10.2015 rendered by the learned District Judge (Forests), Shimla, HP in HMA Petition No. 17-S/3 of 2013.

2. "Key facts" necessary for the adjudication of the present appeal are that the marriage between the parties was solemnised on 8.7.1992 according to Hindu rites and customs at Gopal Mandir, Boileauganj, Shimla. Appellant is working in the HP Secretariat and the respondent is working as a Junior Basic Trained Teacher in the Department of Elementary Education at Government Primary School, Kelti, Mashobra Block, District Shimla. From the wedlock of the appellant and respondent, two children were born, one son and one daughter. Daughter was 18 years of age and son was 14 years of age. In the year 1995, respondent brought her two brothers and five sisters to live with the appellant and completely devoted herself to their education, upbringing and other responsibilities towards them and she started completely shirking from her matrimonial duties and consistently avoided to look after her children and she refused to perform any of the matrimonial duties towards her children. She even stopped preparing food for her husband and children. From the year 2000, respondent completely stopped fulfilling her conjugal duties and obligations towards the appellant as his wife. Respondent even called appellant a dog and a pig and used to tell him that he was no longer her husband and she used to spit on him in the

presence of his friends. On 5.9.2005, respondent left the matrimonial house and started living separately at K.L. Sood Niwas, Mashobra and since then there is no contact between the appellant and the respondent. The appellant was forced to file a divorce petition against the respondent, which was contested by the respondent. Respondent made false promise and misguided the appellant that she will mend her ways but she again continued with her cruelty and desertion by insulting the appellant repeatedly in the presence of relatives and friends.

3. Petition was contested by the respondent. Respondent has admitted the factum of marriage. According to her, divorce petition instituted by the appellant against her was dismissed on 23.4.2008. She is pursuing JBT training. Relations between the parties were cordial. Appellant used to insist upon giving her entire salary to him. Daughter was pursuing studies in B.A. 1st Year in St. Bedes College and the son was studying in 9th Standard at Kendriya Vidyalaya Jakhoo. Appellant forced her to abort the pregnancy from a private medical practitioner at Solan. They resided together at Village Malyana till 1997. Then they shifted to Dhobighat, Shimla and started living there in tenanted premises belonging to one Daya Ram. Thereafter, government accommodation was allotted in favour of the appellant and they started living there. She has been looking after the children properly. She was given beatings by the appellant. In the month of September 2005, he levelled false and frivolous allegations against her and she was thrown out of the house. She never called her husband dog or pig. She never uttered that appellant was not her husband. She never spat on him.

4. Issues were framed by the learned trial Court on 4.7.2014. He dismissed the petition on 1.10.2015.

5. Mr. Adarsh K. Vashista, Advocate, has vehemently argued that the appellant has proved cruelty as well as desertion against the respondent.

6. I have heard the learned counsel for the appellant and also gone through the record carefully.

7. Appellant has appeared as PW-6. According to him, initially the behaviour of the respondent was normal. However, after 1995, he called her two brothers and five sisters to stay with them at Shimla and got their education in the school. She concentrated only on sisters and brothers. She totally ignored the children. In the year 2000, she started treating him with cruelty. Her attitude became indifferent and careless. She refused to perform matrimonial obligations. She stopped cooking, washing clothes, cleaning utensils and refused to do any domestic work. Appellant was forced to do all domestic work. She even refused to recognize him as her husband. She used to insult him in the presence of children, guests and friends and even called him a dog and a pig. She even used to spit on him. On 5.9.2005, she left the matrimonial house but his son and daughter remained with him. He looked after his children and was forced to do all domestic work. He filed divorce petition against the respondent which was compromised in the year 2009. Respondent admitted her fault and promised to behave properly and tendered apology as well. She joined the matrimonial home but 2-4 days later she again started misbehaving with him. She was in the habit of leaving the matrimonial house without informing him and used to remain missing for about 9-10 days. He was forced to lodge complaint with the police. She even refused to provide meals to the children. In his cross-examination, he admitted that presently respondent is living in US Club. He further admitted that he and respondent are residing in Set No. 15 in US Club. His son and daughter are also living in the same house. Sometimes, he used to live in Mehali and sometimes in the house in US Club. Neither the son nor the daughter has been cited as witness. He has not lodged any complaint in the Women Commission or with the Police against the respondent.

8. PW-1 Yash Pal Sharma, in his cross-examination admitted that he did 3 years course in Electrical Engineering from Una and he stayed at Una for three years. He was unemployed. He also admitted that the appellant was living in Government accommodation. Respondent and children were also living in the same house.

9. PW-2 Jyotsana Sharma testified that the appellant had constructed house at Malyana and she alongwith her brother occasionally used to reside there.

10. PW-3 Archana Phul has stated that the relations between the parties were not cordial. In the year 2005, respondent left the house. Behaviour of the respondent towards appellant was hostile. She never performed her matrimonial obligations. All the domestic work was done by the appellant.

11. PW-4 Ramesh Chand Sharma deposed that on 18.8.2009, they reconciled the matter and during the compromise, respondent admitted her fault and tendered apology.

12. PW-5 Bhawani Dutt has also supported the case of appellant by stating that the appellant used to do all the domestic work and used to look after the children.

13. Respondent has appeared as RW-1. She testified that in April, 1996, she was transferred to Baldeyan and Government accommodation was allotted to them in Chhota Shimla. She stayed there for five years in the house. Her sister was living at Malyana. Her husband used to come to house in late hours at about 9-10 PM and never looked after her children. He always told her to hand over her entire salary and when she refused, her husband used to level false allegations against her that she is spending salary on her brothers and sisters. He also used to give beatings to her. She has never refused to cohabit with the appellant. Appellant constructed a house at Mehali and one lady Durga was residing in that house with the appellant. Appellant levelled false allegations against the respondent that she was having illicit relations with her *Jeeja*.

14. The grounds taken in the petition by the appellant with regard to cruelty have not been proved. Parties are living together at US Club. RW-1 (respondent) has categorically testified that she has never refused to cohabit with the appellant. Appellants used to force her to give her entire salary to him. She was beaten up and thrown out of the house. She has never uttered the words like 'dog' and 'pig'. Allegations levelled by the appellant are sketchy. Neither the son nor the daughter has been cited as witness by the appellant. None of the witnesses examined by the appellant supported the contention of the appellant that the respondent called appellant a dog or a pig. Instances narrated by the appellant are neither grave nor serious. The instances narrated by the appellant are 'ordinary wear and tear of the married life'. Appellant has failed to prove that the respondent has treated the appellant with cruelty.

15. 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."

16. 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."

17. Appellant has also taken ground that the respondent has deserted him. However, fact of the matter is that they are residing under one roof in US Club. Appellant has beaten up and humiliated the respondent. She was thrown out of the house. Thus, the appellant can not be allowed to take advantage of his own wrongs. In order to prove desertion, appellant was required to prove *animus deserendi*. Appellant has not led any tangible evidence to prove this plea.

18. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships have held that desertion is a matter of interference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

> "What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-
>
> "Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".
>
> The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-
>
> "In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.
>
> The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".
>
> Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present

case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

19. 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.

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

Shalini Singh Thakur D/o Sh. Ramesh Kumar Thakur. ....Revisionist

Versus

State of H.P. & another. ....Non-revisionists.

Cr. Revision No. 381 of 2015
Date of Order 7.4.2016

Code of Criminal Procedure, 1973- Section 397- Statement of prosecutrix was not recorded by learned Sessions Judge (Forests) Shimla H.P. - it is directed in revision with the consent of the parties that prosecutrix will appear before the trial Court on 28.4.2016 and her statement will be recorded in accordance with law – in case the Learned Sessions Judge is on leave on 28.4.2016, then statement of prosecutrix will be recorded on subsequent date fixed by learned Sessions Judge. (Para-1)

For the revisionist:	Mr. Dinesh Kumar, Advocate.
For Non-revisionist No.1:	Mr. M.L. Chauhan, Additional Advocate General.
For Non-revisionist No.2.:	Mr. Satyen Vaidya, Sr. Advocate with Mr. Vivek Sharma, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Petition filed under Section 397 Code of Criminal Procedure against the order date 14.9.2015 passed by learned Sessions Judge (Forests) Shimla H.P. vide which statement of prosecutrix was not recorded in case No. 5-S/7 of 2015/14 under Section 376 IPC relating to FIR No. 19 of 2013. Present petition filed by the prosecutrix with the prayer that direction be issued to learned trial Court to record her statement. With the consent of learned Advocate appearing on behalf of revisionist and learned Additional Advocate General appearing on behalf of non-revisionist No.1 and Mr. Satyen Vaidya, Sr. Advocate appearing on behalf of non-revisionist No.2 following order passed:-

i) Prosecutrix will appear before learned trial Court on 28.4.2016 and thereafter learned Sessions Judge will record statement of prosecutrix in accordance with law. If learned Sessions Judge will avail leave on 28.4.2016 then statement of prosecutrix will be recorded on subsequent date fixed by learned Sessions Judge.

ii) Record of learned trial Court along with certified copy of order be sent back forthwith.

iii) Present revision petition is disposed of. Pending applications if any also disposed of.

Dasti copy.

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

State of H.P. .....Appellant.

Versus

Arun Kumar alias Ashu & anr. .....Respondents.

Cr. Appeal No. 211 of 2010.
Reserved on: April 06, 2016.
Decided on: April 07, 2016.

Indian Penal Code, 1860- Section 363, 376 and 120-B- Prosecutrix was returning from Satsang along with the co-accused N –accused were following them – 'N' tied the hands of prosecutrix - accused A carried the prosecutrix towards the Dehri, where she was raped- PW-2 came towards the Kunde-Wala-Choe in search of the prosecutrix- accused ran away on seeing her- accused were tried and acquitted by the trial court- held, in appeal that

Medical Officer had not noticed any injury on her person- prosecutrix claimed that she was dragged to a distance of more than 400 meters, therefore, she would have sustained injuries by dragging- it is difficult to believe that prosecutrix would not have protested when her hands were being tied by 'N'—it was admitted by PW-2 that there are two groups in the village- he and his family belong to one group and the family of accused belongs to other – in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed.

(Para-16 to 20)

For the appellant: Mr. M.A.Khan, Addl. Advocate General.
For the respondents: Mr. Bhupinder Singh, Advocate, for respondent No. 1.
Mr. Arvind Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 14.9.2009, rendered by the learned Addl. Sessions Judge, Una, H.P., in Sessions Case No. 19 of 2008, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 363, 376 and 120-B IPC have been acquitted.

2. The case of the prosecution, in a nut shell, is that on 11.5.2008, at about 12:00 (noon), while the prosecutrix was returning back from Satsang alongwith the co-accused Neelam, at Sohari, the accused were following them. At a place known as Kunde-Wala-Chowe, the girl named Neelam tied the hands of the prosecutrix. Accused Arun Kumar carried the prosecutrix towards Dehri. Thereafter, the accused forcibly untied the string of her salwar and committed sexual intercourse with her, after gagging her mouth with a piece of cloth. The paternal aunt (Chachi) of the prosecutrix, namely, Neelam (PW-2) came towards the Kunde-Wala-Chowe in search of the prosecutrix. The accused fled away from the spot. On the basis of the statement of PW-2 Neelam, FIR Ext. PW-1/A was registered at PS Bangana on 11.5.2008. The prosecutrix was medically examined by PW-6 Dr. Pushpawali Raizada. She issued MLC Ext. PW-6/B. The case was investigated and challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 15 witnesses. The accused were also examined under Section 313 Cr.P.C. They pleaded innocence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A. Khan, Addl. Advocate General has vehemently argued that the prosecution has proved its case against the accused persons. On the other hand, M/S Bhupinder Singh and Arvind Sharma, Advocates for the respective accused have supported the judgment of the learned trial Court dated 14.9.2009.

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

6. PW-1 (name withheld) is the prosecutrix. According to her, on 11.5.2008, she along with Neelam were coming back from Satsang at village Sohari at about 12:00 noon. Two boys were following them. When they reached near the Kunde-Wala-Chowe, accused Neelam caught hold of her hands and tied her hands behind her back. One boy stayed back with Neelam and the other carried her towards Dehri. He forcibly untied the string of her salwar. He kept both the hands on her breasts and committed sexual intercourse with her. Her paternal aunt (Chachi) Neelam came on the spot. On hearing her voice, the accused fled away from the spot. She was crying and her aunt took her back to

home. When her Uncle came back at about 5:00 PM, he was narrated the incident. Thereafter, the matter was reported to the police. The police recorded her statement, upon which FIR Ext. PW-1/A was registered at PS Bangana. She was got medically examined on 11.5.2008. In her cross-examination, she admitted that the distance between the road and Kunde-Wala-Chowe was about 10-12 meters. The distance between Kunde-Wala-Chowe to the house is also about 10-12 meters. She admitted that if one has to go from the road to Chowe, he has to cross by the side of her house.

7. PW-2 Neelam Devi testified that she had gone for looking the prosecutrix towards Kunde-Wala-Chowe. The prosecutrix was crying. She took her and asked her as to why she was crying. She narrated the incident to her. The accused ran away from the spot.

8. PW-3 Madan Lal deposed that when he came back to his house at about 5:00 PM, the prosecutrix was crying. She narrated the entire incident to him. He along with his wife took the prosecutrix to the Police Station and FIR was lodged.

9. PW-4 Pawan Thakur deposed that the police has taken into possession the birth certificate of the prosecutrix on 12.5.2008 from the Panchayat Secretary of Gram Panchayat, Sohari. The accused Arun Kumar handed over the undergarments to the police vide memo Ext. PW-4/B.

10. PW-5 Des Raj deposed that accused Arun Kumar made disclosure statement to the effect that he has concealed his under garments behind a trunk and he could get the same recovered. In this behalf, memo Ext. PW-5/A was prepared.

11. PW-6 Dr. (Mrs.) Pushpavali Raizada is the material witness. According to her, no injury marks were seen on the whole body. Hymen was ruptured and old tags were present. Vagina admitted one finger. She issued MLC vide Ext. PW-6/B. In her cross-examination, she admitted that as per the alleged history recorded in the MLC, it was shown that two boys had dragged the prosecutrix from the road to a Nalla while she was coming from Satsang. Keeping in view the entire examination and the old tags found in hymen, it could not be said that there had been recent sexual intercourse. According to her, 'recent' signifies one day or more.

12. PW-7 Subhash Chand prepared the birth certificate of the prosecutrix vide Ext. PW-7/A. In his cross-examination, he admitted that he has not brought the original record. He also admitted that he was not posted at Sohari nor the entry was made during his tenure. He remained as Panchayat Secretary for two years at Gram Panchayat Sohari before he was transferred to Chowli on 23.8.2008. He also admitted that entry in the register is made on the basis of the information furnished by the parents of the child. He was re-examined and he admitted in his cross-examination that he has brought the original record on the basis of which certificate Ext. PW-7/A was issued. In his further cross-examination, he admitted that he could not say as to who had got the entry of the birth of the prosecutrix recorded. He also admitted that there was some over-writing over one of the words. He also admitted that the register was not paginated. He also admitted that the signatures of the District Panchayat Officer were not present on the register.

13. PW-8 Dr. Ravinder Mohan has examined the accused. He noticed that the secondary sexual character of the boy was fully developed within normal limits. He issued MLC Ext. PW-8/B.

14. PW-13 Kaur Chand deposed that on 11.5.2008, the prosecutrix accompanied by her Aunt Neelam Kumari, grandmother Kalan Devi, Uncle Madan Lal came to the Police Station. The statement of the prosecutrix was recorded. She was sent to RH Una for medical examination. He inspected the spot and prepared spot map Ext. PW-13/B. The clothes of the prosecutrix were taken into possession. The underwear of the accused was

also seized vide seizure memo Ext. PW-4/B, on the basis of the disclosure statement made vide Ext. PW-5/A.

15. The prosecutrix was re-examined on 28.4.2009. According to her, she was medically examined at RH Una on 11.5.2008. The doctor had taken her shirt, salwar and dupatta into possession.

16. According to the prosecutrix (PW-1), on 11.5.2008, when she along with Neelam was coming back from Satsang at village Sohari at about 12:00 noon, two boys followed them. When they reached near the Kunde-Wala-Chowe, accused Neelam caught hold of her from hands and tied her hands behind her back. One boy stayed back with Neelam and the other carried her towards Dehri. He forcibly untied the string of her salwar. He kept both the hands on her breasts and committed sexual intercourse with her. In the meantime, her paternal aunt (Chachi) Neelam came on the spot. On hearing her voice, the accused fled away from the spot. PW-6 Dr. (Mrs.) Pushpavali Raizada has medically examined the prosecutrix. According to her, no injury marks were seen on the whole body. Hymen was ruptured and old tags were present. Vagina admitted one finger. She issued MLC vide Ext. PW-6/B. In her cross-examination, PW-6 Dr. (Mrs.) Pushpavali Raizada has admitted that as per the alleged history recorded in the MLC, it was shown that two boys had dragged the prosecutrix from the road to a Nalla when she was coming back to house from Satsang. However, the fact of the matter is that no injuries have been noticed on the whole body of the prosecutrix. The place where the alleged incident took place was uneven. In case, the prosecutrix was dragged to a distance of more than 400 meters, she was bound to receive injuries on her body.

17. It is also not believable that the friend of the prosecutrix would have tied her hands and the prosecutrix would not have resisted the same. It has also come in the statement of PW-6 Dr. (Mrs.) Pushpavali Raizada that keeping in view the entire examination and the old tags found in hymen, it could not be said that there had been recent sexual intercourse. PW-6 Dr. (Mrs.) Pushpavali Raizada has explained the word “recent” which signifies one day or more.

18. In FIR Ext. PW-1/A, the prosecutrix has specifically stated that her mouth was gagged and thus, she could not raise the alarm. However, while appearing in the Court as PW-1, the prosecutrix has not stated so that her mouth was gagged by the accused. It is also not believable that accused physically carried the prosecutrix to a distance of 400 meters. The place, where the hands of the prosecutrix were tied by Neelam Kumari is about 400 meters away from the scene of occurrence as per the spot map Ext. PW-13/B. PW-3 Madan Lal has admitted in his cross-examination that there are two groups in the village. He and his family belong to one group and the family of accused belongs to other group for litigation.

19. PW-7 Subhash Chand has issued birth certificate of the prosecutrix vide Ext. PW-7/A. In his cross-examination, he has admitted that the original register was not paginated. He also admitted that the signatures of the District Panchayat Officer were not present on the register. He also admitted that the entry in the register is made on the basis of the information furnished by the parents of the child. He also admitted that he was not working at Sohari nor the entry in the birth register was made during his tenure.

20. Thus, the prosecution has failed to prove the case against the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 14.9.2009.

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

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

State of Himachal Pradesh ..... Appellant
Versus
Amar Chand .....Respondent

Cr. Appeal No. 204/2010
Reserved on: April 6, 2016
Decided on: April 7, 2016

N.D.P.S. Act, 1985- Section 20- Accused turned and tried to run away on seeing the police vehicle- he was apprehended and searched- 400 grams of charas was found from the right pocket of his jacket during search - he was acquitted by the trial Court- held in appeal, accused was not apprised of his legal right to be searched before a gazetted officer or a Magistrate, which was mandatory- there are discrepancies in the testimonies of the witnesses regarding the place where accused was apprehended and manner of carrying investigation- held, that in these circumstances prosecution case was not proved- trial Court had rightly acquitted the accused-appeal dismissed. (Para-12 to 16)

Cases referred:

State of Delhi v. Ram Avtar (2011) 12 SCC 207

For the appellant : Mr. M.A. Khan, Additional Advocate General with Mr. Ramesh Thakur, Deputy Advocate General.

For the respondent : Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 26.8.2009 rendered by learned Special Judge, Fast Track Court, Kullu, Himachal Pradesh in Sessions Trial No. 05 of 2009, 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, 1985 (hereinafter referred to as 'Act' for convenience sake), has been acquitted.

2. "Key facts" necessary for the adjudication of the present appeal are that on 12.3.2008, at 6.20 PM, SI Om Parkash along with ASI Daya Ram, C. Nikka Ram and Home-guard Amar Singh reached near 15 Mile (name of place) on patrolling in official vehicle driven by C. Dinesh Kumar. Near the bridge on the National Highway 21, one young man was found standing. On seeing the police vehicle, he turned back and ran away towards village Batahar via bridge. He was apprehended. No independent witness was available. During the course of personal search of the accused one polythene envelope was recovered from the right pocket of his jacket. On checking of this polythene envelope, it was found containing charas in the shape of sticks. Recovered charas was weighed in the street light and it was found to be 400 grams. Two samples of charas, 25 grams each, were separated from the recovered charas and were sealed in separate parcels. Remainder of the charas was put back in the same polythene envelope and was sealed in separate parcel. Seal impression 'T' had been affixed on each parcel. NCB-I in triplicate was filled on the spot. Seal after use

was handed over to ASI Daya Ram. Search and seizure memo was prepared. Rukka was prepared. It was sent to the Police Station, Manali through HG Amar Singh for registration of FIR. Site plan was prepared. SI Om Parkash went to the Police Station, Manali alongwith accused and case property. Case property was deposited with MHC Hem Raj at Police Station, Manali. Report of FSL Junga was received. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution examined as many as thirteen witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He denied the case of the prosecution. Accused was acquitted as mentioned above. 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. Mr. Naveen K. Bhardwaj, Advocate, has supported the Judgment dated 26.8.2009.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 ASI Daya Ram deposed that on 12.3.2008, he alongwith SI Om Prakash, Constable Nikka Ram and HHG Amar Singh, reached at 15 Mile. They were on patrol duty. They had reached on the spot in the official vehicle being driven by Constable Dinesh Kumar. Near bridge at 15 Mile, one person was standing on the road. On seeing the police party, said person tried to flee away from the spot towards village Batahar side via bridge. Said person was chased and apprehended by SI Om Prakash. It was a secluded place. No independent witnesses were present. SI Om Prakash took personal search of accused in his presence as well as in the presence of Constable Nikka Ram. Accused was wearing blue jean jacket. During the checking of jacket, one polythene envelope was recovered from the right pocket of jacket. Polythene envelope was removed from the pocket of the jacket and was checked. polythene envelope was containing Bhang/Charas in the shape of sticks. The recovered Charas was weighed on the spot. It weighed 400 grams. . Two samples of charas 25 grams each were separated from the recovered charas and were sealed in separate parcels. Remainder of Charas was put back in the same polythene envelope and was sealed in separate parcel. Three seal impressions of 'T' were fixed on each sample parcel and five seal impressions of 'T had been affixed on bulk parcel. NCB form in triplicate was filled on the sot by SI Om Prakash. Case property was produced in the Court during the examination of PW-1 Daya Ram. In his cross-examination, he deposed that the proceedings were conducted at the spot underneath the street light. They sat on parapet in order to prepare memo and conduct the proceedings. SI Om Prakash handed over Rukka to Amar Singh.

8. PW-2 Inspector Om Prakash deposed the manner in which accused was apprehended, contraband was recovered from him. According to him, 5 seal impressions of 'T' were affixed on the bulk parcel. NCB form in triplicate was filled up from column No. 1 to 11. Sample of seal 'T' was prepared separately by him. In his cross-examination, he has admitted that the proceedings were conducted near the shed, on the road.

9. PW-3 HC Hem Raj deposed that on 12.3.2008, one sealed bulk parcel and two sample parcels, NCB form in triplicate, samples of seal 'T', search and seizure memo had been deposited with him by SI Om Prakash. He deposited the same in the Malkhana and necessary entry was made in the Malkhana Register. On 13.3.2008, he sent one sealed sample parcel, NCB-I Form in triplicate, copy of FIR, seizure memo, sample of seal 'T' to FSL Junga through C. Prakash Chand vide RC No. 250/08. He deposited the same at FSL Junga. In his cross-examination, he has admitted that the bulk parcel was not bearing three seal impressions of 'T'.

10. PW-4 HHC Prakash Chand deposed that on 13.3.2008, MHC Hem Raj had handed over one sealed sample parcel alongwith relevant documents to him with the directions to deposit the same at FSL Junga vide RC No. 250/08. He took the same to FSL Junga and deposited the same in the laboratory.

11. PW-6 HHG Amar Singh testified the manner in which accused was apprehended at 15 Mile, search, seizure and sealing proceedings were conducted at the spot. Accused was subjected to personal search by SI Om Prakash. During the course of personal search, Charas was recovered from the pocket of jacket of accused. Rukka was handed over to him. He took it to Police Station, Manali. In his cross-examination, he has admitted that they had crossed the bridge while chasing the accused. Accused was questioned on the other side of the bridge where he was apprehended.

12. Case of the prosecution, in a nutshell, is that the accused was apprehended near the bridge at 15 Mile. His personal search was carried out and one polythene envelope was recovered from right pocket of the jacket. The polythene envelope was removed from the pocket of the jacket and was checked. It contained charas. It weighed 400 grams.

13. According to PW-1 Daya Ram, personal search of the accused was carried out in the presence of Nikka Ram. PW-2 Om Parkash also deposed that accused was subjected to personal search by him. PW-6 Amar Singh also testified that accused was subjected to personal search by Om Prakash and during the personal search, contraband was recovered. Since personal search of the accused had been carried out, he should have been apprised of his legal right to be searched before a gazetted officer or a Magistrate. Section 50 is mandatory.

14. Their Lordships of the Hon'ble Supreme Court in **State of Delhi v. Ram Avtar** reported in (2011) 12 SCC 207 have held that merely asking accused whether he wished to be searched by a Magistrate or a Gazetted Officer without informing that he enjoys a right in this behalf, is no compliance of Section 50 of the Narcotic Drugs & Psychotropic Substances Act. Their Lordships have held as under:

> " 9. One of the earliest and significant judgments of this Court, on the issue before us is the case of State of Punjab v. Balbir Singh, [(1994) 3 SCC 299] where the Court considered an important question i.e., whether failure by the empowered or authorized officer to comply with the conditions laid down in Section 50 of the Act while conducting the search, affects the prosecution case. In para 16 of the said judgment, after referring to the words "if the person to be searched so desires", the Court came to the conclusion that a valuable right has been given to the person, to be searched in the presence of the Gazetted Officer or Magistrate if he so desires. Such a search would impart much more authenticity and creditworthiness to the proceedings, while equally providing an important safeguard to the accused. It was also held that to afford this opportunity to the person to be searched, such person must be fully aware of his right under Section 50 of the Act and that can be achieved only by the authorized officer explicitly informing him of the same. The statutory language is clear, and the provisions implicitly make it obligatory on the authorized officer to inform the person to be searched of this right. Recording its conclusion in para 25 of the judgment, the Court clearly held that non-compliance with Section 50 of the Act, which is mandatory, would affect the prosecution case and vitiate the trial. It also noticed that after being so informed, whether such person opted for exercising his right or not would be a question of fact, which obviously is to be determined on the facts of each case.

10. This view was followed by another Bench of this Court in the case of Ali Mustaffa Abdul Rahman Moosa v. State of Kerala, [(1994) 6 SCC 569], wherein the Court stated that the searching officer was obliged to inform the person to be searched of his rights. Further, the contraband seized in an illegal manner could hardly be relied on, to the advantage of the prosecution. Unlawful possession of the contraband is the sine qua non for conviction under the NDPS Act, and that factor has to be established beyond any reasonable doubt. The Court further indicated that articles recovered may be used for other purposes, but cannot be made a ground for a valid conviction under this Act.

11. In the case of Saiyad Mohd. Saiyad Umar Saiyad v. State of Gujarat, [(1995) 3 SCC 510], the Court followed the principles stated in Balbir Singh's case (supra) and also clarified that the prosecution must prove that the accused was not only made aware of his right but also that the accused did not choose to be searched before a Gazetted Officer or a Magistrate.

12. Then the matter was examined by a Constitution Bench of this Court, in the case of State of Punjab v. Baldev Singh [(1999) 6 SCC 172], where the Court, after detailed discussion on various cases, including the cases referred by us above, recorded its conclusion in para 57 of the judgment . The relevant portions of this conclusion are as under:

> "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 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.
>
> XXX XXX XXX (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 official concerned 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 the judicial process may come under a 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 the 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 provided by Section 50 at the trial, would render the trial unfair.
>
> XXX XXX XXX (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 person concerned 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."

13. Still in the case of Ahmed v. State of Gujarat, [(2000) 7 SCC 477), a Bench of this Court followed the above cases including Baldev Singh's case (supra) and held that even where search is made by empowered officer who may be a Gazetted Officer, it remains obligatory for the prosecution to inform the person to be searched about his right to be taken to the nearest Gazetted Officer or Magistrate before search. In this case, the Court also noticed at sub-para (e) at page 482 of the judgment that the provisions of Section 50 of the Act, which afford minimum safeguard to the accused, provide that when a search is about to be made of a person under Section 41 or Section 42 or Section 43 of the Act, and if the person so requires, then the said person has to be taken to the nearest Gazetted Officer of any department mentioned in Section 42 of the Act or to the nearest Magistrate.

14. In the case of K. Mohanan v. State of Kerala, [(2010) 10 SCC 222] another Bench of this Court while following Baldev Singh's case (supra) stated in unambiguous terms that merely asking the accused whether he wished to be searched before a Gazetted Officer or a Magistrate, without informing him that he enjoyed a right under law in this behalf, would not satisfy the requirements of Section 50 of the Act.

15. We may also notice here that some precedents hold that though a right of the person to be searched existed under Section 50 of the Act, these provisions are capable of substantial compliance and compliance in absolute terms is not a requirement under law. Reference in this regard can be made to Joseph Fernandez v. State of Goa, [(2000) 1 SCC 707], Prabha Shankar Dubey v. State of Madhya Pradesh, [(2004) 2 SCC 56], Krishna Kanwar v. State of Rajasthan, [(2004) 2 SCC 608, Manohar Lal v. State of Rajasthan, [(1996) 11 SCC 391], Karnail Singh v. State of Haryana, [(2009) 8 SCC 539].

16. In the case of Prabha Shankar Dubey (supra), this Court while referring to Baldev Singh's case (supra) took the view that Section 50 of the Act in reality provides additional safeguards which are not elsewhere provided by the statute. As the stress is on the adoption of reasonable, fair and just procedure, no specific words are necessary to be used to convey the existence of this right. The notice served, in that case, upon the person to be searched was as follows:

> `By way of this notice you are informed that we have received information that you are illegally carrying opium with you, therefore, we are required to search your scooter and you for this purpose. You would like to give me search or you would like to be searched by any gazetted officer or by a Magistrate?'

Keeping the afore-referred language in mind, the Court applied the principle of substantial compliance, and held that the plea of non- compliance with the requirements of Section 50 of the Act was without merit on the facts of that case.

17. The Court held as under:

> "12. The use of the expression "substantial compliance" was made in the background that the searching officer had Section 50 in mind and it was unaided by the interpretation placed on it by the Constitution Bench in Baldev Singh case. A line or a word in a judgment cannot be read in isolation or as if interpreting a statutory provision, to impute a different meaning to the observations.

> 13. Above being the position, we find no substance in the plea that there was non-compliance with the requirements of Section 50 of the Act."

18. Similarly, in Manohar Lal's case (supra) the option provided to the accused, not to go to a Magistrate if so desired, was considered to imply requirement of mere substantial compliance; and that strict compliance was not necessary.

19. In the case of Union of India v. Satrohan, [(2008) 8 SCC 313] though the Court was not directly concerned with the interpretation of the provisions of Section 50 of the Act, the Court held that Section 42(2) of the Act was mandatory. It also held that search under Section 41(1) of the Act would not attract compliance to the provisions of Section 50 of the Act. To that extent this judgment was taking a view different from that taken by the equi-Bench in Ahmed's case (supra). This question to some extent has been dealt with by the Constitution Bench in the case of Vijaysinh Chandubha Jadeja v. State of Gujarat [(2011) 1 SCC 609] (hereinafter referred to as `Vijaysinh Chandubha Jadeja'). As this question does not arise for consideration before us in the present case, we do not consider it necessary to deliberate on this aspect in any further detail.

20. In the case of Vijaysinh Chandubha Jadeja v. State of Gujarat, [(2007) 1 SCC 433], a three Judge Bench of this Court had taken the view that the accused must be informed of his right to be searched in presence of a Magistrate and/or a Gazetted Officer, but in light of some of the judgments we have mentioned above, a reference to the larger bench was made, resulting. Accordingly, a Constitution Bench was constituted and in the case of Vijaysinh Chandubha Jadeja (supra) of this Court, referring to the language of Section 50 of the Act, and after discussing the above-mentioned judgments of this Court, took the view that there was a right given to the person to be searched, which he may exercise at his option. The Bench further held that substantial compliance is not applicable to Section 50 of the Act as its requirements were imperative. The Court, however, refrained from specifically deciding whether the provisions were directory or mandatory.

21. It will be useful to refer the relevant parts of the Constitution Bench in Vijaysinh Chandubha Jadeja (supra). In para 23, the Court said

> `In the above background, we shall now advert to the controversy at hand. For this purpose, it would be necessary to recapitulate the conclusions, arrived at by the Constitution Bench in Baldev Singh case'.

After further referring to the conclusions arrived at by the Constitution Bench in Baldev Singh's case (supra) (which have been referred by us in para 9 of this judgment) and reiterating the same the Constitution Bench in Vijaysinh Chandubha Jadeja (supra) this case concluded as under:

> "31. We are of the opinion that the concept of "substantial compliance" with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh case. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf."

22. An analysis of the above judgments clearly show that the scope of the provisions of Section 50 of the Act are no more res integra and stand

concluded by the above judgments particularly the Constitution Bench judgments of this Court in the cases of Baldev Singh (supra) and Vijaysinh Chandubha Jadeja (supra).

23. In the present case, we are concerned with the provisions of Section 50 of the Act as it was, prior to amendments made by Amending Act 9 of 2001 w.e.f. 2.10.2001. In terms of the provisions, in force at the relevant time, the petitioner had a right to be informed of the choice available to him; making him aware of the existence of such a right was an obligation on the part of the searching officer. This duty cast upon the officer is imperative and failure to provide such an option, in accordance with the provisions of the Act, would render the recovery of the contraband or illicit substance illegal. Satisfaction of the requirements in terms of Section 50 of the Act is sine qua non prior to prosecution for possession of an unlawful narcotic substance.

24. In fact, the Constitution Bench in the case of Vijaysinh Chandubha Jadeja (supra), in para 25, has even taken a view that after the amendment to Section 50 of the Act and the insertion of sub-section 5, the mandate of Section 50(2) of the Act has not been nullified, and the obligation upon the searching officer to inform the person searched of his rights still remains. In other words, offering the option to take the person to be searched before a Gazetted Officer or a Magistrate as contemplated under the provisions of this Act, should be unambiguous and definite and should inform the suspect of his statutory safeguards.

25. Having stated the principles of law applicable to such cases, now we revert back to the facts of the case at hand. There is no dispute that the concerned officer had prior intimation, that the accused was carrying smack, and the same could be recovered if a raid was conducted. It is also undisputed that the police party consisting of ASI - Dasrath Singh, Head Constable- Narsingh, Constable - Manoj Kumar and lady constable-Nirmla had gone in a Government vehicle to conduct the raid. The vehicle was parked and the accused, who was coming on a scooter, had been stopped. He was informed of and a notice in writing was given to him of, the suspicions of the police, that he was carrying smack. They wanted to search him and, therefore, informed him of the option available to him in terms of Section 50 of the Act. The option was given to the accused and has been proved as Ex. PW-6/A, which is in vernacular. The High Court in the judgment under appeal has referred to it and we would prefer to reproduce the same, which reads as under :

"Musami Ram Avtar urf Rama S/o late Sh. Mangat Ram R/o 71/144, Prem Nagar, Choti Subzi Mandi, Janakpuri, Delhi, apko is notice ke tehat suchit kiya jata hai ki hamare pas itla hai ki apko kabje me smack hai aur apki talashi amal mein laye jati hai. Agar ap chahen to apki talashi ke liye kisi Gazetted officer ya Magistrate ka probandh kiya ja sakta hai."

26. The High Court while relying upon the judgment of this Court in the case of Baldev Singh (supra) and rejecting the theory of substantial compliance, which had been suggested in the case of Joseph Fernandez (supra), found that the intimation did not satisfy the provisions of Section 50 of the Act. The Court reasoned that the expression `duly' used in Section 50 of the Act connotes not `substantial' but `exact and definite compliance'. Vide Ex.PW-6/A, the appellant was informed that a Gazetted Officer or a Magistrate could be arranged for taking his search, if he so required. This

intimation could not be treated as communicating to the appellant that he had a right under law, to be searched before the said authorities. As the recovery itself was illegal, the conviction and sentence has to be set aside.

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."

15. There are discrepancies in the statements of witnesses where the accused was apprehended, whether it was before the bridge or beyond the bridge. According to PW-2 Om Prakash, all the memos were prepared by him on the spot. However, PW-6 HHG Amar Singh deposed that the memos were scribed by Daya Ram or Nikka Ram. PW-1 Daya Ram deposed that the proceedings were conducted on the spot underneath street light. However, PW-6 Amar Singh deposed that the memos were prepared by Om Prakash inside the vehicle.

16. Thus, the prosecution has failed to prove that the Charas was recovered from the exclusive and conscious possession of the accused. Section 50 of the Act has not been complied with. There are major contradictions in the statements of the witnesses as discussed herein above. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

17. Thus, we find no merit in the appeal, which is accordingly dismissed. Pending applications are also disposed of. Bail bonds of accused are discharged.

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

State of Himachal Pradesh .....Appellant.

Versus

Arjun Singh .....Respondent.

Cr. Appeal No. 210 of 2010.

Reserved on:April 06, 2016.

Decided on: April 07, 2016.

N.D.P.S. Act, 1985- Section 20- Accused got perplexed on seeing the police and tried to run away- he was apprehended- his search was conducted during which 6 kg 250 grams of charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that prosecution version was not supported by independent witnesses- local witnesses were also not associated- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these circumstances prosecution case was not proved beyond reasonable doubt- trial Court had rightly acquitted the accused- appeal dismissed.

(Para-15 to 24)

For the appellant: Mr. M.A.Khan, Addl. AG with Mr. Ramesh Thakur, Dy. AG.
For the respondent: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 5.9.2009, rendered by the learned Special Judge (I)-cum Sessions Judge Kangra at Dharamshala, H.P., in Sessions case No. 9-K/VII-2009, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 20, (Act no. 61 of 85) of the Narcotic Drugs and Psychotropic Substances 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 19.12.2008, PW-12 ASI Subhash Shashtri, HC Prabhat Nanda, HHC Desh Raj, Const. Mohinder Singh, Const. Pankaj Kumar and Const. Kuljeet Singh left CIA office for detection of crime towards the area of Police Station Kangra and Shahpur. At about 7:00 PM, they laid *Naka* on the National Highway at Sanoura Chowk. The I.O. associated Rajesh Thakur and Vikram Singh in *Naka* party and at about 7:30 PM, they noticed that one person came from Gaggal Airport side. When he saw the police, he became perplexed and tried to run away. The accused was apprehended. The accused had wrapped his body with blanket. On removing the blanket, it was noticed that the accused was carrying one bag around his shoulder. On checking, it was found containing one polythene bag in which charas in the shape of sticks was recovered. The charas weighed 6 kg 250 grams. Two samples of 25 grams each were separated from the bulk charas and sealed with three seals of seal impression "T". The remaining charas was separately sealed with the same seal. The seal impression was obtained on a piece of cloth vide memo Ext. PW-1/A. NCB forms were also filled in and seal impression of "T" was also embossed over the same and seal after use was handed over to PW-1 Rajesh Thakur. The case property was taken into possession vide memo Ext. PW-1/B in the presence of witnesses Vikram Singh and Rajesh Thakur. PW-12 ASI Subhash Shashtri also prepared rukka Ext. PW-3/B and sent to the Police Station through Const. Harjeet Singh. Thereafter, FIR was registered. PW-12 ASI Subhash Shashtri produced the case property before the SHO for re-sealing. SHO resealed Ext. P-1 to P-3 with seal impression "D". SHO also filled in the relevant columns of NCB form. The case property along with NCB form was deposited with MHC Kuldeep Singh vide memo Ext. PW-11/C. The chemical examiner report is Ext. P-6. 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. According to him, he was falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Rajesh Mandhotra, Advocate for the accused has supported the judgment of the learned trial Court dated 5.9.2009.

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

6. PW-1 Rajesh Thakur, testified that on 19.12.2008 in the evening he had gone to Gaggal for collecting his motorcycle from the workshop. Vikram was also with him. At about 6/6:30 PM, one Mohinder from CIA staff met him and took him to the Gaggal Police Post alongwith Vikram. He was told by Mohinder that they had recovered 6/7 kg charas and they should sign some documents. They signed 4/5 papers prepared by the police. He did not know the accused. On that day, at about 7:30 PM, ASI Subhash Shashtri had not apprehended the accused at Sanoura Chowk in their presence with bag containing charas. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he denied that on 19.12.2008 at 7:30 PM, seven police officials from C.I.A. staff Dharamshala and he alongwith Vikram Singh were present at Sanoura Chowk. He denied that accused came from the Airport side towards them. On seeing the police, he returned back and started running. He denied that he was chased by Const. Mohinder Singh. His statement was not recorded and only his signatures were obtained by the police. He has denied portion “A to A” of his statement Mark “A”. He also denied that accused had wrapped himself with blanket and on removal of the blanket he was holding one bag around his shoulder. He denied that the bag was checked and it was found containing one polythene white colour containing charas in the shape of sticks. He also denied that the charas weighed 6 kg 250 grams. He also denied the manner in which the sampling and sealing proceedings were carried out on the spot. He also denied that I.O. filled up the NCB form in his presence and embossed seal impression of seal “T” on each sample at three places and thereafter the seal was entrusted to him. Further, he has identified signatures on seizure memo Ext. PW-1/B. Vikram had signed the same in his presence but accused had not signed the same in his presence. He admitted his signatures as well as that of Vikram on bulk parcel Ext. P-1 and sample parcels Ext. P-2 and P-3. The case property was produced before the Court during the examination of PW-1 Rajesh Thakur. In his further cross-examination, he denied that the bag Ext. P-4 and polythene envelope Ext. P-5 and sticks of charas Ext. P-6 were recovered in his presence from the accused. He admitted his signatures as well as of Vikram on memo Ext. PW-1/C. He denied that the personal search of accused was conducted in their presence. He identified his signatures as well as that of Vikram on personal search memo vide Ext. PW-1/D. He denied that Ext. PW-1/B, PW-1/C and PW-1/D were read over to him though he admitted that the contents were found to be true and thereafter he signed the documents. He was not forced to sign the documents.

7. PW-2 Vikram Singh testified that he alongwith Rajesh Thakur had gone to Gaggal for collecting his motorcycle. Around 6:00 PM, one police official known to Rajesh Thakur met them and took them to Police Post Gaggal. The police obtained signatures on 3-4 documents. The accused was not known to him. He was also declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he denied that on 19.12.2009 at about 7:30 PM, seven police officials from CIA

staff Dharamshala alongwith him and Rajesh were present at Sanoura Chowk. He denied that the police had laid down *Naka* on the road. He also denied that the accused was seen coming from the side of Airport. He also denied that he was apprehended by Const. Mohinder Singh. His statement was not recorded but signatures were obtained by the police. He denied portion "A" to "A" of his statement Mark "B". He also denied that the accused had wrapped himself with blanket and on removal of such blanket, he was holding one bag around his shoulder. He denied that bag was checked and found containing one polythene white colour containing charas in the shape of sticks. He also denied that charas weighed 6 kg 250 grams. He denied the manner in which the sealing proceedings were completed on the spot. He denied that the seal after use was entrusted to PW-1 Rajesh Thakur. He admitted his signatures on Ext. PW-1/A. He denied that the I.O. filled up the NCB forms in his presence and embossed impression of seal "T" on the same and thereafter returned the seal to PW-1 Rajesh Thakur. He identified his signatures on Ext. PW-1/B. PW-1 Rajesh Thakur had signed the same in his presence but the accused has not signed the same in his presence. He admitted his signatures on sample parcels Ext. P-2 and P-3. He denied that Ext. P-4 bag was carried by the accused. He also denied that charas Ext. P-6 was found in polythene bag Ext. P-5. He denied that charas Ext. P-6 was recovered from the bag in possession of the accused in his presence and PW-1 Rajesh Thakur. Bag Ext. P-4, polythene envelope Ext. P-5 and sticks P-6 were not recovered in his presence from the accused. He denied that *rukka* was handed over to Const. Harjeet Singh. He identified his signatures on memo Ext. PW-1/C. He denied that the personal search of the accused was conducted in their presence, however, admitted signatures on memo Ext. PW-1/D.

8. PW-3 Const. Harjeet Pathania deposed that on 19.12.2008, he alongwith other police party went towards Gaggal Sanoura. They reached at Sanoura Chowk at 7:00 PM and laid a *Naka*. PW-1 Rajesh Thakur and PW-2 Vikram Singh were also associated with them at Sanoura Chowk. At 7:30 PM, they noticed one person coming from the side of Airport. He got frightened and tried to escape. He was apprehended. The accused had wrapped himself with blanket. The same was removed and accused was found carrying one bag hung on his shoulder. It was checked and found containing 6 kg 250 grms charas. Two samples were separated from the bulk charas and kept in polythene and sealed in two separate parcels by affixing three seals of seal "T" on each parcel. The remaining bulk charas was also sealed in separate parcel along with bag and polythene by affixing 6 seals of seal "T". The case property was taken into possession vide memo Ext. PW-1/D in the presence of Vikram Singh, Rajesh Thakur and Prabhat Nanda. Thereafter, rukka Ext. PW-3/B was prepared and handed over to him by the I.O. at 9:15 PM. In his cross-examination, he testified that in his statement Mark "C", he has stated that Rajesh Thakur and Vikram were associated by the I.O. at the time of laying *Naka*. (Confronted with mark "C" wherein it is not so recorded). He admitted that he stated to the police that at around 7:30 PM, accused came from the Airport side and when he saw the police, he got frightened and tried to run away and he was apprehended by Const. Mohinder Singh. Confronted with mark "C" wherein it is not so recorded). He stated in his statement that the accused was having a blanket and underneath a cloth a bag was hung by him around his shoulder and that on checking the bag a polythene envelope was found inside it. It contained charas in the form of sticks. Confronted with mark "C" wherein it is not so recorded). He stated in his statement that on weighing the charas it weighed 6 kg 250 grms and that out of which samples of 25 grams each were separated therefrom and bulk as well as sample parcels were sealed in separate parcels by applying seal impression "T". Confronted with mark "C" wherein it is not so recorded).He has stated in his statement that recovery memo Ext. PW-1/B was prepared in his presence which was signed by PW-1, PW-2 and HC Prabhat Nanda and accused. Confronted with mark "C" wherein it is not so recorded). He admitted that he has not signed any recovery memo as well as parcels.

9. PW-4 HC Prabhat Nanda also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed at Sanoura Chowk. According to him, ASI Subhash Shashtri has prepared *rukka* Ext. PW-3/B. It was handed over to Const. Harjeet Singh at 9:00 PM. He took the same to the Police Station for registration of the case. In his cross-examination, he admitted that Gaggal and Sanoura falls in Panchayat area. He also admitted that there are 8/10 shops at Sanoura. He also admitted that they have not associated any local witness in the Naka.

10. PW-7 HC Surender Kumar deposed that on 22.12.2008 due to leave of MHC Kuldeep Chand, he was officiating as MHC Kangra. On that day, he handed over one sealed parcel duly sealed with seals "T" & "D", sample seals of seals and NCB form, two in number vide R/C No. 397/08 to HHC Joginder Singh for depositing the same in FSL Junga. He proved malkhana register Ext. PW-7/B.

11. PW-8 HHC Joginder singh deposed that MHC Surender Kumar handed over the case property vide R/C No. 397/08 for depositing the same at FSL, Junga. He deposited it on 23.12.2008.

12. PW-11 SHO Partap Singh deposed that he received *rukka* Ext. PW-3/B from Const. Harjeet Singh, on the basis of which he registered FIR Ext. PW-3/C. He prepared the case file and handed over the same to Const. Harjeet. ASI Subhash Shashtri has produced before him 3 sealed parcels duly sealed with seal "T", NCB forms and sample seal "T" for re-sealing. He checked the seals and found them intact. Thereafter, he resealed all the three parcels with seal "D" by putting two impressions on each parcel. He prepared memo regarding re-sealing of case property vide Ext. PW-11/C. Thereafter, he deposited the case property with MHC Kuldeep Singh at 12:45 AM.

13. PW-12 ASI Subhash Shashtri also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed at Sanoura Chowk. He prepared rukka Ext. PW-3/B. It was handed over to Const. Harjeet Singh and sent to the Police Station. In his cross-examination, he admitted that he has not taken into possession the blanket on 19.12.2008. He also admitted that no independent witness was associated by him from Sanoura as well as from Gaggal.

14. PW-13 HC Kuldeep Singh deposed that he was posted as MHC in PS Kangra. On 20.12.2008 at about 12:45 AM (during night time), SHO deposited with him one bulk sealed parcel duly sealed with seals of "T" and "D". There were six seal impressions of seal "T" and two seal impressions of seal "D" on the bulk parcel and the same was 6 kg and 200 grams in weight. The SHO, PS Kangra had also deposited with him two sealed sample parcels which were having three seal impressions of seal "T" and two seal impressions of seal "D". He filled up column No. 12 of the NCB forms. The case property was entered by him in the malkhana register vide Ext. PW-7/B.

15. The case of the prosecution has not been supported by PW-1 Rajesh Thakur and PW-2 Vikram Singh. According to them, the accused was not apprehended in their presence nor any contraband was recovered from the accused, though they have admitted their signatures on the documents. PW-4 HC Prabhat Nanda, in his cross-examination, has admitted that Gaggal and Sanoura falls in Panchayat area. He also admitted that there were 8/10 shops at Sanoura. He further admitted that they have not associated any local witness in the *Naka*. PW-12 ASI Subhash Shashtri, in his cross-examination, has admitted that no independent witness was associated by him from Sanoura as well as from Gaggal.

16. The case of the prosecution is that when the accused was apprehended he had wrapped a blanket and was carrying a bag. The police has not recovered the blanket, as

per the statement of I.O. PW-12 ASI Subhash Shashtri. It is not one of those cases where the place of incident was isolated or secluded. The police should have associated local witnesses in order to inspire confidence in search, seizure and sealing proceedings on the spot.

17. The case property was produced while recording the statement of PW-1 Rajesh Thakur and PW-12 ASI Subhash Shashtri. 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)."

18. 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 re-deposited 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 re-deposited 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.

19. Sub-rule (2) Rule 22.18 of Punjab Police Rules, reads as under:

"(2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.

Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so."

20. Rule 27.18 of Punjab Police Rules, reads as under:

"27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).

Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

> (5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

21. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

22. In Punjab Police Rules, also applicable to the State of Himachal Pradesh, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

23. In the instant case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

24. Thus, the prosecution has failed to prove the case against the accused under Sections 20, (Act no. 61 of 85) of the ND & PS Act that the charas was recovered from the conscious and exclusive possession of the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 5.9.2009.

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

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

Veepul Lakhanpal .....Petitioner.
Versus
Smt. Pooja .....Respondent.

CMPMO No. 57 of 2016.
Judgment reserved on: 1.4.2016.
Date of decision: April 7, 2016.

Code of Civil Procedure, 1908- Section 10 - Proceedings were instituted by the respondent under Section 12 of the Hindu Marriage Act- application was filed under Section 10 of CPC on the ground that earlier petition instituted by the petitioner under Section 13 was pending - similar plea had been raised in that petition- application was dismissed by the trial Court- held, that fundamental test to attract Section 10 is, whether final decision in the previous suit would operate as res-judicata in the subsequent suit or not- Section 10 will apply if there is identity of the matter in issue in both the suits- respondent has not filed any counter-claim and no decree of annulment can be passed in favour of the respondent in the proceedings under Section 13 of Hindu Marriage Act- scope of the petition under Sections 12 and 13 are different- petition dismissed. (Para-6 to 14)

For the Petitioner : Mr. Harsh Khanna, Advocate.
For the Respondent : Mr. Anirudh Sharma, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This petition under Article 227 of the Constitution of India at the instance of the husband takes exception to the order passed by learned Additional District Judge-1, Solan on 14.1.2016 whereby his application under Section 10 read with Section 151 of the Code of Civil Procedure (for short the 'Code') for staying the proceedings has come to be dismissed.

2. The facts giving rise to the present petition may be noticed. The proceedings pending before the learned trial Court (Additional District Judge-1, Solan) have been instituted by the respondent under Section 12 of the Hindu Marriage Act (for short 'Act') wherein the petitioner moved application under Section 10 of CPC on the ground that earlier petition instituted by the petitioner under Section 13 of the Act was already pending adjudication before the learned District Judge, Shimla. The respondent had not only put in appearance, but had also raised similar plea regarding impotency of the petitioner and had

further raised certain other contentions, which were similar to the one set out in the present petition.

3. It was further averred that the relief sought by the respondent in the impugned proceedings pending before the Court at Solan had already been sought by her in the proceedings under Section 13 of the Act pending before the learned District Judge, Shimla. Therefore, she could not be allowed to set up same ground in two different proceedings pending before the two Courts of competent jurisdiction on the same cause of action. It was further averred that the findings in one petition would operate as *resjudicata* in another proceeding and in case both the proceedings are allowed to continue, then there is every likelihood of contradictory findings, being recorded by the two Courts on the same matter.

4. The learned Court below dismissed the application by holding that the provision of Section 10 of CPC would not be applicable to the present case as the necessary ingredients of the Section were not attracted in the present case.

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

5. Section 10 of the Code of Civil Procedure reads thus:

> *"**10. Stay of suit.** – No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating undr the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.*
>
> *Explanation. – The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."*

6. The object of Section 10 CPC is to prevent Courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, the same would operate as *res-judicata* in the subsequent suit. Section 10 applies only in cases where the whole of the subject matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of subject matter in both the proceedings is identical.

7. The mere common grounds in the previous suit and subsequent suit would not attract the Section 10. The basic purpose and underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action, the same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts given by two Courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding(s).

8. It is not in dispute that the respondent in the proceedings instituted by the petitioner under Section 13 of the Hindu Marriage Act has only filed her reply and has not raised a counterclaim therein. It is further not in dispute that the grounds taken by her in the petition instituted by her under Section 12 of the Act are quite similar to those raised as a defence in the proceedings instituted by the petitioner under Section 13 of the Act.

9. Section 23-A of the Act, confers a right upon the respondent to seek a decree by way of counter claim while filing reply to a petition seeking decree of divorce or judicial separation or restitution of conjugal rights. The aforesaid section inter alia provides that in any proceedings for divorce or judicial separation or restitution of conjugal rights, the respondent may not only oppose the relief sought on the aforesaid ground, but may also make a counter claim for any relief under this Act on that ground and the Court may grant such a decree.

10. Section 23-A only applies to the proceedings for the following reliefs:

(i) divorce;

(ii) judicial separation and ;

(iii) restitution of conjugal rights.

But this Section has no applicability insofar as the relief claimed by the respondent under Section 12 of the Act is concerned. Even otherwise, no decree of annulment of marriage can be passed in favour of the respondent by the Court on the ground of impotency in the proceedings instituted by the petitioner under Section 13 of the Hindu Marriage Act at Shimla wherein the respondent has raised a specific plea of impotency. Such decree of annulment of marriage can only be passed in a substantive petition under Section 12 of the Act which is pending before the Court at Solan. Thus, the scope, ambit and result of both the petitions are entirely different. Moreover, the grounds for filing of an application under Section 12 of the Act and the grounds for filing of an application under Section 13 of the Act are entirely different.

11. The learned counsel for the petitioner would then argue that the petition filed by the respondent pending before the learned Court at Solan be transferred to Shimla by exercising the power under Section 21-A of the Act. I am afraid that even this prayer of the petitioner cannot be acceded to.

12. Section 21-A reads thus:

> ***"21-A. Power to transfer petitions in certain cases***.- *(1) Where - (a) a petition under this Act has been presented to a District Court having jurisdiction by a party to marriage praying for a decree for a judicial separation under Section 10 or for a decree of divorce under Section 13; and*
>
> *(b) another petition under this Act has been presented thereafter by the other party to the marriage praying for a decree for judicial separation under Section 10 or for a decree of divorce under Section 13 on any ground, whether in the same District Court or in a different District Court, in the same State or in a different State, the petitions shall be dealt with as specified in sub-section (2).*
>
> *(2) In a case where sub-section (1) applies, -*
>
> *(a) If the petitions are presented to the same District Court, both the petitions shall be tried and heard together by that District Court;*
>
> *(b) if the petitions are presented to different District Courts, the petition presented later shall be transferred to the District Court in which the*

earlier petition was presented and both the petitions shall be heard and disposed of together by the District Court in which the earlier petition was presented.

(3) In a case where Clause (b) of sub-section (2) applies, the Court or the Government, as the case may be, competent under the Code of Civil Procedure, 1908 (5 of 1908), to transfer any suit or proceeding from the District Court in which the later petition has been presented to the District Court in which the earlier petition is pending, shall exercise its powers to transfer such later petition as if it had been empowered so to under the said Code."

13. This Section has been added by Section 14 of the Marriage Laws (Amendment) Act, 1976 and makes provision for a case where both the parties to a marriage file separate petitions against each other either in the same Court or in different Courts in the same State or in different States. It provides that in such a case both the petitions shall be tried by the District Court in which the first petition was filed and the petition by the other party shall be transferred to that Court by the Government or by the High Court in accordance with the provisions of the Code of Civil Procedure relating to transfer. These provisions are contained in Sections 22 to 25 of the Code and apply to petitions for judicial separation and for divorce but not to petitions under Sections 9, 11 or 12. In other words, if one petition is for judicial separation or divorce but the other is for restitution or for nullity, this Section will not apply.

14. In view of the above discussion, I have no difficulty in concluding that the order passed by the learned Court below is just and legal. Having said so, I find no merit in this petition and the same is accordingly dismissed, so also the pending application(s), leaving the parties to bear their own costs.

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

Vinod Gupta .....Petitioner.

Versus

M/S Navkar Poly Plast Co. & ors. .....Respondents.

CMPMO No. 320 of 2015.
Reserved on: 4.4.2016.
Decided on: 8.4.2016**.**

Code of Civil Procedure,1908- Order 9 Rule 13- An ex-parte decree was passed which was put to execution- the decree was sent to District Judge, Gurgaon for execution - application for staying the execution petition was filed at Gurgaon - an application under Order 9 Rule 13 for setting aside the ex-parte decree was also filed- it was pleaded in the application that J.D has resigned from the company- he was wrongly impleaded as Managing Director, whereas the liability was that of the Company- held, that initially JD had appeared on behalf of the defendants in the main suit - time was sought for filing written statement- written statement was not filed and the defendants were proceeded ex-parte- it was admitted by J.D that summons were received by him- this shows that J.D had intentionally absented from the Court- application was to be filed within 30 days from the date of decree- further, no

material was placed on record to show that J.D has ceased to be Director of the Company-petition dismissed. (Para-6 to 7)

For the petitioner:	Mr. Prashant Sharma, Advocate, vice counsel.
For the respondents:	Mr. Karan Singh Kanwar, Advocate, for respondent No.1. Mr. Suneet Goel, Advocate for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is instituted against the order dated 25.7.2015, rendered by the learned Civil Judge (Sr. Divn.), Sirmaur District at Nahan, H.P. in CMA No. 54-CM/6 of 2014 in CMA No. 21/6 of 2014.

2. Key facts, necessary for the adjudication of this petition are that the respondent No.1 (hereinafter referred to as decree holder) instituted Civil Suit No. 13-CS/1 of 2009 against respondent No. 2 (JD) as well as the petitioner (JD), namely, Siri Ram Straw Products Ltd and Vinod Gupta, respectively, for recovery of Rs.10,80,000/-. The Civil Suit was decreed by the learned District Judge, Sirmaur District at Nahan on 16.7.2010. The defendants-judgment debtors were proceeded ex parte. The decree holder instituted Execution Petition titled as M/S Navkar Poly Plast Company versus Siri Ram Straw Products Ltd. It was sent to the learned District Judge, Gurgaon for execution.

3. The petitioner (JD) moved an application for staying the execution petition in the Court of learned Addl. District Judge, Gurgaon on 3.7.2015, wherein he has undertaken to give bank guarantee/FDR of the decreetal amount. The petitioner (JD) also moved an application under Order 9 Rule 13 CPC seeking setting aside of the judgment and decree dated 16.7.2010 before the learned District Judge, Sirmaur District at Nahan. The learned District Judge, Sirmaur District at Nahan vide order dated 26.2.2014 returned the petition to the petitioner (JD) to present the same in the Court of competent jurisdiction. It is, in these circumstances, the application under Order 9 Rule 13 CPC came before the learned Civil Judge (Sr. Divn.), Sirmaur at Nahan. The petitioner filed an application under Order 21 read with Section 151 CPC for staying the operation of ex-parte judgment and decree dated 16.7.2010 rendered in Civil Suit No. 13-CS/1 of 2009.

4. According to the averments made in the application filed by the petitioner (JD) under Order 9 Rule 13 CPC, he had already resigned as Director of the Company i.e. Siri Ram Straw Products Ltd. He had no concern with the Company w.e.f. 12.3.2008. He was wrongly impleaded as Managing Director whereas the liability was that of the Company. The personal immoveable property of the petitioner (JD) was attached and tried to be sold in auction by the decree holder. The application was contested by the decree holder. The petitioner (JD) has filed an application for staying the execution petition in the Court of learned Addl. District Judge, Gurgaon on 3.7.2015, wherein he has undertaken to give bank guarantee/FDR of the decreetal amount. The learned Advocate appearing on behalf of the decree holder has submitted at the bar that the undertaking given in the Court of learned Addl. District Judge, Gurgaon on 3.7.2015 has not been honoured.

5. I have heard learned counsel for the parties and have also gone through the impugned order dated 25.7.2015, carefully.

6. The judgment and decree in question is dated 16.7.2010. In the Civil Suit, one person on behalf of Vinod Gupta and Siri Ram Straw Products Ltd. appeared in the

Court of learned District Judge on 24.6.2010, as per the record and took time for filing written statement. However, no written statement was filed. The petitioner (JD) and respondent No. 2 were proceeded as ex-parte and ex-parte judgment and decree for sum of Rs. 6,27,914/- plus interest at the rate of 24% per annum w.e.f. 4.10.2006 till its realization was passed. The petitioner (JD) himself has admitted that he has received summons from the Court in the Civil Suit on 24.6.2010. Thus, it is evident that despite the receipt of summons, the petitioner (JD) has not chosen to contest the suit and has suffered ex-parte judgment and decree. The judgment and decree was sent for execution to the learned Addl. District Judge, Gurgaon. The learned Addl. District Judge, Gurgaon restrained the petitioner (JD) from transferring or changing the nature of the property by way of sale, gift or otherwise and prohibited any person from receiving the same by way of sale, purchase, gift or otherwise. The warrant of sale under Order 21 Rule 66 CPC was also issued by the learned Addl. District Judge, Gurgaon on 13.5.2015. The house was put up for sale on 4.7.2015.

7. Surprisingly enough, the petitioner (JD) has also filed the Civil Suit in the Court of Civil Judge (Sr. Divn.), Gurgaon titled as Vinod Gupta Versus Navkar Poly Plast, challenging the judgment and decree passed in Civil Suit No. 13-CS/1 of 2009 decided on 16.7.2010 on the ground of fraud and mis-representation. The application under Order 9 Rule 13 CPC ought to have been filed within 30 days from the date of decree i.e. 16.7.2010, however, the petition under Order 9 Rule 13 CPC has been filed on 16.1.2014. The petitioner (JD) has not placed any tangible material on record even to establish prima-facie that he ceased to be Director of the Company on 12.3.2008. The petitioner (JD) has also not placed any documents on record regarding the change of the name of the Company. Thus, there is no illegality or perversity in the impugned order.

8. Accordingly, there is no merit in this petition. The same is dismissed, so also the pending application(s), if any.

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

Baldev Singh .....Appellant

Versus

Jagdish Chand & another ...Respondents

FAO No. 187 of 2010
Decided on : 08.04.2016

Motor Vehicles Act, 1988- Section 166- Tractor was registered as transport vehicle- gross weight of the vehicle was 5225 kilogram which falls within the definition of light motor vehicle- claimant had specifically averred in the claim petition that claimant had loaded cow-dung in the vehicle – sitting capacity of the vehicle was 1+1- findings recorded by Tribunal that insured had committed breach of the terms and conditions of the insurance policy are set aside- insurer is held liable to pay compensation. (Para-5 to 11)

Cases referred:

Oriental Insurance Company versus Gulam Mohammad (since deceased) & others, Latest HLJ 2014 (HP) 244

Joginder Singh @ Pamma versus Vikram @ Vickey and others, Latest HLJ 2014 (HP) Suppl. 292

For the Appellant :	Mr. Manohar Lal Sharma, Advocate.
For the respondents:	Mr. Ajay Verma, Advocate, vice Ms. Archana Dutt, Advocate, for respondent No. 1. Mr. Aman Sood, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

The appellant has questioned the award dated 25th February, 2010, passed by the Motor Accident Claims Tribunal (I) Sirmaur District at Nahan, H.P., hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 87-MAC/2 of 2007, titled **Jagdish Chand versus Shri Baldev Singh & another,** whereby the compensation to the tune of Rs.8,22,122/- with interest @ 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimant-respondent No. 1 herein and against the driver-appellant herein, for short 'the impugned award'.

2. The Tribunal has decided all the issues in favour of the claimant and against the driver/owner. It held that the tractor was not to be used for agricultural purpose, as per registration certificate and saddled the owner-cum-driver with liability.

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

4. The only question to be determined in this appeal is-whether the findings returned by the Tribunal in para-21 of the award are legally correct? The answer is in the negative for the following reasons.

5. The copy of the Registration Certificate Ext. RW-1/D is on the record. Clause 16 of the said document does disclose that the tractor is meant for transport, also. The gross weight of the offending vehicle, as shown in Ext. RW-1/D, is 5225 kilogram, falls within the definition of 'light motor vehicle.'

6. This Court has laid down the same principle in case titled **Oriental Insurance Company versus Gulam Mohammad (since deceased) & others,** reported in ***Latest HLJ 2014 (HP) 244*** and in case titled as **Joginder Singh @ Pamma versus Vikram @ Vickey and others**, reported in ***Latest HLJ 2014 (HP) Suppl. 292.***

7. The claimant has specifically averred in the claim petition that the claimant-injured had loaded cow- dung in the offending vehicle, met with an accident, sustained injuries and succumbed to the same.

8. The seating capacity of the offending vehicle was 1+1, i.e. the risk of the driver was covered in terms of the Insurance Policy.

9. The finding of the Tribunal that the insured has violated terms and conditions of the Insurance Policy, is illegal. Accordingly, the findings returned by the Tribunal in para-21 of the impugned award are set aside and it is held that the deceased was traveling in the tractor with trolley, as labourer. He was engaged by the driver-cum-owner for the purpose of loading and unloading the cow dung.

10. Having said so, it is held that the impugned award is set aside and the insurer is saddled with the liability.

11. The insurer-Insurance Company is directed to deposit the awarded amount within eight weeks from today. On deposit, the same be released in favour of the claimant, strictly as per the terms and conditions contained in the impugned award, through payees' account cheque or depositing it in his account.

12. It is made clear that the amount deposited by the owner-Baldev Singh, before the Registry as statutory amount, is awarded as costs in favour of the claimant

13. The Registry is directed to release the statutory amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing in his account.

14. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

15. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

H.P.State Cooperative Bank Ltd.having its Head Office at The Mall Shimla through its Managing Director Shri Amit Kashyap. ....Applicant/plaintiff

Versus

National Insurance Company Ltd. and another ....Non-applicants/defendants

OMP No. 380 of 2015 in
Civil Suit No. 4086 of 2013
Order Reserved on 30.3.2016
Date of Order 8th April 2016

Code of Civil Procedure, 1908- Order XVIII Rule 3-A- Plaintiff filed an application to appear as his own witness after examination of other witnesses pleading that suit is based upon record which is to be proved by examining witnesses- application was opposed by the defendants- held, that plaintiff can be permitted to examine himself after othe witnesses only on medical ground, he being out of station due to compelling reasons, death of relative and marriage ceremony of daughter or son- examination of the plaintiff before other witnesses is a rule and deviation is exception- exemption sought on the ground that suit is based upon the document is no explanation at all- application dismissed. (Para-8)

Cases referred:

Ayyasami Gounder and others vs. T.S.Palanisami Grounder, AIR 1980 Madras 237
N.C.Kaladharan vs. Kamaleshwaran and others, (2002)10 SCC 184

For the Applicant: Mr. Raman Sethi Advocate.
For the Non-applicants: Mr. N.K. Thakur Sr. Advocate with Mr.Jagdish Thakur, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Application filed under Order XVIII Rule 3-A read with Section 151 CPC by plaintiff to appear as his own witness at the later stage after examination of other witnesses in civil suit No. 4086 of 2013 title H.P. State Cooperative Bank Ltd. vs. National Insurance Company Ltd. It is pleaded that suit is entirely based on record and record would be proved in accordance with law through witnesses mentioned at Sr. No. 1 to 6. It is pleaded that examination of witnesses mentioned at Sr. No. 1 to 6 prior to plaintiff is essential in present case. Prayer for acceptance of application filed under Order XVIII Rule 3-A CPC sought.

2. Per contra response filed on behalf of non-applicants pleaded therein that as per Order XVIII Rule 3-A CPC plaintiff is supposed to appear before other witnesses in civil suit. It is pleaded that examination of a party before other witnesses is a rule and examination of party after witnesses is an exception. It is pleaded that plaintiff intends to fill up the lacuna in present case and same is not permissible under law. It is pleaded that applicant did not disclose any cogent reason for examination of plaintiff at the later stage. Prayer for dismissal of application sought.

3. Applicant also filed rejoinder and re-asserted the allegations mentioned in application.

4. Court heard learned Advocate appearing on behalf of the applicant and learned Advocate appearing on behalf of the non-applicants and also perused the entire record carefully.

5. Following points arise for determination in present bail application:-

1. Whether application filed under Order XVIII Rule 3-A read with Section 151 CPC is liable to be accepted as mentioned in memorandum of grounds of application?
2. Final Order.

Findings on Point No.1 with reasons

6. Submission of learned Advocate appearing on behalf of applicant that applicant/plaintiff be permitted to appear as a witness at the later stage after examination of other witnesses is rejected being devoid of any force for the reasons hereinafter mentioned. Plaintiff H.P.State Cooperative Bank Ltd. filed civil suit for recovery of `25438311/- (Rupees two crores fifty four lacs thirity eight thousand three hundred eleven only) against Insurance Company with future interest at the rate of 18% per annum from the date of filing of suit till recovery of entire amount on the basis of insurance policies. It is prima facie proved on record that plaintiff purchased Banker's Indemnity Policy No.2003/421101/46/03/7700001 dated 1.4.2003 w.e.f. 1.4.2003 to 31.3.2004 and also purchased Banker's Indemnity policy No.2006/421101/46/06/ 7700000001 dated 3.4.2006 for the period of 3.4.2006 to 2.4.2007 and also purchased Banker's Indemnity policy 2007/421101/46/07/7700000001 dated 30.3.2007 for the period of 1.4.2007 to 31.3.2008. It is pleaded that embezzlements /frauds /misappropriations /falsfications were reported by internal auditors. It is pleaded that FIR was also lodged against Shri Visheshar Lal Sanartu the then Incharge of Branch office as delinquent officer vide FIRs Nos. 81 and 82 dated 14.6.2008 at police station Rampur under Sections 420, 418, 408, 409, 463, 464, 378 IPC read with Section 120-B IPC. It is pleaded that despite legal notice National Insurance Company did not indemnify the plaintiff bank.

7. Non applicants assert that plaintiff is estopped by his own act conduct and acquiescance from filing present suit. It is pleaded that on similar cause of action plaintiff has initiated proceedings under Section 69 of H.P. Cooperative Societies Act against delinquent officer and present suit is pre-mature. It is pleaded that suit of plaintiff is barred by limitation. It is pleaded that plaintiff did not adhere to terms and conditions of Banker's Indemnity Policy and further pleaded that plaintiff bank failed to get branch audited annually by bank authorities or by statutory auditors. It is pleaded that plaintiff has no enforceable cause of action. It is pleaded that plaintiff did not approach Court with clean hands and suppressed material facts from Court. Prayer for dismissal of application sought.

8. Twelve issues framed on 4.11.2014. Court is of the opinion that plaintiff can be permitted to examine at the later stage after examination of other witnesses only on following grounds. (1) Medical grounds. (2) Out of station ground due to compelling reasons. (3) Absence of plaintiff due to death of relative. (4) Absence of plaintiff due to marriage ceremony of daughter or son. It is well settled law that examination of plaintiff in civil suit prior to other witnesses is a rule and deviation is exception. Reasons mentioned in application by applicant that documents placed on record would be proved and till the documents placed on record would not be proved plaintiff be exempted to appear as witness before other witnesses is not judicial reasonable ground because as per Indian Evidence Act documents should be proved as per primary evidence or secondary evidence as per Chapter V Sections 61, 62 and 63 of Indian Evidence Act 1872. It is well settled law that contents of documents are proved through marginal witnesses who are signatories to documents. It is held that there are no sufficient reasons mentioned in application which permit the plaintiff to record his statement at the later stage. It is well settled law that as per law plaintiff is permitted to appear in witness box twice in civil suit i.e. (1) In affirmative evidence. (2) In rebuttal evidence. In view of the fact that order XVIII Rule 3-A CPC is a rule and deviation is exception it is held that plaintiff intends to fill up lacuna in civil suit by way of examining himself as witness at the later stage. It is well settled law that plaintiff cannot be permitted to fill up lacuna in civil suit by way of appearing at later stage subsequent to other witnesses. Present suit is filed by H.P. State Cooperative Bank Ltd. having its Head Office at The Mall Shimla through its Managing Director Shri Amit Kashyap and it is prima facie proved on record that Shri Amit Kashyap is working at The Mall Shimla which is nearby the premises of H.P. High Court and Shri Amit Kashyap can appear in witness box easily. It is held that there are no reasonable judicial grounds to allow application. ***See AIR 1980 Madras 237 title Ayyasami Gounder and others vs. T.S.Palanisami Grounder. Also see (2002)10 SCC 184 title N.C.Kaladharan vs. Kamaleshwaran and others.*** In view of above stated facts point No. 1 is answered in negative.

Point No.2 (Final order)

9. In view of my findings on point No.1 application filed under Order XVIII Rule 3-A CPC is rejected. Observations will not effect the merits of case in any manner and will strictly confine for the disposal of OMP No. 380 of 2015. OMP No. 380 of 2015 stands disposed of.

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

Himachal Road Transport Corporation & Anr. .....Appellant

Versus

Kamlesh Kumari and others ..... Respondents

FAO No. 44 of 2010.
CO No.: 312 of 2010.
Decided on : 08.04.2016

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 10,240/- per month- 1/4th amount was to be deducted towards the personal expenses of the deceased and the loss of the dependency will be Rs. 7680/- per month- age of the deceased was 50 years- multiplier of 10 is applicable, thus, claimants are entitled to Rs.7,680 x 10 x 12= Rs. 9,21,600/- towards the loss of income- they are also entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of estate', 'loss of consortium' and 'funeral expenses' – thus, they are entitled to Rs. 9,61,600/- along with interest @ 7.5% per annum from the date of the filing of the claim petition. (Para-12 to 16)

Motor Vehicles Act, 1988- Section 166- It was contended that deceased was travelling on the roof of the vehicle, therefore, he himself was negligent- held, that allowing a person to travel on the roof of the vehicle by itself amounts to negligence on the part of driver and conductor of the bus – therefore, Tribunal had rightly held that driver was negligent and his negligence had caused accident. (Para-9 to 11)

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.Jagdish Thakur, Advocate.
For the respondents:	Mr.Ramakant Sharma, Senior Advocate, with Ms.Devyani Sharma, Advocate, for respondents No.1 to 6. Mr.Rajesh Kumar Sharma, Advocate, for respondents No.7 and 8.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral)

Subject matter of this appeal is the award, dated 12th October, 2009, passed by the Motor Accident Claims Tribunal-I, Solan camp at Nalagarh, (for short, the Tribunal), in Claim Petition No.24-NL/2 of 2007, titled Kamlesh Kumari and others vs. Himachal Road Transport Corporation and others, whereby compensation to the tune of Rs.8,03,000/-, with interest at the rate of 9% per annum from the date of the award till deposit, came to be awarded in favour of the claimants and the Himachal Road Transport Corporation (for short, HRTC), i.e. the present appellants came to be saddled with the liability, being the owners of the bus, (for short, the impugned award).

2. Feeling aggrieved, the HRTC filed the instant appeal on the ground that the Tribunal has wrongly fastened it with the liability. On the other hand, the claimants

challenged the impugned award by filing Cross Objections No.312 of 2010 on the ground that the amount of compensation awarded by the Tribunal is inadequate.

3. The driver and the conductor have not questioned the impugned award on any ground, thus, it has attained finality so far as it relates to them.

4. Thus, two questions arise for determination in this appeal – i) Whether the driver of the offending bus had driven the bus rashly and negligently; and ii) Whether the amount of compensation awarded by the Tribunal is adequate.

5. Facts of the case, in brief, are that Hari Krishan became victim of the vehicular accident, which was caused by the driver, namely, Hoshiar Singh, while driving the bus bearing No.HP-03B-6014, belonging to the HRTC, rashly and negligently, on 15th June, 2007. The deceased was traveling on the roof of the bus and when the bus reached near village Kishanpura, the driver gave a jerk to the bus in a high speed as a result of which the deceased fell down from the roof of the bus and suffered injuries and succumbed to the same. Thus, the claimants claimed compensation to the tune of Rs.10.00 lacs, as per the break-ups given in the claim petition.

6. Respondents resisted the claim petition by filing replies.

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

"1. Whether deceased Hari Krishan has died on account of rash/negligent driving of the bus by the respondent No.3 and 4? OPP

2. If issue No.1 is proved in affirmative to what amount of compensation the petitioners are entitled to and from whom? OPP

3. Relief."

8. Parties led their evidence. The Tribunal after scanning the evidence held that the driver of the offending bus, on the fateful day, had driven the offending bus rashly and negligently and caused the accident in which deceased Hari Krishan sustained injuries and succumbed to the same.

9. The learned counsel for the appellants-Corporation argued that since the deceased was traveling on the roof of the bus, therefore, the deceased himself was negligent and no rashness and negligence is attributable to the driver of the offending bus.

10. The argument raised by the learned counsel for the appellants-Corporation is without any basis for the simple reason that allowing a person to travel on the roof of a bus, in itself, amounts to negligence on the part of the driver and the conductor of the bus. A passenger can only be allowed to sit inside the bus, and that too, as per the seating capacity, and if the driver and the conductor, even after noticing that a person is on the roof of the bus, does not stop the bus and ask the said person to alight from the roof of the bus, it amounts to rashness and negligence of the driver.

11. Thus, the Tribunal has rightly held that the driver of the offending bus had driven the bus rashly and negligently and had caused the accident. Accordingly, the findings returned by the Tribunal on issue No.1 are upheld.

12. As far as issue No.2 is concerned, the deceased was a government employee and as per the salary certificate proved on record as Ext.PW-2/A, he, at the time of death, was earning Rs.10,240/- per month. Admittedly, the claimants are six in number. The Tribunal has fallen in error in deducting 1/3rd amount from the salary of the deceased towards his personal expenses. However, in view of the law laid down by the Apex Court in

Sarla Verma (Smt.) and others vs. Delhi Transport Corporation and another, (2009) 6 SCC 121, which decision was also upheld by the larger Bench of the Apex Court in **Reshma Kumari and others vs. Madan Mohan and another, 2013 AIR (SCW) 3120,** 1/4th amount was to be deducted towards the personal expenses of the deceased. Thus, the loss of source of dependency to the claimants can be said to be Rs.7680/- per month.

13. The age of the deceased at the time of death was 50 years and multiplier applicable was of 10. However, the Tribunal has again fallen in error in applying the multiplier of 8.

14. In view of the above, the claimants are held entitled to compensation under the head loss of source of dependency to the tune of Rs.7680/- x 12 x 10 = Rs.9,21,600/-. In addition, the claimants are also held entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of estate', loss of consortium' and 'funeral expenses'.

15. Having said so, the claimants are held entitled to Rs.9,61,600/- as compensation under the following heads:

i) Loss of source of dependency:	Rs. 9,21,600/-
ii) Loss of love and affection:	Rs.10,000/-
iii) Loss of estate:	Rs.10,000/-
iv) Loss of consortium	Rs.10,000/-
v) Funeral expenses:	Rs.10,000/-
Total:	Rs. 9,61,600/-

16. The above amount shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit. The insurer is directed to deposit the entire amount, alongwith up-to-date interest, in the Registry of this Court, within a period of six weeks from today and on deposit, the Registry is directed to release the said amount in favour of the claimants, in terms of the impugned award, through their bank accounts, after proper identification.

17. In view of the above, the appeal filed by the appellants-HRTC is dismissed and the cross objections filed by the claimants are allowed, and stand disposed of accordingly.

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

Smt. Indara Devi and others ...Appellants.

Versus

Rakesh Kaushal and another ...Respondents.

FAO No. 229 of 2010
Decided on: 08.04.2016 psychic

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 14,028/- per month- claimants were four in number- 1/4th amount is to be deducted towards personal expenses- thus, claimants have lost dependency of Rs. 10,500/- per month - age of the deceased was

recorded as 41 years in the post mortem report- multiplier of '12' is applicable- thus, claimants are entitled to Rs. 10,500 x 12 x 12 = Rs. 15,12,000/- - claimants are entitled to compensation of ₹ 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses- however, in view of statement of the Counsel for the respondent, claimants held entitled to compensation of Rs. 14,50,000/- along with interest @ 7.5% per annum from the date of the award. (Para-6 to 12)

Cases referred:
Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

For the appellants:	Mr. Shyam S. Chauhan, Advocate, vice Mr. Neeraj K. Sharma, Advocate.
For the respondents:	Nemo for respondent No. 1. Mr. Jagdish Thakur, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is the judgment and award, dated 5th November, 2009, made by the Motor Accident Claims Tribunal, Una, Himachal Pradesh (for short "the Tribunal") in M.A.C. Petition No. 27 of 2008, titled as Smt. Indira Devi and others versus Sh. Rakesh Kaushal and others, whereby compensation to the tune of ₹ 6,72,000/- with interest @ 9% per annum from the date of the impugned award till its realization and costs assessed at ₹ 3,000/- came to be awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The insured/owner-cum-driver 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-claimants have questioned the impugned award on the ground of adequacy of compensation.

4. Thus, the only questioned to be determined in this appeal is – whether the amount awarded is adequate or otherwise?

5. I have gone through the impugned award read with the record and am of the considered view that the amount awarded by the Tribunal is inadequate for the following reasons:

6. The claimants have pleaded in the claim petition that the age of the deceased was 30 years, but the post-mortem report does disclose that the deceased was 41 years at the time of the accident. The Tribunal has taken all factors into consideration and rightly held that the deceased was 45 years of age at the time of the accident, but, has fallen in an error in applying the multiplier of '8' as multiplier of '12' was just and appropriate in view of 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 **(2009) 6 Supreme**

Court Cases 121, which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.**

7. The deceased was a whole time Class-IV employee of Bhakra Beas Management Board and his net salary was ₹ 14,028/- per month in terms of the salary certificate, Ext. PW-2/A. The claimants were four in number, thus, one fourth was to be deducted towards personal expenses of the deceased. After deducting one fourth, the claimants have lost source of dependency to the tune of ₹ 10,500/- per month.

8. Viewed thus, the claimants have suffered loss of income/dependency to the tune of ₹ 10,500 x 12 x 12 = ₹ 15,12,000/-. The claimants are also entitled to compensation to the tune of ₹ 10,000/- each under the heads 'loss of consortium', loss of estate', 'loss of love and affection' and 'funeral expenses'.

9. At this stage, Mr. Jagdish Thakur, learned counsel for the insurer, stated at the Bar that he has sought approval for settling the claim for ₹ 14,50,000/- in lump-sum. His statement is taken on record.

10. In view of the above, I am of the considered view that the offer made is just and reasonable and the claimants are held entitled to compensation to the tune of ₹ 14,50,000/-.

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

12. The insurer is directed to deposit the amount before the Registry within twelve weeks. In default, the claimants shall be entitled to interest @ 7.5% per annum from the date of the impugned award. On deposition, the amount 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 depositing the same in their respective bank accounts.

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

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

M/s Maja Unipac. .....Petitioner/Plaintiff.

Vs.

HP Financial Corporation Ltd. .....Non-petitioner/Defendant.

OMP No.362 of 2014
Order reserved upon OMP on: 30.3.2016.
Date of Order: April 8, 2016

Code of Civil Procedure, 1908- Section 114- Order 47 Rule 1- Civil suit was dismissed by the Court under Order XVII rules 2 and 3 read with Order IX rule 3 CPC **–** case was earlier listed for the evidence but no evidence was produced- hence, suit was dismissed- it was pleaded that Courts were closed for winter vacation- major fire broke out in the sister concern of petitioner and in the fire total plant and machinery along with records and stocks were reduced to ashes- held, that this plea is duly supported by affidavit and no objection

was filed by other side- therefore, application is allowed subject to payment of cost of Rs. 3,000/-. (Para-5 to 7)

For the petitioner: Mr.Rajneesh Maniktala, Advocate.
For non-petitioner: Mr.J.L.Kashyap, Advocate.

The following order of the Court was delivered:

P.S.Rana, Judge.

Present petition is filed for review of order dated 23.6.2014 passed by Hon'ble High Court of HP in civil suit No. 15 of 2011 title Ms Maja Unipac Vs. H.P Financial Corporation Ltd. It is pleaded that plaintiff evidence could not be produced in civil suit No. 15 of 2011 because courts were closed for winter vacation w.e.f. 11.1.2014 to 24.2.2014 and steps could not be taken due to vacation period. It is further pleaded that thereafter on 24.2.2014 major fire broke out in the sister concern of petitioner i.e. M/s Maja Health Care Kishanpura Baddi District Solan HP and in the fire total plant and machinery along with records and stocks etc were reduced to ashes causing loss to the tune of Rs. 15-20 crores. It is further pleaded that matter was reported to police station and FIR was lodged. It is further pleaded that M/s Maja Health Care happens to be sister concern of petitioner and is owned by same family which has established plaintiff firm. It is further pleaded that firm was duly insured with fire cover. It is further pleaded that Insurance Company appointed surveyor to assess actual loss and petitioner had to coordinate with architects, suppliers of machinery, bankers and chartered accountants. It is further pleaded that due to aforesaid facts petitioner could not take steps to summon witnesses in civil suit No. 15 of 2011. Prayer for review of order dated 23.6.2014 sought and prayer to restore civil suit No.15 of 2011 to its original number also sought.

2. Notice was issued to non-petitioner and learned counsel appearing on behalf of non-petitioner did not file any response to the petition.

3. Court heard learned Advocate appearing on behalf of petitioner and learned Advocate appearing on behalf of non-petitioner and also perused entire records carefully.

4. Following points arise for determination in present petition.

1. Whether order dated 23.6.2014 passed in civil suit No. 15 of 2011 title M/s Maja Unipac Vs. H.P Financial Corporation is liable to be reviewed as alleged?.

2. Relief.

Findings upon Point No.1 with reasons.

5. It is proved on record that civil suit No. 15 of 2011 was dismissed by Hon'ble High Court of HP on 23.6.2014 under Order XVII rules 2 and 3 read with Order IX rule 3 CPC in the presence of learned Advocate appearing on behalf of parties. It is proved on record that in civil suit No. 15 of 2011 issues were framed by Hon'ble High Court of HP on 9.8.2012 and thereafter case was listed for plaintiff evidence on 10.10.2012, 30.10.2013, 11.4.2014 and 23.6.2014. It is proved on record that learned Advocate appearing on behalf of plaintiff stated before the Court that plaintiff is not coming forward to summon evidence in civil suit No. 15 of 2011 despite intimation given through registered A.D post. It is proved on record that thereafter Hon'ble High Court of HP vide order dated 23.6.2014 dismissed civil suit No. 15 of 2011 on the ground that plaintiff did not lead evidence despite opportunity granted. Hon'ble High Court of HP dismissed the suit under the provisions of

Order XVII rules 2 and 3 read with Order IX rule 3 CPC and Hon'ble High Court of HP directed that plaintiff would be entitled to refund court fee in accordance with law.

6. Petition filed by petitioner for review of order dated 23.6.2014 is supported with affidavit. Non-petitioner did not file any response despite opportunity granted and learned Advocate appearing on behalf of non-petitioner submitted before court on dated 13.5.2015 that non-petitioner does not want to file any response. Affidavit filed by petitioner remained un-rebutted on record. In view of the fact that affidavit filed by petitioner remained un-rebutted on record court is of the opinion that it is expedient in the ends of justice to review order dated 23.6.2014. Review petition has been filed by petitioner within limitation. Civil Suit No. 15 of 2011 was dismissed on 23.6.2014 and review petition was filed on 28.8.2014 within three months from the date of order. It is well settled law that application for review may be necessitated by way of invoking doctrine of 'actus curiae neminem gravabit'. See Board of Control for cricket India and another Vs. Netaji Cricket Club AIR 2005 SC 592. In view of the above stated facts point No.1 is answered in affirmative.

Point No.2(Relief).

7. In view of findings on point No.1 above petition is allowed subject to costs of Rs.3000/- (Three thousand). Order dated 23.6.2014 passed in civil suit No. 15 of 2011 is reviewed. Observations will not effect merits of case in any manner and will be strictly confined to the disposal of OMP No.362 of 2014. Civil Suit No. 15 of 2011 is restored to its original number subject to payment of costs. OMP No. 362 of 2014 is disposed of.

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

FAOs No. 168 & 314 of 2010
Decided on : 08.04.2016

1. FAO No. 168 of 2010

M/s Oriental Insurance Company ....Appellant
Versus
Smt. Hira Devi & others ...Respondents

2. FAO No. 314 of 2010

Mrs. Hira Devi & others ....Appellants
Versus
M/s Oriental Insurance Company ....Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was aged 46 years at the time of accident- multiplier of 13 was applied by the Tribunal- held, that multiplier of 11 is applicable- monthly income of the deceased was Rs.8,000/-- 1/3rd amount is to be deducted towards the personal expenses- thus, claimants are entitled to Rs. 64,000/- x 11 = Rs. 7,04,000/- under the head 'loss of dependency'- claimants are also entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of estate', 'loss of consortium' and 'funeral expenses'- thus, claimants are entitled to total compensation of Rs.7,44,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-15 to 23)

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
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

FAO No. 168 of 2010

For the Appellant — Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.
For the Respondents: — Mr. Peeyush Verma, Advocate.

FAO No. 314 of 2010

For the Appellants : — Mr. Peeyush Verma, Advocate.
For the respondent: — Mr. G.C. Gupta, Senior Advocate with Ms. Meera Devi, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Both these appeals are outcome of a award dated 12th March, 2010, passed by the Motor Accident Claims Tribunal (II) Shimla, H.P., hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 2-S/2 of 2007, titled **Smt. Hira Devi & others versus M/s Oriental Insurance Company Limited,** whereby the compensation to the tune of Rs.8,50,000/- came to be awarded in favour of the claimants and the insurer was saddled with liability, for short 'the impugned award'.

2. The claimants and the insurer have questioned the impugned award. Thus, I deem it proper to determine both these appeals by this judgment.

3. The insurer has questioned the impugned award on the following two counts:

1. *That the owner and driver have not been arrayed as party respondents in the claim petition;*
2. *that the amount of compensation is on the higher side.*

4. The claimants have questioned the impugned award on the ground of adequacy of compensation.

5. Heard.

6. The claimants had filed the claim petition for grant of compensation to the tune of Rs.20.00 lacs, as per the break-ups given in the claim petition, on the ground that deceased Karam Chand was traveling in vehicle i.e. Maruti Zen bearing registration No. HP-51A-1271, which was being driven by driver-cum-owner, namely, Jagdish Chand, rashly and

negligently and caused the accident, sustained injuries and succumbed to the same. It is also averred in the claim petition that in the said accident, driver-cum-owner Jagdish Singh also died.

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 Karam Chand died on 30.06.2006 because of rash and negligent driving of vehicle No. HP-51A-1271 by one Jagdish Singh? …OPP*

2. *If issue No. 1 is proved in affirmative, what amount the petitioners are entitled to? …OPP*

3. *Whether the petition is not maintainable, as alleged?….OPR*

4. *Whether the vehicle No. HP-51A-1271 was being driven in violation of terms and conditions of the insurance policy? ….OPR*

5. *Whether the driver of vehicle No. HP-51A-1271 was not having valid and effective driving licence? …OPR*

6. *Whether the petition is bad for non-joinder of necessary parties? …OPR*

7. *Relief."*

Issue No. 1.

9. The parties have led evidence. The Tribunal after scanning the evidence, oral as well as documentary, held that the offending vehicle was being driven by driver-cum-owner, namely, Jagidish Singh, rashly and negligently, caused the accident, in which the said driver and Karam Chand, sustained injuries and succumbed to the same. There is no dispute on the said findings. Accordingly, the findings returned by the Tribunal on Issue No. 1 are upheld.

10. Before I deal with Issue No. 2, I deem it proper to deal with Issues No. 3 to 6.

11. The argument of the learned Senior Counsel appearing on behalf of the insurer argued that the claim petition was not maintainable, is devoid of any force for the following reasons.

Issue No. 3.

12. 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. The fact that the owner has passed away and the offending vehicle was insured, is not in dispute. Thus, the argument that the owner was to be a party respondent in the claim petition, is irrelevant.

13. Having said so, the Tribunal has rightly decided issue No. 3. Accordingly, the findings returned by the Tribunal on said issues are upheld.

Issue No. 4 to 6.

14. The onus to prove issues No. 4 to 6 was on the insurance company, has not led any evidence, thus failed to discharge the same. Accordingly, the findings returned by the Tribunal on Issues No. 4 to 6 are upheld.

Issue No. 2.

15. The Tribunal has fallen in an error in applying the multiplier of '13', because admittedly, the age of the injured was 46 years at the time of accident and the multiplier of

'11' was applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in **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.**

16. In para 10 of the impugned award, the Tribunal has held that the monthly income of the deceased was about Rs.8,000/- , which appears to be reasonable. There is evidence on the record that the deceased was an agriculturist, was doing some other vocations also, and was dealing in apples. While exercising the guess work, it can be safely held that the monthly income of the deceased would not have been less than Rs.8,000/- and the Tribunal has rightly recorded the findings.

17. The Tribunal has rightly deducted 1/3rd towards the personal expenses of the deceased and assessed the loss of dependency to the tune of Rs.64,000/- per annum in view of the ratio laid down by the Apex Court in the judgments, *supra.*

18. Accordingly, the claimants are held entitled to the tune of Rs.64,000/- x 11 = Rs. 7,04,000/- under the head 'loss of dependency'.

19. 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.

20. The Tribunal has awarded interest @ 6% per annum from the date of filing of the claim petition, is on the lower side.

21. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as ***United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,*** *reported in (****2002) 6 SCC 281****;* ***Satosh Devi versus National Insurance Company Ltd. and others****, reported in* ***2012 AIR SCW 2892****;* ***Amrit Bhanu Shali and others versus National Insurance Company Limited and others*** *reported in* ***(2012) 11 SCC 738****;* ***Smt. Savita versus Binder Singh & others****, reported in* ***2014, AIR SCW 2053****;* ***Kalpanaraj & others versus Tamil Nadu State Transport Corpn****., reported in* ***2014 AIR SCW 2982****;* ***Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others****, reported* ***in (2015) 4 SCC 433****, and* ***Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another****, reported* ***in (2015) 4 SCC 434****,* and discussed by this Court in a batch of ***FAOs, FAO No. 256 of 2010***, titled as ***Oriental Insurance Company versus Smt. Indiro and others***, being the lead case, decided on 19.06.2015.

22. Having said so, I deem it proper to enhance the rate of interest from 6% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

23. Viewed thus, it is held that the claimants are entitled to compensation to the tune of Rs.7,04,000/- + Rs.40,000/- total amounting to Rs.7,44,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

24. Accordingly, the impugned award is modified, as indicated above.

25. The Registry is directed to release the entire amount in favour of the claimants, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing the same in their accounts. The excess amount, if any, be

refunded to the insurance company through payees' cheque account or by depositing it in its bank account.

26. Accordingly, the appeals are disposed of.

27 Send down the records after placing copies of the judgment on both the files of the Tribunal.

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

Mohan Lal .....Appellant
Versus
Lalit Mohan & others ..... Respondents

FAO No.31 of 2010
Date of decision: 08.04.2016

Motor Vehicles Act, 1988- Section 166- Deceased was aged 24 years at the time of Accident- it was pleaded that deceased was working as labourer and was also performing job of a petty contractor- however, no evidence was led to show that the deceased was a petty contractor- Tribunal assessed the income of the deceased as Rs. 3,000/- per month which is on the lower side- even a labourer does not earn less than Rs. 150/- per day or say Rs. 4,500/- per month – deceased was a bachelor- half amount is to be deducted towards personal expenses- multiplier of '15' is applicable- thus, claimants are entitled to Rs. 2,250 x 12 x 15= Rs. 4,05,000/-_towards loss of dependency- Rs. 10,000/- each awarded under the heads 'loss of love and affection', loss of estate' and 'funeral expenses'- thus, claimants are entitled to Rs. 4,35,000/- along with interest @ 7.5% per annum from the date of the filing of the petition till deposit. (Para-10 to 16)

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. Karan Singh Kanwar, Advocate.
For the respondents: Mr.O.P. Negi, Advocate vice Mr. V.S. Chauhan, Advocate, for respondent No.1.
Ms.Anjana Khan, Advocate, for respondents No.2(a) to 2(d).
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 award, dated 13th March, 2009, passed by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P., (for short, "the Tribunal") in MAC Petition No.168-MAC/2 of 2006, titled Sh. Mohan Singh vs. Sh. Lalit Mohan & others, whereby a sum of Rs.1,49,000/- alongwith interest at the rate of 7.5% per

annum came to be awarded as compensation in favour of the claimant (for short the "impugned award").

2. The driver, the owner-insured 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 claimant has questioned the impugned award on the ground of adequacy of compensation. Thus, the only question to be determined in this appeal is whether the amount is inadequate. The answer is in affirmative for the following reasons.

4. The deceased Yash Pal, at the age of 24 years, became the victim of vehicular accident, which was caused by Rajinder Kumar (respondent No.2), while driving Swaraj Majda bearing registration No.HP-03B-0212 rashly and negligently on 14.8.2006, as a result of which the deceased sustained injuries and succumbed to the same. Thus, The claimant, being the father of the deceased Yash Pal, filed the claim petition for grant of compensation to the tune of Rs.8,00,000/-, as per the break-ups given in the claim petition.

5. The respondents resisted the claim petition by filing replies.

6. The following issues came to be framed in the claim petition:-

"1. Whether Yash Pal died on account of the injuries sustained in a vehicular accident involving truck/Tipper bearing No.HP-03B-0212 being driven by respondent No.2 in a rash or negligent on 14.8.2006 at place Kayardu Mine, as alleged? OPP

2. If issue No.1 is proved in affirmative whether the petitioner being L.R. of the deceased is entitled to receive compensation, if so, to what amount and from whom? OPP

3. Whether the petition is not maintainable in the present form, as alleged? OPR-3

4. Whether the driver of the truck did not possess a valid and effective driving licence and that the vehicle in question was plied in violation of the terms and conditions of the insurance policy, as alleged? OPR-3

5. Whether the petition has been filed in collusion with the respondents No.1 and 2, as alleged? OPR-3

6. Relief ."

7. In order to prove his claim, the claimant appeared in the witness box as PW-1 and also examined Vijay Singh as PW-2. The respondents, on the other hand, have not examined any witness.

8. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimant has proved that the driver of the offending vehicle had driven the said vehicle rashly and negligently and had caused the accident in which deceased Yash Pal lost his life. The said findings of the Tribunal are not in dispute. Accordingly, the findings returned by the Tribunal on issue No.1 are liable to be upheld and the same are upheld.

9. In regard to issues No.3, 4 and 5, the onus to prove the said issues was upon respondent No.3-insurer, has not led any evidence to prove the said issues and therefore, has not discharged the onus cast on it. Accordingly, the findings returned by the Tribunal on the said issues are also upheld.

10. Regarding issue No.2, which pertains to quantum of compensation, the claimant has pleaded that his son was working as labourer and also performing the job of a

petty contractor. However, the claimant has not led any evidence to show that the deceased was performing the job of a contractor. The Tribunal, after appreciating the rival pleadings of the parties and the evidence, has assessed the income of the deceased as Rs.3,000/- per month by working as a labourer, which, to my mind, is on the lower side. In common parlance, even a labourer does not earn less than Rs.150/- per day or say Rs.4,500/- per month. Accordingly, the monthly income of the deceased is assessed at Rs.4,500/- per month.

11. Admittedly, the deceased was a bachelor at the time of death. Therefore, in view of the law laid down by the Apex Court in 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 case titled as ***Reshma Kumari & others*** versus ***Madan Mohan and another, reported in 2013 AIR (SCW) 3120***, the Tribunal has again fallen in error in deducting 1/3rd amount from the monthly income of the deceased towards his personal expenses, rather 1/2 amount was to be deducted. Accordingly, the monthly loss of source dependency to the claimant can be said to be Rs.2,250/-.

12. It is admitted case of the parties that the age of the deceased was 24 years at the time of the accident. The Tribunal has incorrectly applied the multiplier of '12'. In view of Schedule II appended to the Motor Vehicles Act, 1988 read with the judgment made by the Apex Court in ***Sarla Verma's case (supra),*** multiplier of 15 is appropriate in the instant case.

13. In view of the above discussion, it is held that the claimant lost source of dependency to the tune of Rs.2,250x12x15= Rs.4,05,000/-.

14. In addition, the claimant is also held entitled to Rs.10,000/- each under the heads 'loss of love and affection', 'loss of estate' and 'funeral expenses'.

15. Having said so, the claimant is held entitled to Rs.4,35,000/- as compensation under the following heads:

i) Loss of source of dependency:	Rs. 4,05,000/-
ii) Loss of love and affection:	Rs.10,000/-
iii) Loss of estate:	Rs.10,000/-
iv) Funeral expenses:	Rs.10,000/-
Total:	Rs. 4,35,000/-

16. The above amount shall carry interest at the rate of 7.5% per annum from the date of filing of the claim petition till deposit. The insurer is directed to deposit the entire amount, alongwith up-to-date interest, in the Registry of this Court, within a period of six weeks from today and on deposit, the Registry is directed to release the said amount in favour of the claimant, through his bank account, after proper identification.

17. Accordingly, the impugned award is modified, as indicated above and the appeal is disposed of.

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

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

Om Parkash .....Appellant

Versus

Dilawar Singh (deceased) and others ..... Respondents

FAO No. 53 of 2010.
Decided on : 08.04.2016

Motor Vehicles Act, 1988- Section 166- Claimant had sustained 80% permanent disability - he remained admitted in the hospital for a pretty long time – his income tax return shows that his income was Rs. 17,16,913 and Rs. 9,46,432/-- Tribunal had assessed the income of the claimant as Rs. 20,000/-, which is upheld- he had sustained 80% disability in his left leg which stands amputated above knee – it was duly proved that claimant will not be able to perform the job of the contractor as he was performing earlier- disability will affect the earning capacity by 50% or Rs. 10,000/- per month- the age of the claimant was 48 years- thus, multiplier of '14' is applicable- claimant is entitled to Rs.10,000 x 12 x 14 = Rs. 16,80,000/-, under the head 'loss of future earning'- claimant remained admitted in the hospital for a considerable period and by exercising guess work- it can be said that claimant was not able to earn anything for six months- thus, claimant is entitled to Rs. 20,000/- x 6 = Rs. 1,20,000/- under the head 'loss of income'- claimant is entitled to Rs. 50,000/- under the head pain and sufferings undergone' and Rs. 50,000/- under the head 'future pain and sufferings'- claimant is also entitled to Rs.1 lac under the head 'loss of amenities of life' and Rs. 50,000/- under the head 'medical expenses, transportation charges, attendant charges and special diet'- claimant is also entitled to Rs. 50,000/- under the head 'future medical treatment'- thus, claimant is entitled to Rs. 21,00,000/- along with interest @ 7.5% per annum from the date of the judgment till deposit. (Para-16 to 31)

Motor Vehicles Act, 1988- Section 169- Driver had died during the pendency of the petition- held, that there is no necessity to bring on record legal representatives of the driver at this stage- provision of order 22 have not been made applicable to the proceedings under Motor Vehicles Act by the Government- name of respondent No. 1 is deleted from the array of the respondent. (Para-3 to 6)

Cases referred:

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

Arvind Kumar Mishra versus New India Assurance Co. Ltd. & another, 2010 AIR SCW 6085

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

Kavita versus Deepak and others, 2012 AIR SCW 4771

Sarla Verma and others 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: Mr.Peeyush Verma, Advocate.

For the respondents: Mr.Amit Singh Chandel, Advocate, for respondent No.2.
Mr.Deepak Bhashin, Advocate, for respondent No.3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (Oral):

Subject matter of this appeal is the award, dated 29th December, 2009, passed by the Motor Accident Claims Tribunal, Una, (for short, the Tribunal), in Claim Petition No.22 of 2007, titled Om Parkash vs. Dilawar Singh and others, whereby

compensation to the tune of Rs.8,00,000/-, with interest at the rate of 9% from the date of the award till payment, came to be awarded in favour of the claimant and the insurer was saddled with the liability, (for short, the impugned award).

2. The insurer, the driver and the owner/insured have not questioned the impugned award on any count, thus, the same has attained finality so far as it relates to them.

3. It may also be placed on record that Mr.Amit Singh Chandel, Advocate, stated that during the pendency of the appeal, respondent No.1 (driver) had passed away. His statement is taken on record. There is no need to bring on record the legal representatives of the said respondent at this stage since the factum of insurance is admitted and the findings returned on issue No.1 are not in dispute.

4. In view of the mandate of Sections 169 and 176 of the Motor Vehicles Act, 1988, (for short, the MV Act), the State of Himachal Pradesh has framed the Himachal Pradesh Motor Vehicles Rules, 1999, (hereinafter referred to as the Rules). Rule 232 of the Rules ibid provides as under:

> **"232. The Code of Civil Procedure to apply in certain cases:-**
>
> The following provisions of the First Schedule to the Code of Civil Procedure, 1908 shall so far as may be, apply to proceedings before the Claims Tribunal, namely, Order V, Rules 9 to 13 and 15 to 30 ; Order IX ; Order XIII ; Rule 3 to 10 ; Order XVI, Rules 2 to 21 ; Order XVII ; Order XXI and Order XXIII, Rules 1 to 3.
>
> **Section 169 and 176 (b)."**

5. Thus, it is clear from the above quoted Rule that the provisions of Order 22 of the CPC have not been made applicable to the proceedings under the MV Act.

6. Accordingly, respondent No.1 is deleted from the array of respondents. The Registry is directed to make necessary correction in the cause title with red ink.

7. Feeling aggrieved and dissatisfied with the impugned award, the claimant has challenged the impugned award by the medium of instant appeal on the ground of adequacy of compensation.

8. Thus, the only question needs to be determined in this appeal is – Whether the amount awarded by the Tribunal is adequate?

9. To answer the above question, it is necessary to give a brief account of the facts of the case.

10. The claimant filed the Claim Petition under Section 166 of the M.V. Act, wherein it was pleaded that on 12th March, 2007, at about 12.10 p.m., when he was standing alongside the road at Jaijon Mor, truck bearing No.HP-23A 5151, being driven by respondent No.1 rashly and negligently, came from Ghaluwal side and run over the claimant as a result of which he sustained injuries in his left leg, was taken to district hospital Una, fromwhere was referred to PGI Chandigarh. It has also been alleged that the left leg of the claimant was completely crushed in the accident as a result of which it had to be amputated above the knee joint. FIR bearing No.52/07 under Sections 277, 337 and 338 Indian Penal Code at Police Station, Haroli was also registered. It was further alleged that the claimant also took treatment from Gulati Hospital, Hoshiarpur, HIM Bones and Joints Care Hospital, Gagret and Bharaj Life Care Hospital, Hoshiarpur. Thus, the claimant sought compensation to the tune of Rs.1.5 crore, as per the break-ups given in the Claim Petition.

11. Respondents resisted the claim petition by filing replies.

12. On the pleadings of the parties, the following issues came to be framed:

"1. Whether the petitioner received injuries due to rash and negligent driving of respondent No.1 while driving truck No.HP-23A-5151 owned by respondent No.2? 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 respondents No.1 and 2 had violated the terms and conditions of the insurance policy and respondent 3 is not liable to pay the compensation? OPR

4. Relief."

13. In order to prove their claim, the parties have led their respective evidence. The Tribunal, after scanning the evidence, has held that the driver of the offending truck, namely, Dilawar Singh, had driven the truck rashly and negligently and had caused the accident. The said findings of the Tribunal are not in dispute. Accordingly, the findings returned on issue No.1 are upheld.

14. Before issue No.2 is taken up, I deem it proper to deal with issue No.3. To prove the said issue, the onus was on respondent No.3/insurer, in which it has failed. The Tribunal while deciding the said issue against the insurer, has specifically recorded that the insurer had led no evidence to prove the said issue. Moreover, the insurer has not challenged the findings recorded by the Tribunal. Accordingly, the findings returned on issue No.3 are also upheld.

15. Coming to issue No.2, which pertains to the quantum of compensation, admittedly, the claimant has sustained 80% disability, which is permanent in nature and remained admitted in the hospital for a pretty long time.

16. The Apex Court in **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, 2010 AIR SCW 6085, Ramchandrappa versus The Manager, Royal Sundaram Aliance Insurance Company Limited, 2011 AIR SCW 4787** and **Kavita versus Deepak and others, 2012 AIR SCW 4771,** has clearly laid down the principles as to how compensation has to be awarded in cases where the claimants have suffered permanent disability and how the assessment is to be made.

17. The claimant has placed on record income tax returns for the assessment years 2006-07 and 2007-08, which do disclose that the total income of the deceased for the said years was Rs.17,16,913 and Rs.9,46,432/-, respectively. In addition, the claimant has also proved on record that various works stood allotted in his favour for the years 2008-09 and 2009-10. However, after considering the fact that the work of a contractor is full of uncertainties, the Tribunal assessed the monthly income of the claimant to be Rs.20,000/-, which is upheld.

18. The claimant had suffered 80% permanent disability in his left leg, which stands amputated above knee, qua which disability certificate has been proved on record as Ext.PW-1/C. The question is whether the disability suffered by the claimant has affected the earning capacity of the injured in future and if so, to what extent.

19. PW-1 Dr.Indu Bhardwaj has proved the disability certificate and has also stated that because of this disability, the injured would not be able to walk on uneven

surfaces. However, she has not given the details of what is the effect of the disability on the earning capacity of the injured. Still, it is clear that the accident had definitely shattered the physical frame of the claimant. The claimant has to walk for the whole of his life on crutches, which would definitely affect the earning capacity of the claimant. The claimant would not be in a position to perform the job of contractor as he would have been performing prior to the accident. The accident has rendered the claimant unable to work even as a labourer and pursue any other profession.

20. The Tribunal, after discussing the pleadings and the evidence, has awarded a sum of Rs.5,60,000/- to the claimant under the head future loss of earning. How the Tribunal made this assessment is not spelled out in the impugned award. Therefore, keeping in view the profession of the claimant and the injury sustained by him, it can safely be inferred that the permanent disability suffered by the claimant has affected his earning capacity.

21. After exercising the guess work and while keeping in view the expert evidence, it can be held that the disability suffered by the claimant as a result of the accident has affected 50% of the earning capacity of the claimant/injured, i.e. 50% of Rs.20,000/-, which comes to Rs.10,000/- per month.

22. The age of the claimant/injured was 40 years. Therefore, in view of the dictum 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) 3120,** read with Schedule-II attached to the M.V.Act, multiplier 14 was applicable. Accordingly, multiplier 14 is applied.

23. Thus, the claimant/injured is held entitled to Rs.10,000 x 12 x 14 = Rs.16,80,000/-, under the head 'loss of future earning'.

24. In the instant case, the claimant has proved on record that he remained admitted in the hospital for a considerable period. After the discharge from the hospital, the claimant would also have remained confined to the bed. Such period of confinement to the bed, by exercising guess work, can be said to be not less than six months and during this period, the claimant can be said to have not earned a single penny. Accordingly, he is also held entitled to Rs.20,000/- x 6 = Rs.1,20,000/- under the head 'loss of income during the said period.

25. The claimant/injured, as discussed hereinabove, remained admitted in the hospital and thereafter, was confined to the bed for a considerable long period. The claimant suffered 80% permanent disability and became handicapped for whole life. The accident has also shattered the physical frame of the claimant. Thus, the claimant suffered a lot and has to suffer throughout his life.

26. Accordingly, I am of the opinion, that the claimant is also entitled to Rs.50,000/- under the head ' pain and sufferings undergone' and Rs.50,000/- under the head 'future pain and sufferings'.

27. The claimant, at the time of accident, was 40 years of age and because of the permanent disability suffered by him to the extent of 80%, he would face hardships throughout his life, which may also result in frustration and mental stress. Therefore, the claimant is also entitled to Rs.1.00 lac under the head 'loss of amenities of life'.

28. The claimant has specifically pleaded in the Claim Petition that he remained admitted in the hospital and had to spend Rs.80,000/- for medical expenses, transportation

charges etc. However, keeping in view the facts of the case and the evidence led, I deem it proper to award Rs.50,000/- under the head 'medical expenses, transportation charges, attendant charges and special diet'.

29. Keeping in view the nature of injuries sustained by the claimant, which has resulted into 80% permanent disability, the claimant may have to undergo medical check-ups/treatment, at intervals, throughout his life. Thus, supposedly, I deem it proper to award Rs.50,000/- under the head 'future medical treatment'.

30. Having glance of the above discussion, the claimant is awarded Rs.21,00,000/-, under different heads as under:

i) Loss of future earning capacity : Rs.16,80,000/-
ii) Loss of income during the period of hospitalization and confinement to bed : Rs.1,20,000/-
iii) Medical expenses, special diet, attendant charges and transportation charges: Rs.50,000/-
iv) Future medical treatment : Rs.50,000/-
v) Pain and sufferings undergone: Rs.50,000/-
vi) Future pain and sufferings : Rs.50,000/-
vii) Loss of amenities of life: Rs.1,00,000/-.

31. The amount shall carry interest at the rate of 7.5% per annum from the date of passing of the impugned award, till deposit.

32. In view of the above discussion, the appeal is allowed and the amount of compensation is enhanced. 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 entire amount, alongwith interest, in favour of the claimant, after proper identification.

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

Oriental Insurance Company ...Appellant.
Versus
Smt. Shinder Kaur and others ...Respondents.

FAO No. 151 of 2010
Reserved on: 18.03.2016
Decided on: 08.04.2016

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid driving licence at the time of accident- insurer examined Clerk, DTO Hoshiarpur who proved entries regarding the renewal of the driving licence- he has not deposed that owner/insured had committed any breach- it was for the insurer to plead and prove that there was breach of terms and conditions of the policy – licence was issued for LTV and was renewed for LMV- un-laden weight of the vehicle was 2590 kgs and as such vehicle falls within the definition of LMV- therefore, driver had a valid and effective driving licence at the time of accident.

Motor Vehicles Act, 1988- Section 166- Claimants pleaded that deceased was earning Rs. 10,000/- per month from saw mill and Rs. 3,000/- per month from growing the vegetables but they failed to prove the income relating to the vegetables- hence, income of the deceased has to be taken as Rs. 10,000/- per month, after deducting 1/3rd amount towards personal

expenses, claimants have lost 2/3rd amount towards loss of dependency- age of the deceased was 40 years- multiplier of 14 was applicable- Tribunal had wrongly awarded Rs. 50,000/- under the head 'loss of consortium', Rs. 50,000/- under the head 'love and affection' and Rs. 10,000/- under the head 'last rites'- Tribunal had also wrongly awarded interest @ 9% per annum, whereas, interest was to be awarded @ 7.5% per annum- thus, claimants are entitled to Rs. 6666/- x 12 x 14 = Rs. 11,19,888/- under the head 'loss of income' – Rs. 10,000/- each under the heads 'loss of consortium', 'loss of love and affection', 'loss of estate' and 'funeral expenses'- thus, claimants are entitled to Rs. 11,19,888/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- + Rs. 10,000/- = Rs. 11,59,888/-, or say Rs. 11,60,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization. (Para-19 to 37

(Para-14 to 18)

Cases referred:

Sarla Verma (Smt) and others versus Delhi Transport Corporation and another, (2009) 6 Supreme Court Cases 121

Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120

United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 SCC 281

Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892

Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 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

United India Insurance Company Ltd. versus Smt. Kulwant Kaur, Latest HLJ 2014 (HP) 174

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

A.P.S.R.T.C. & another versus M. Ramadevi & others, 2008 AIR SCW 1213

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

Ningamma & another versus United India Insurance Co. Ltd., 2009 AIR SCW 4916

Sanobanu Nazirbhai Mirza & others versus Ahmedabad Municipal Transport Service, 2013 AIR SCW 5800

For the appellant:	Mr. G.C. Gupta, Senior Advocate, with Ms. Meera Devi, Advocate.
For the respondents:	Mr. Gaurav Gautam, Advocate, for respondents No. 1 to 3. Mr. J.L. Bhardwaj, Advocate, for respondents No. 4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

Subject matter of this appeal is the judgment and award, dated 11th February, 2010, made by the Motor Accident Claims Tribunal-II, Solan, H.P. (for short "the Tribunal") in MAC Petition No. 14-NL/2 of 2008, titled as Smt. Shinder Kaur and others versus Kamal Kumar and others, whereby compensation to the tune of ₹ 10,70,000/- with interest @ 12% per annum from the date of the claim petition till its realization came to be

awarded in favour of the claimants and against the insurer (for short "the impugned award").

2. The claimants, the owner-insured and the driver 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 the grounds that the Tribunal has fallen in an error in saddling it with liability as the driver of the offending vehicle was not having the valid and effective driving licence to drive the same and the amount awarded is excessive.

4. Learned Senior Counsel appearing on behalf of the appellant-insurer argued that the rate of interest and the amount awarded under all the heads is not in accordance with the law, rather is a bounty, be set aside and the owner-insured has committed a willful breach in terms of the terms and conditions contained in the insurance policy read with the mandate of Section 147 of the Motor Vehicles Act, 1988 (for short "MV Act") for the reason that the driver of the offending vehicle was not having a valid and effective driving licence at the time of the accident.

5. Learned counsel for the claimants argued that though the claimants have not filed any appeal for enhancement, but the amount awarded is meagre, rather inadequate and the Tribunal has also not applied the multiplier as per the law applicable.

6. In order to determine all these issues, it is necessary to give a flashback of the case, the womb of which has given birth to the case in hand:

7. The claimants invoked the jurisdiction of the Tribunal for grant of compensation to the tune of ₹ 10,00,000/-, as per the break-ups given in the claim petition, on the grounds taken in the claim petition.

8. The respondents in the claim petition resisted the same on the grounds taken in the respective memo of objections.

9. On the pleadings of the parties, following issues came to be framed by the Tribunal:

> *"1. Whether the death of Sat Pal was caused on account of rash and negligent driving by the respondent No. 2 of the offending vehicle, as alleged? OPP*
>
> *2. If issue No. 1 is proved in affirmative, whether the petitioners are entitled for compensation, if so the amount thereof? OPP*
>
> *3. Whether the respondents No. 1 and 2 are liable to pay compensation if awarded and that is to be indemnified by the respondent No. 3? OPR-3*
>
> *4. Whether the vehicle at the time of the accident was being plied in violation of the terms and conditions of the insurance policy. If so the effect thereof? OPR-3*
>
> *5. Whether the respondent No. 2 was not having a valid and effective driving licence at the time of the accident. If so the effect thereof? OPR-3*
>
> *6. Relief."*

10. The claimants examined Dr. Puneet Sharma as PW-1, Shri Hardev Kumar as PW-3, Shri Krishan Dayal as PW-4, HC Mansa Ram as PW-5 and one of the claimants, Smt. Shinder Kaur herself appeared in the witness box as PW-2 in support of their claim. The owner-insured and the driver of the offending vehicle have not examined any witness. The appellant-insurer examined Shri Kuldeep Singh, Clerk, DTO Hoshiarpur as RW-1.

Issue No. 1:

11. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that respondent No. 2-driver, namely Gurdev Singh, has driven the Tempo, bearing registration No. HP-64-0143, rashly and negligently on 15th October, 2007 near Agro Factory, Rajpura and caused the accident in which deceased-Sat Pal sustained injuries and succumbed to the injuries.

12. The said issue is not in dispute. However, I have gone through the record and am of the considered view that the claimants have proved the said issue. Accordingly, the findings returned by the Tribunal on issue No. 1 are upheld.

13. Before dealing with issues No. 2 and 3, I deem it proper to determine issues No. 4 and 5.

Issue No. 4:

14. It was for the insurer to prove that the owner-insured has committed willful breach in terms of the insurance policy read with the mandate of Sections 147 and 149 of the MV Act, has not led any evidence to this effect. The insurance policy is on the record as Ext. RW-1/C which was valid and effective at the time of the accident, details of which are given in para 14 of the impugned award.

15. The insurer has examined Kuldeep Singh, Clerk, DTO Hoshiarpur as RW-1, has proved the entries regarding renewal of the driving licence. He has not deposed that the owner-insured of the offending vehicle has committed any breach, not to speak of willful breach. Having said so, the findings returned by the Tribunal on issue No. 4 are upheld.

Issue No. 5:

16. It was for the appellant-insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence at the relevant point of time, has failed to do so. The perusal of the record does disclose that the driving licence was issued for 'LTV' and was thereafter renewed for 'LMV'. Meaning thereby, the driver of the offending vehicle was having a valid and effective driving licence for driving a light motor vehicle.

17. The unladen weight of the offending vehicle was 2590, as is evident from the Certificate of Registration, Ext. RW-1/B, thus, falls within the definition of 'LMV'.

18. Having said so, the Tribunal has rightly made the discussion. Accordingly, it is held that the driver of the offending vehicle was having a valid and effective driving licence to drive the same at the relevant point of time. Thus, the findings returned by the Tribunal on issue No. 5 are upheld.

Issues No. 2 and 3:

19. The claimants have specifically pleaded that the deceased was earning ₹ 10,000/- per month from saw mill and ₹ 3,000/- per month from growing the vegetables, but have failed to prove the income relating to the vegetables. Accordingly, the Tribunal held that the claimants have proved that the deceased was earning ₹ 10,000/- per month. After making one third deductions towards his personal expenses, held that the claimants have

lost source of income to the extent of two third of the monthly income of the deceased. The assessment made is quite legal, needs no interference.

20. But, the Tribunal has fallen in an error in applying the multiplier of '12'. It is pleaded that the age of the deceased was 40 years at the time of the accident and has also been held by the Tribunal, which has not been disputed by the appellant-insurer or the driver and the owner-insured of the offending vehicle.

21. Viewed thus, the multiplier of '14' was to be applied 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 **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120,** read with the Second Schedule appended with the MV Act.

22. The Tribunal has also fallen in an error in awarding ₹ 50,000/- under the head 'loss of consortium', ₹ 50,000/- under the head 'love and affection' and ₹ 10,000/- under the head 'last rites'.

23. The Tribunal has also committed a legal mistake while awarding interest @ 12% per annum, which was to be awarded as per the prevailing rates.

24. It is a beaten law of the land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in (**2002) 6 SCC 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892**; **Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 SCC 738; Smt. Savita versus Binder Singh & others**, reported in **2014 AIR SCW 2053; Kalpanaraj & others versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 SCC 433;** and **Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 SCC 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010, titled as Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

25. Having said so, I deem it proper to reduce the rate of interest from 12% per annum to 7.5% per annum from the date of filing of the claim petition till its realization.

26. The question is - whether the Tribunal or Appellate Court is/are within its/their jurisdiction to grant more compensation than what is claimed?

27. 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 for the following reasons:

28. 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. It is apt to reproduce paras 41 to 45 of the judgment herein:

> "41. Before I determine what is the just and adequate compensation in the case in hand, it is also a moot question –

whether the Appellate Court can enhance compensation, even though, not prayed by the medium of appeal or by cross-objection.

42. The Motor Vehicles Act, 1988 (hereinafter referred to as "the MV Act") has gone through a sea change in the year 1994 and sub-section (6) has been added to Section 158 of the MV Act, which reads as under:

> *"**158. Production of certain certificates, licence and permit in certain cases.** -*
>
> *.....*
>
> *(6) As soon as any information regarding any accident involving death or bodily injury to any person is recorded or report under this section is completed by a police officer, the officer incharge of the police station shall forward a copy of the same within thirty days from the date of recording of information or, as the case may be, on completion of such report to the Claims Tribunal having jurisdiction and a copy thereof to the concerned insurer, and where a copy is made available to the owner, he shall also within thirty days of receipt of such report, forward the same to such Claims Tribunal and Insurer."*

In terms of this provision, the report is to be submitted to the Tribunal having the jurisdiction.

43. Also, an amendment has been carried out in Section 166 of the MV Act and sub-section (4) stands added. It is apt to reproduce sub-section (4) of Section 166 of the MV Act herein:

> *"**166. Application for compensation.** -*
>
> *.....*
>
> *(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act."*

It mandates that a Tribunal has to treat report under Section 158 (6) (supra) of the MV Act as a claim petition. Thus, there is no handicap or restriction in granting compensation in excess of the amount claimed by the claimant in the claim petition.

44. Keeping in view the purpose and object of the said provisions read with the mandate of Section 173 of the MV Act, I am of the view that the Appellate Court is exercising the same powers, which the Tribunal is having. Also, sub-clause (2) of Section 107 of the Code of Civil Procedure (hereinafter referred to as "the CPC") mandates that the Appellate Court is having all those powers, which the trial Court is having. It is apt to reproduce Section 107 sub-clause (2) of the CPC herein:

> *"**107. Powers of Appellate Court.** -*
>
> *.....*
>
> *(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same*

duties as are conferred and imposed by the Code on Courts of original jurisdiction in respect of suits instituted therein."

45. Thus, in the given circumstances, the Tribunal as well as the Appellate Court is within the jurisdiction to enhance the compensation. "

29. The same view was taken by the Apex Court in the case of **Nagappa versus Gurudayal Singh and others,** reported in **AIR 2003 Supreme Court 674.** It is apt to reproduce paras 7, 9 and 10 of the judgment herein:

"7. Firstly, under the provisions of Motor Vehicles Act, 1988, (hereinafter referred to as "the MV Act") there is no restriction that compensation could be awarded only up to the amount claimed by the claimant. In an appropriate case where from the evidence brought on record if Tribunal/Court considers that claimant is entitled to get more compensation than claimed, the Tribunal may pass such award. Only embargo is – it should be 'Just' compensation, that is to say, it should be neither arbitrary, fanciful nor unjustifiable from the evidence. This would be clear by reference to the relevant provisions of the M.V. Act. Section 166 provides that an application for compensation arising out of an accident involving the death of or bodily injury to, persons arising out of the use of motor vehicles, or damages to any property of a third party so arising, or both, could be made (a) by the person who has sustained the injury; or (b) by the owner of the property; (c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or (d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be. Under the proviso to sub-section (1), all the legal representatives of the deceased who have not joined as the claimants are to be impleaded as respondents to the application for compensation. Other important part of the said Section is sub-section (4) which provides that "the Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of Section 158 as an application for compensation under this Act." Hence, Claims Tribunal in appropriate case can treat the report forwarded to it as an application for compensation even though no such claim is made or no specified amount is claimed.

8. .....

9. It appears that due importance is not given to sub-section (4) of Section 166 which provides that the Tribunal shall treat any report of the accidents forwarded to it under sub-section (6) of Section 158, as an application for compensation under this Act.

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."

30. The Apex Court in a case titled as **A.P.S.R.T.C. & another versus M. Ramadevi & others,** reported in **2008 AIR SCW 1213,** held that the Appellate Court was

within its jurisdiction and powers in enhancing the compensation despite the fact that the claimants had not questioned the adequacy of the compensation.

31. The Apex Court in the case titled as **Oriental Insurance Co. Ltd. versus Mohd. Nasir & Anr.,** reported in **2009 AIR SCW 3717,** 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.*

32. The Apex Court in another case titled as **Ningamma & another versus United India Insurance Co. Ltd.,** reported in **2009 AIR SCW 4916,** held that the Court is duty bound to award just compensation to which the claimants are entitled to. It is profitable to reproduce para 25 of the judgment 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."*

33. 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."

34. The Apex Court in a latest judgment in the case titled as **Smt. Savita versus Bindar Singh & others,** reported in **2014 AIR SCW 2053,** has laid down the same proposition of law and held that the Tribunal as well as the Appellate Court can ignore the claim made by the claimant in the application for compensation. It is apt to reproduce para 6 of the judgment herein:

"6. After considering the decisions of this Court in Santosh Devi 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."

35. Accordingly, it is held that the claimants are entitled to compensation to the tune of ₹ 6666/- x 12 x 14 = ₹ 11,19,888/- under the head 'loss of income'.

36. The claimants are also awarded ₹ 10,000/- each under the heads 'loss of consortium', 'loss of love and affection', 'loss of estate' and 'funeral expenses'.

37. Viewed thus, the claimants are held entitled to total compensation to the tune of ₹ 11,19,888/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = 11,59,888/-, i.e. ₹ 11,60,000/- with interest @ 7.5% per annum from the date of the claim petition till its realization.

38. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove.

39. The insurer is directed to deposit the enhanced awarded amount before the Registry within eight weeks. On deposition of the amount, the entire awarded amount be released in favour of the claimants strictly as per the terms and conditions contained in the impugned award after proper identification through payee's account cheque or by depositing the same in their respective bank accounts.

40. The appeal is disposed of accordingly.

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

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

FAOs No. 195 & 307 of 2010
Decided on : 08.04.2016

1. FAO No. 195 of 2010

Smt. Prabha & others .....Appellants
Versus
Parveen Kumar & others ...Respondents

2. FAO No. 307 of 2010

National Insurance Company Limited .....Appellant
Versus
Smt. Prabha & others ...Respondents

Motor Vehicles Act, 1988- Section 166- Deceased was earning Rs. 22,547/-, or say Rs. 22,600/-- 1/4th amount was to be deducted towards personal expenses as number of dependants are four- thus, claimants have lost Rs. 16,950/-, or say Rs. 17,000/- per month- they are entitled to Rs.17,000 x 12 x 13 = Rs. 26,52,000/- under the head 'loss of dependency'- claimants are also entitled to Rs. 10,000/- each under the head 'loss of love and affection', 'loss of estate', 'loss of consortium' and 'funeral expenses'- thus, claimants are entitled to total compensation of Rs. 26,92,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-5 to 13)

Cases referred:

Sarla Verma (Smt.) and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

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

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

FAO No. 195 of 2010

For the appellants : Mr. J.L. Bhardwaj, Advocate.
For the respondents: Mr. Vinay Mehta, Advocate, for respondents No. 1 & 2.
Mr. Jagdish Thakur, Advocate, for respondent No. 3.

FAO No. 307 of 2010

For the appellants : Mr. Jagdish Thakur, Advocate.
For the respondents: Mr. J.L. Bhardwaj, Advocate, for respondents No. 1 to 4.
Mr. Vinay Mehta, Advocate, for respondents No. 5 & 6.
Mr. Jagdish Thakur, Advocate, for respondent No. 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

Both these appeals are outcome of a common award dated 17th February, 2010, passed by the Motor Accident Claims Tribunal (III) Shimla, H.P., hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 38-S/2 of 05/2002, titled **Smt. Prabha & others versus Parveen Kumar & others,** filed by the claimants for grant of compensation to the tune of Rs.40.00 lacs, as per the break-ups given in the claim petition, whereby the compensation to the tune of Rs.23,13,000/- came to be awarded in favour of the claimants and the insurer was saddled with liability, for short 'the impugned award'.

2. The 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 and claimants have questioned the impugned award on the ground of adequacy of compensation. Thus, the only question to be determined in these appeals is-*the amount of compensation is adequate or otherwise*? I am of the considered view that the amount of compensation is inadequate for the following reasons.

4. Admittedly, the age of the deceased was 46 years at the time of accident, thus, the Tribunal has rightly applied the multiplier of '13', is accordingly upheld.

5. The deceased was an employee. The claimants have placed on record his salary certificate Ext. PW-6/A, which does disclose that the last pay drawn by the deceased was Rs.22,547/-, approximately Rs. 22,600/-.

6. The Tribunal has fallen in an error in deducting 1/3rd instead of 1/4th towards the personal expenses of the deceased, in view of the fact that the claimants are four in number 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. In view of the ratio laid down by the apex Court in the cases, *supra,* It is held that the claimants have lost source of dependency to the tune of Rs.16,950/-, i.e. Rs.17,000/- per month. Accordingly, the claimants are held entitled to the tune of Rs.17,000/- x 12 = Rs.2,04,000 x 13 = Rs.26,52,000/- under the head 'loss of dependency'.

8. 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.

9. The Tribunal has awarded interest @ 9% per annum from the date of filing of the award, is on the higher side.

10. 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.

11. 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.

12. Viewed thus, it is held that the claimants are entitled to compensation to the tune of Rs.26,52,000/- + Rs.40,000/- total amounting to Rs. 26,92,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

13. The amount of compensation is enhanced and the impugned award is modified, as indicated above.

14. 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 the same in their accounts.

15. Send down the records after placing copies of the judgment on both the files of the Tribunal.

16. The appeals are accordingly disposed of.

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

Rajan Sharma .....Appellant
Versus
Ravinder Singh and others ..... Respondents

FAO No. 540 of 2009.
Reserved on: 01.04.2016.
Pronounced on : 08.04.2016

Motor Vehicles Act, 1988- Section 166- It was asserted in the claim petition that accident had taken place due to rashness and negligence of the claimant- it was pleaded that claimant had hit the scooter against the rear portion of the bus showing that bus was ahead of the scooter- it was not pleaded that rear portion had hit the scooter while overtaking or in the process of reversing the bus- an FIR was lodged – matter was compromised which shows that there was no negligence on the part of the driver- otherwise there was no necessity of compromise- in these circumstances, MACT had rightly held that negligence of the driver was not proved- appeal dismissed. (Para-6 to 12)

For the appellant: Mr.Jagdish Thakur, Advocate.
For the respondents: Mr.Abhishek Barowalia, Advocate, for respondent No.1.
Nemo for respondents No.2 and 3.
Mr.Sanjeev Kuthiala, Advocate, for respondents No.4 and 5.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this appeal is the award, dated 20th October, 2009, passed by the Motor Accident Claims Tribunal, Una, H.P., (for short, the Tribunal), in Claim Petition No.36 of 2006, titled Rajan Sharma vs. Ravinder Singh and others, whereby the claim petition was dismissed, (for short, the impugned award).

2. Claimant invoked the jurisdiction of the Tribunal under Section 166 of the Motor Vehicles Act, 1988, (for short, the Act), and sought compensation to the tune of Rs.17.00 lacs, as per the break-ups given in the claim petition.

3. Respondents No.1 to 3 i.e. the driver of the bus (respondent No.1) and the Himachal Road Transport Corporation (respondents No.2 and 3) resisted the claim petition by filing replies.

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

"1. Whether petitioner Rajan Sharma sustained injuries in motor accident caused by rash and negligent driving of a bus HP-68-0105 by Ravinder Singh respondent No.1 on May 10, 2006? OPP

2. Whether the petitioner is entitled to compensation if so to what amount and from whom? OPP

3. Whether the petitioner was himself responsible for causing an accident. If so to what effect? OPR 1 to 3

4. Whether the petition is bad for non-joinder of necessary parties? OPR 1 & 3.

5. Whether the petition is not maintainable? OPR 2 to 3

6. Relief."

5. In order to prove his claim, the claimant examined PW-1 Dr.(Mrs.) Indu Bhardwaj, PW-2 HC Dev Raj, PW-3 Dr.Ashish Lekhi, PW-4 Suresh Kumar, PW-5 Naveen Sharma and the claimant himself appeared as PW-6. Respondent driver appeared in the witness box as RW-1. No other evidence was led by the respondents. In addition, the claimant and the respondents placed on record documents the gist of which has been given in the 'list of exhibits' appended at the end of the impugned award.

6. During the course of hearing, the learned counsel for the appellant/claimant vehemently argued that the claimant has proved by leading oral as well as documentary evidence that the driver, namely, Ravinder Singh had driven the bus bearing No.HP-68-0105 rashly and negligently on 10th May, 2006 at about 9.45 p.m. at village Marwari, Tehsil Amb, District Una, H.P. and caused the accident, in which the claimant sustained injuries and remained under treatment for the same.

7. Respondent No.1 i.e. the driver of the bus has filed the reply, wherein, in paragraphs 5 & 6, in reply to paragraphs 8 to 10 on merits, has specifically pleaded that the accident had taken place due to rash and negligent driving of the claimant himself. It is apt to reproduce the said paragraphs hereunder:

> *"5. That the contents of Para no.8 & 9 of the petition are admitted. However the replying respondent was in no way responsible for the accident as the accident has taken place due to the rash and negligent divining of the scooter by the petitioner himself.*

6. That the contents of Para no.10 of the petition are incorrect hence denied. In fact it was the petitioner who was driving the scooter and was driving it rashly and negligent and the petitioner approached the main road from Bhadarkali side without caring for the other traffic on the road and struck the scooter on the back bumper of the bus being driven by the replying respondent."

8. Respondents No.2 and 3 i.e. the Himachal Road Transport Corporation have also filed the reply and in paragraph 25, they have specifically stated that the claimant had caused the accident while driving the scooter rashly and negligently.

9. The claimant has not been able to prove, by leading evidence, that the accident was the outcome of rash and negligent driving of the driver of the bus i.e. respondent No.1. It is the case of the claimant himself that the rear portion of the bus hit the scooter, meaning thereby that the bus was ahead of the scooter. It is not the case of the claimant that the rear portion of the bus hit the scooter while overtaking the scooter or the bus was in reverse motion and hit the scooter. Thus, how the bus hit the scooter and caused the accident is not forthcoming.

10. It is also worthwhile to mention here that no FIR was lodged in regard to the accident and no case was presented before the court of competent jurisdiction. On the contrary, the brother of the claimant and respondent No.4 had entered into a compromise Ext.R-1 with the driver of the bus, which, apparently, establishes that the parties had settled the issue, consequent to which the Head Constable PW-2 Dev Raj had entered report No.21, Ext.PW-2/A, in the daily diary, Police Post Daulatpur and closed the matter. Had the bus driver driven the bus rashly and negligently, what was the need for the brother of the claimant to settle the issue and in case the police had made the closure report wrongly, why the claimant had not challenged the report before the court of competent jurisdiction.

11. There is no iota of evidence in order to return findings, prima facie, that the bus driver Ravinder Singh had driven the bus rashly and negligently. On the contrary, a perusal of the compromise Ext.R-1 does disclose that the claimant, while driving the scooter, had himself struck with the rear side of the bus.

12. The Tribunal, after discussing the rival pleadings of the parties and the evidence, in paragraphs 6 to 10 of the impugned award, has rightly come to the conclusion that the claimant was not able to prove that the driver of the bus had driven the bus rashly and negligently and had caused the accident, which findings require no interference by this Court.

13. Having said so, there is no merit in the appeal filed by the claimant and the same is dismissed. Consequently, the impugned award is upheld.

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BEFORE HON'BLE MR DHARAM CHAND CHAUDHARY, J.

Shri Ram Raksh Pal Singh
(dead) through his LRs. ...Defendants-non applicants-Appellants-.

Versus

Smt. Sarla Devi & others ..Plaintiffs-respondents-applicants.

CMP No. 14541 of 2013 in
RSA No. 424 of 1992
Date of Decision: 08.04.2016.

Code of Civil Procedure, 1908- Section 152- Suit of the plaintiff was decreed by Sub Judge- RSA was dismissed by the High Court- matter was taken to Hon'ble Supreme Court and the Civil Appeal was dismissed for non-prosecution- during execution, it was found that suit was filed for possession of the land measuring 11 marlas- however, by mistake half share of the land measuring 2 kanal 1 marla i.e. 1 kanal was not mentioned in the judgment and decree- khasra No. 3800 was wrongly typed as 3890- application for correction was filed which was dismissed- revision was preferred but was dismissed as withdrawn- held, that no party should suffer due to the mistake committed by the Court and whatever is intended by the Court must be duly reflected while passing order or decree- Court is competent to correct decree irrespective of the fact, whether the error had occurred due to mistake of the parties in their pleading or due to the mistake of the court- when the judgment has been upheld, doctrine of merger is applicable and the Court which passed the judgment in appeal is competent to correct the same- it was apparent from the judgment that Khasra number was wrongly typed as 3890- hence, same ordered to be corrected to 3800 - land recorded in Khewat No.71, Khatauni Nos. 484 and 485, measuring 2-01 kanal was not mentioned in the pleading- allowing the application would amount to modification of the judgment and decree which is not permissible- application partly allowed. (Para-10 to 24)

Cases referred:

Dwaraka Das Versus State of M.P. and another, (1993) 3 SCC 500
Jayalakshmi Coelho Versus Oswald Joseph Coelho, (2001) 4 SCC 181
Rania Versus Smt. Kamla Devi and another, AIR 1976 HP 57
Devi Roop Versus Smt. Devku and others, 2006(2) Shim. LC 158
Jai Singh & Another Versus Smt. Sarla Devi, 2011 (3) Him. L.R. 1395

For the Appellants:	Mr. Tara Singh Chauhan, Advocate, for the appellants/non-applicants No.1(a) to 1(d) and 3 to 7.
For the Respondents:	Mr. K.D. Sood, Sr. Advocate with Ms.Vandana Thakur, Advocate, for respondents No.1 to 5-applicants. None for appellants No.2(a) to 2(b) and respondent No.6.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J

CMP No. 14541 of 2013

This application has been filed with the following prayer:-

> "It is, therefore, prayed that the application deserved to be allowed in the interest of justice and the accidental / clerical / typographical mistake which has occurred in the judgment and decree passed by the Senior Sub-Judge, Una in Civil Suit No.277 of 1984 Dhanpat Rai Versus Niranjan Singh decided on 12.09.1988 out of which RSA No. 424 of 1992 had arisen and which RSA No. 424 of 1992 was decided by this Hon'ble Court by its judgment dated 17.05.2001 Ram Raksh Pal Singh Versus Sarla Devi corrected. Such other orders which this Hon'ble Court may deems fit and proper in the facts and circumstances of the case, may also be passed in favour of the applicant."

2. Applicants are successors-in-interest of the original plaintiff Dhanpat Rai, who has since expired. Deceased plaintiff has filed the suit with the following prayers:-

> "That it is claimed and prayed that the decree for specific performance of contract dated 26.12.1982 directing the defendant to execute the sale deed in favour of the plaintiff qua the suit land measuring 8 kanals 11 marlas described in the head note of the plaint and in the alternative decree for recovery of Rs.32000/- be passed with costs in favour of the plaintiff against the defendant or any other relief the court deems fit on the facts and the circumstances of the case be granted."

3. Suit after holding the trial was decreed, for the relief so sought, by learned Senior Sub-Judge, Una, vide judgment and decree dated 12.09.1988.

4. An appeal preferred against the judgment and decree was also dismissed by learned District Judge, Una vide judgment and decree dated 13.10.1992.

5. Regular Second Appeal bearing No. 424 of 1992 filed in this Court was also dismissed on 17.05.2001.

6. Matter was further taken to the Hon'ble Apex Court in Civil Appeal No. 3052 of 2003. The same was also dismissed for non prosecution vide order dated 07.10.2010. The judgment and decree passed by learned Senior Sub-Judge, therefore, has attained the finality.

7. It is during the course of execution proceedings the applicant/plaintiff came to know that the suit though was filed for the decree of possession of land measuring 8 kanal 11 marlas, however, by way of mistake half share of the land measuring 2 kanal 1 marla i.e. 1 kanal entered in Khewat No. 71, Khatauni Nos. 484 and 485, Khasra No. 3798 omitted to be mentioned in the judgment and decree and also that Khasra No.3800 came to be wrongly typed as Khasra No.3890. This has led in filing an application under Sections 151, 152 and 153 of the Code of Civil Procedure (hereinafter referred to as the CPC) in the Court of learned Civil Judge (Senior Division), Una. The same, however, was dismissed in default on 14.03.2008. The applicants/plaintiffs thereafter moved another application being OMP No.102 of 2008. The same was dismissed by learned Civil Judge (Senior Division), Una, vide order dated 01.10.2012, on the ground that no clerical mistake was there in the judgment and decree and also that the application was not maintainable. The applicants/plaintiffs have filed Civil Revision No.139 of 2012 in this Court against the order passed by learned Civil Judge (Senior Division), Una in OMP No. 102 of 2008. According to learned counsel, the Revision Petition, was later on withdrawn and the same stands dismissed accordingly.

8. The relief in this application has been sought on the grounds *inter alia* that the suit was filed for possession of land measuring 8 kanals 11 marlas in terms of the agreement dated 26.12.1982. However, a portion thereof measuring 1 kanal entered in Khewat No.71, Khatauni Nos. 484 and 485, Khasra No. 3798 to the extent of half share of Niranjan Singh omitted to be mentioned in the plaint. Similarly Khasra No.3800 came to be wrongly typed out as Khasra No.3890.

9. Application has been contested and resisted by the defendants/non-applicants on the ground that neither the suit was filed before this Court nor this Court has decreed the suit originally. Also that no *lis* is pending in this Court and as such, at this belated stage, the applicants/plaintiffs are not entitled to seek any correction in the judgment and decree. The mistake sought to be corrected according to the respondents/defendants is neither clerical nor arithmetical and on this score also the application deserves dismissal. Rejoinder has also been filed.

10. On hearing learned counsel representing the parties at length and taking into consideration the law cited at the Bar, the bare perusal of the provisions of Sections 151, 152 and 153 of the CPC, the clerical or arithmetical mistake in the judgments, decrees or order or errors arising therein on account of any accidental slip or omission can be corrected at any time by the Court either on its own motion or on the application filed by any of the parties. The scope of provisions contained under Section 152 of the CPC has further been interpreted by the Apex Court and various High Courts, including our own High Court in several judicial pronouncements. Support in this regard can be drawn from the judgment of the Apex Court in *Dwaraka Das Versus State of M.P. and another,* (1993) 3 SCC 500. This judgment reads as follows:-

> "6. Section 152 C.P.C. provides for correction of clerical or arithmetical mistakes in judgments, decrees or orders of errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, Court or the Tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The correction contemplated are of correcting only accidental omission or mistakes and not all omissions and mistake which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the Section cannot be pressed into service to correct an omission which is intentional, however erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective orders in the *lis* pending before them. No Court can, under the cover of aforesaid sections, modify, alter or add to the terms of its original judgment, decree or order. In the instant case, the trial Court had specifically held the respondents-State liable to pay future interest only despite the prayer of the appellant for grant of interest with effect from the date of alleged breach which impliedly meant that the Court had rejected the claim of the appellant in so far as pendente lite interest was concerned. The omission in not granting the pendente lite interest could not be held to be accidental omission or mistake as was wrongly done by the trial Court while order dated 30-11-1973. The High Court was, therefore, justified in setting aside the aforesaid order by accepting the revision petition filed by the State."

11. Similar is the ratio of the judgment again rendered by the Apex Court in *Jayalakshmi Coelho Versus Oswald Joseph Coelho,* (2001) 4 SCC 181. The judgment also reads as follows:-

> "13. So far legal position is concerned, there would hardly be any doubt about the proposition that in terms of Section 152 C.P.C., any error occurred in the decree on account of arithmetical or clerical error or accidental slip may be rectified by the Court. The principle behind the provision is that no party should suffer due to mistake of the Court and whatever is intended by the Court while passing the order or decree must be properly reflected therein, otherwise it would only be destructive to the principle of advancing

the cause of justice. A reference to the following cases on the point may be made:

The basis of the provision under Section 152 C.P.C. is found on the maxim "Actus Curiae Neminem Gravabit" i.e. an act of Court shall prejudice no man (Jenk Cent-118) as observed in a case reported in AIR 1981 Gauhati 41, The Assam Tea Corporation Ltd. v. Narayan Singh. Hence, an unintentional mistake of the Court which may prejudice cause of any party must be rectified. In another case reported in AIR 1962 SC 633, Janakirama Iyer v. P. M. Nilakanta Iyer it was found that by mistake words "net profit" was written in the decree in place of "mesne profit". This mistake was found to be clear by looking to the earlier part of the judgment. The mistake was held to be inadvertent. In Bhikhi Lal v. Tribeni, AIR 1965 SC 1935, it was held that a decree which was in conformity with the judgment was not liable to be corrected. In another case reported in AIR 1966 SC 1047, Master Construction Co. (P) Ltd. v. State of Orissa, it has been observed that arithmetical mistake is a mistake of calculation, a clerical mistake is a mistake in writing or typing whereas an error arising out of or occurring from accidental slip or omission is an error due to careless mistake on the part of the Court liable to be corrected. To illustrate the point, it has been indicated as an example that in a case where the order may contain something which is not mentioned in the decree would be a case of unintentional omission or mistake. Such omissions are attributable to the Court who may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits are required for such rectification of mistake. In a case reported in (1999) 3 SCC 500, Dwarakadas v. State of M.P. this Court has held that the correction in the order or decree should be of the mistake or omission which is accidental and not intentional without going into the merits of the case. It is further observed that the provisions cannot be invoked to modify, alter or add to the terms of the original decree so as to in effect pass an effective judicial order after the judgment in the case. The trial Court had not granted the interest pendente lite though such a prayer was made in the plaint but on an application moved under Section 152 CPC the interest pendente lite was awarded by correcting the judgment and the decree on the ground that non-awarding of the interest pendente lite was an accidental omission. It was held that the High Court was right in setting aside the order. Liberal use of the provisions under Section 152 CPC by the Courts beyond its scope has been deprecated. While taking the above view this Court had approved the judgment of the Madras High Court in Thirugnanavalli Ammal v. P. Venugopala Pillai, AIR 1940 Madras 29 and relied on Maharaj Puttu Lal v. Sripal Singh, reported in AIR 1937 Oudh 191 : ILR 12 Lucknow 759. Similar view is found to have been taken by this Court in a case reported in (1996) 11 SCC 528, State of Bihar v. Nilmani Sahu, where the Court in the guise of arithmetical mistake on re-consideration of the matter came to a fresh conclusion as to the number of trees and the valuations thereof in the matter which had already been finally decided. Similarly in the case of Bai Shakriben (dead) by Natwar Melsingh v. Special Land Acquisition Officer, reported in (1996) 4 SCC 533, this Court found omission of award of additional amount under Section 23 (1-A), enhanced interest under Section 28 and solatium etc. could not be treated as clerical or arithmetical error in the order. The application for

amendment of the decree in awarding of the amount as indicated above was held to be bad in law.

12. It is thus seen from the law laid down by the Apex Court that the principle on which provisions of Section 152 of CPC are based, is that no party should suffer due to mistake on the part of the Court and whatever is intended by the Court while passing an order or decree must be properly reflected therein.

13. Now if coming to the judgment of our own High Court, in *Rania Versus Smt. Kamla Devi and another,* AIR 1976 HP 57, it has been held in this judgment that the Court under Section 152 of the CPC, is competent to amend a clerical error in a decree irrespective of such error had occurred on account of mistake of the parties themselves in their pleadings. The relevant portion of this judgment also reads as follows:-

> "4. According to Mt. Anupa Kuer v. Yogendra Jha (AIR 1954 Pat 108) where the plaint omitted to state from which direction the plaintiff claimed recovery of possession over the suit plots, it was held that the decree, which, having been drawn in accordance with plaint, also omitted to give such direction should be amended since there was no ambiguity as to the subject-matter of the suit but there was only a mistake as to the description of the property. Similarly in Shahzad Khan v. Pt. Sheo Kumar (AIR 1957 All 133) also it has been held that a court can under Section 152 amend a clerical error in a decree although the error may have occurred on account of a mistake of the parties themselves in their pleadings and this mistake in the decree was on account of its being copied from the plaint. In such cases it is not necessary to amend the plaint itself. Similarly in N. Subramonia Iyer v. Joseph George (AIR 1959 Ker 386) also it had been observed that the question how far a court can under Section 152 amend clerical error in a decree although the error may have first occurred in the parties' pleadings and may have been merely copied from them in the decree has been the subject of some diversity of judicial opinion. The language of Section 152 does not exclude such mistake and there is no reason for restricting the scope of the Section to correction of errors made by the court itself. Indeed mistakes having their origin anterior to the suit and repeated in the decree have themselves been corrected by exercise of jurisdiction under this section.

14. A Coordinate Bench of this Court in *Mahant Dhanraj Gir @ Vinod Mahant Versus Smt. Lohki Devi,* CMPMO No. 37 of 2007, decided on 08.12.2011, in more or less a similar situation, has upheld the order passed by the trial Court deleting thereby certain Khasra numbers from the decree for which no relief was granted.

15. In view of the settled legal principles in the judgments supra, it is, therefore, crystal clear that not only the error occurred in the judgment and decree on account of own mistake of the ministerial and judicial actions attributed to the Court, but also on account of omissions attributed to the parties, can be ordered to be corrected because it is well settled at this stage that rules of procedure are handmaiden and meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to hamper the cause of justice or sanctify miscarriage of justice. Support can again be drawn in this regard from the judgment of our own High Court in *Devi Roop Versus Smt. Devku and others,* 2006(2) Shim. LC 158. This judgment also reads as follows:-

> "20. It is well settled law that the rules of procedures are handmaiden of justice. These rules should be used to promote the cause or justice and to ensure that the object of doing substantial and real justice is achieved. If

two interpretations are possible then the interpretation favouring the decision of the case on merits resulting in substantial and real justice should be adopted. The rules of procedures should not be used to thwart the ends of justice and to avid adjudication on merits. Reference in this behalf may be made to the judgment of the Constitutional Bench of the Apex Court in *Sardar Amarjit Singh Kalra (dead) by LRs. And others v. Pramod Gupta (Smt.) (Dead) by LRs. and others,* (2003) 3 SCC 272, wherein the Apex Court held as follows:-

> "26. Laws of procedure are meant to regulate effectively, assist and aid the object of doing substantial and real justice and not to foreclose even an adjudication on merits of substantial rights of citizen under personal, property and other laws. Procedure has always been viewed as the handmaid of justice and not meant to hamper the cause of justice or sanctify miscarriage of justice.
>
> ....."
>
> "31. Xxxxxxxxxx. With the march and progress of law, the new horizons explored and modalities discerned and the fact that the procedural laws must be liberally construed to really serve as handmaid, make it workable and advance the ends of justice, technical objections which tend to be stumbling blocks to defeat and deny substantial and effective justice should be strictly viewed for being discouraged, except where the mandate of law inevitably necessitates it....."

16. Now if coming to the question of jurisdiction of this Court to entertain and decide this application, the law on the question is again no more *res integra* as in *Devi Roop's case* (supra), it has been held that the High Court in view of the doctrine of merger is competent to entertain and decide an application for correction of the judgment and decree. In this regard also I may make a reference to the judgment supra , which reads as follows:-

> "18. The next question which has been raised is whether dismissal of a the appeal would be a bar to the trial Court exercising the powers under Sections 152 and 153 C.P.C. Section 153-A of the Civil Procedure Code lays down that where the appellate Court dismisses an appeal *in limine* without issuing notice to the respondents, the power to amend a judgment or order under Section 152 CPC may be exercised by the Court which had passed the original judgment, decree or order. In the present case admittedly the appeal was not dismissed *in limine*. On the other hand, the appeal was not decided on merits also by the learned District Judge. The appeal was dismissed as not maintainable. According to the learned District Judge the appeal was not property constituted since there was no decree against Inder Dutt, who had filed the appeal. The principle underlying Section 153-A CPC is the doctrine of merger. As per this doctrine when an appeal is heard and disposed of after a contested hearing the judgment of the trial Court merges in the judgment of the appellate Court. The Apex Court in *M/s Gojer Brothers (P) Ltd. v. Shri Ratan Lal Singh,* AIR 1974 SC 1380, held as follows:-
>
> "The fundamental reason of the rules that where there has been an appeal, the decree to be executed is the decree of the appellate Court is that in such cases the decree of the trial Court is merged in the decree of the appellate Court. In course of time, this concept which was originally restricted to appellate decrees on the ground that an appeal is a continuation of the suit,

> came to be gradually extended to other proceedings like revisions and even to proceedings before quasi-judicial and executive authorities."
>
> "19. In view of the law laid down by the Apex Court it is clear that if the decree of the trial Court has merge in the decree of appellate Court then of course the trial Court has no jurisdiction to amend the same. In the present case, however, I am of the opinion that the decree of the trial Court never merged in the decree of the appellate Court. The appellate Court did not decide the appeal on merits. Since the appellate Court held that the appeal itself was not maintainable and was not properly constituted, there was in fact no properly constituted appeal pending before it and the decision by the appellate Court was not a decision on merits. Section 153-A C.P.C. only empowers the trial Court to amend the decree or order even when the appeal has been dismissed *in limine.* It does not take away the powers otherwise vested in the trial Court. As observed above, the principle underlying this Section is the doctrine of merger that once an appellate Court has passed a decision then the judgment of the trial Court will merge in the judgment of the appellate Court and it will cease to have jurisdiction to amend its own judgment, decree or proceedings. The appellate Court only disposed of the matter by holding that Inder Dutt had no right to file the appeal since no decree had been passed against him. Therefore, the question of merger does not apply and Section 153-A would not be attracted. The mere fact that the appeal was decided after notice and not *in limine* would not take away the jurisdiction of the trial Court to amend its judgment and decree because of the fact that there was no decision on the case by the learned District Judge."

17. To the similar effect is the law laid down again by a Coordinate Bench of this Court in *Kusum Kumari Versus Krishan Kumar & others,* CMPMO No. 443 of 2008, decided on 25.07.2012.

18. This question even has been gone into by another Coordinate Bench of this Court in *Mahant Dhanraj Gir's case* (supra).

19. Therefore, keeping in view that the appeal filed by the respondents/non-applicants/defendants was ultimately dismissed by this Court, the doctrine of merger shall come into play and as such this Court is competent to entertain and pass appropriate order in this application. The matter though was further taken to the Hon'ble Supreme Court, however, the appeal was dismissed in default and as such there is no adjudication of dispute by the Apex Court on merits. The judgment passed by this Court has, therefore, attained finality.

20. Now if coming to the grounds on which correction in the judgment and decree has been sought, in my considered opinion, first page of the judgment makes it crystal clear that Khasra number of the suit land was wrongly typed as 3890. However, it came to be corrected as 3800 by way of retyping. Irrespective of the correction made, the same gives impression that it is 3890. Therefore, the correction to this effect in the judgment and decree is granted. I, therefore, order that Khasra number in paragraph-1 (b) of the judgment and decree dated 12.09.1988, passed by learned Sub-Judge, Una, in Specific Performance Suit No.277/84, shall be read as 3800 instead of 3890 for all intents and purposes.

21. Now if coming to the inclusion of land measuring 1-1 kanal being half share of Dhanpat Rai, deceased defendant No.1 in the land entered in Khewat No.71, Khatauni

Nos. 484 and 485, measuring 2-01 kanal, no pleadings to this effect was there in the plaint. Allowing the addition to this effect in the judgment and decree would amount to modification, alteration and addition in the judgment and decree without there being pleadings and any proof therefor on record. In the light of the law laid down by the Apex Court in *Dwaraka Das and Jayalakshmi's case* (supra), it is not legally permissible to do so.

22. Our own high Court in *Sh.Jai Singh & Another Versus Smt. Sarla Devi*, 2011 (3) Him. L.R. 1395, while placing reliance on the judgment of the Apex Court in *Dwaraka Das and Jayalakshmi's cases* (supra), has concluded that no Court can modify, alter or add to the terms of original judgment and decree or order in exercise of the powers vested under Sections 151 and 152 of the CPC. This judgment reads as follows:-

> "6. I have heard learned counsel for the parties and have also gone through the record. There is no limitation prescribed for correction of clerical or arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The Court has power to correct these errors at any time either on its own motion or on the application of any parties. In the present case, the suit was decreed on 10.03.1975 and the amendment under Section 152 was allowed on 18.12.2002. In the reply to the amendment application, it has been stated that Kirpa Ram, predecessor-in-interest of the petitioners, had purchased the land from Bala Ram and since then the land is in possession of the petitioners. The respondent or her husband had never raised any objection.
>
> 7. In Dwaraka Das versus State of M.P. and Another (1999) 3 SCC 500 the Supreme Court has held that the exercise of power under Section 152, CPC contemplates the correction of mistakes by Court of its ministerial actions and does not contemplate passing of effective judicial orders after the judgment, decree or orders. No Court can, under the cover of the Sections 151, 152 modify, alter or add to the terms of its original judgment, decree or order.
>
> 8. In Jaya Lakshmi Coelho versus Oswald Joseph Coelho (2001) 4 SCC 181 the decree was passed on 07.03.1992 and the husband filed an application on 30.06.1992 that the decree by mutual consent was granted to the parties on 07.03.1992 but the order remained silent on other reliefs which were mentioned in the agreement and in para-8 of the petition. On those facts, the Supreme Court has held that the power of rectification of clerical, arithmetical errors or accidental slip does not empower the Court to have a second thought over the matter and to find that a better order or decree could or should be passed. It is to be confined something initially intended but left out or added against such intention.
>
> 9.In Bela Debi versus Bon Behary Roy and others AIR 1952 Cal. 86, it has been held that there is no time limit for application under Section 152. It is, however, an equally established fact that no amendment should be allowed if third party has acquired rights, and/or where it would be inequitable or unjust to allow the rectification. In P.S. Narayana Iyer versus Biyari Bivi and Others AIR 1923 Madras 57 it has been held that the exercise of power to amend under Section 152 is discretionary and necessarily so, when no period of limitation is provided for application for its exercise and, therefore no investigation of title can insure those, who acquire rights in property dealt with in a previous decree, against the effect of a subsequent amendment thereof.

10. In J Abid Hussain v. Mrs. R.K. Paul and another AIR 1961 A.P. 508, it has been held that a correction could be made under Section 152 of the Code at any time, such a thing is possible only as long as interests of third party do not intervene, secondly any inertia on the part of a person asking for the amendment should be tolerated when the third party acquire interests, though it is necessary that the third party should have acted in good faith without the knowledge of the defective decree."

23. Therefore, in view of the legal position discussed hereinabove, land measuring 1 kanal being half share of the total land measuring 2-01 kanal entered in Khewat No.71, Khatauni Nos. 484 and 485, Khasra No.3798 cannot be added in the judgment and decree as no such error has occurred therein due to typographical or clerical mistake and rather the addition to this effect has been sought without there being any pleadings in the plaint.

24. In view of the above, present application is partly allowed and the same is accordingly disposed of.

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

The New India Assurance Company Limited ...Appellant.
Versus
Chura Mani and others ...Respondents.

FAO No. 221 of 2010
Decided on: 08.04.2016

Motor Vehicles Act, 1988- Section 149- It was contended by the Insurer that premium was paid through cheque which was dishonoured and insurer is not liable- held, that unless insurer cancels the policy and intimates the owner by way of a notice, the insurer continues to be liable to pay the compensation- appeal dismissed. (Para-6 to 10)

Cases referred:
M/s New Prem Bus Service versus Laxman Singh & another, Latest HLJ 2014 (HP) 579
United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others, Latest HLJ 2014 (HP) 1140

For the appellant: Mr. Praneet Gupta, Advocate.
For the respondents: Ms. Leena Guleria, Advocate, vice Mr. G.R. Palsra, Advocate, for respondents No. 1 to 3.
Mr. Manohar Lal Sharma, Advocate, for respondent No. 4.

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 5th March, 2010, made by the Motor Accident Claims Tribunal-II, Mandi, H.P. (for short "the Tribunal") in Claim Petition No. 14 of 2004, titled as Sh. Chura Mani and others versus Sh. Gopal

Singh and another, whereby compensation to the tune of ₹ 2,59,000/- with interest @ 7.5% per annum came to be awarded in favour of the claimants, against the respondents and the insurer was saddled with liability (for short "the impugned award").

2. The insured/owner-cum-driver and the claimants have not questioned the impugned award on any count, thus, 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 the appeal.

4. Learned counsel for the appellant-insurer argued that the amount of premium was paid by the insured/owner-cum-driver through cheque, which was bounced, thus, the appellant-insurer is not liable.

5. The argument of the learned counsel for the appellant-insurer is not tenable for the reason that the insurer has not been able to prove that it has informed the insured about the bouncing of cheque before or after the accident has taken place.

6. In terms of Section 64-VB of the Insurance Act, 1938 (hereinafter referred to as "the Insurance Act") read with the provisions of Sections 147 to 149 of the Motor Vehicles Act, 1988 (for short "MV Act"), the insurer has to intimate the insured, which has not been done in the present case, and if intimation is not given and during that period, the accident happens, it is the insurer, who is liable.

7. The Apex Court in the case titled as **New India Assurance Co. Ltd. versus Rula and others,** reported in **AIR 2000 Supreme Court 1082,** has held that the insurer has to mandatorily intimate the owner by way of notice about the cancellation of insurance policy and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is liable. It is apt to reproduce para 11 of the judgment herein:

> *"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

8. The matter again came up for consideration before the Apex Court in **Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd.,** reported in **2007 AIR SCW 7948,** and the same principle has been laid down. It is apt to reproduce paras 26 to 28 of the judgment herein:

> *"26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of*

the opinion, the insurance company would not be liable to satisfy the claim.

27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :

> *"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."*

We, therefore, agree with the opinion of the High Court.

28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly.

9. In the case titled as **United India Insurance Co. Ltd. versus Laxmamma & Ors.,** reported in **2012 AIR SCW 2657,** the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not made and conveyed and if the accident occurs till the cancellation is made, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:

> *"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."*

10. The same view has been taken by this Court in the cases titled as **M/s New Prem Bus Service versus Laxman Singh & another,** reported in **Latest HLJ 2014 (HP) 579,** and **United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others,** reported in **Latest HLJ 2014 (HP) 1140.**

11. Having said so, the impugned award is well reasoned, needs no interference.

12. Viewed thus, the impugned award is upheld and the appeal is dismissed.

13. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts.

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

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

The New India Assurance Company Limited ...Appellant.
Versus
Kumari Sujata and others ...Respondents.

FAO No. 237 of 2010
Decided on: 08.04.2016

Motor Vehicles Act, 1988- Section 166- Deceased was working as teacher and was drawing Rs. 23,765/- as salary- after deducting 1/3rd amount, claimants have lost source of dependency of Rs. 15,800/- per month- deceased was aged 47 years at the time of accident- multiplier of '13' is applicable- Tribunal had awarded interest @ 12% per annum- however, rate of interest should be awarded as per the prevailing rates. (Para-14 to 16)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, (2009) 6 SCC 121
Reshma Kumari & Ors. versus Madan Mohan & Anr., 2013 AIR SCW 3120
United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others, (2002) 6 Supreme Court Cases 281
Santosh Devi versus National Insurance Company Ltd. and others, 2012 AIR SCW 2892
Amrit Bhanu Shali and others versus National Insurance Company Limited and others, (2012) 11 Supreme Court Cases 738
Savita versus Binder Singh & others, 2014 AIR SCW 2053
Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn., 2014 AIR SCW 2982
Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others, (2015) 4 SCC 433
Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another, (2015) 4 Supreme Court Cases 434
Oriental Insurance Company versus Smt. Indiro and others, I L R 2015 (III) HP 1149

For the appellant: Mr. Praneet Gupta, Advocate.
For the respondents: Mr. Rupinder Singh, Advocate, for respondents No. 1 and 2.
Mr. I.N. Mehta, Advocate, for respondents No. 3 and 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 2nd March, 2010, made by the Motor Accident Claims Tribunal-II, Solan, District Solan, Himachal

Pradesh (for short "the Tribunal") in M.A.C. Petition No. 42-S/2 of 2009, titled as Kumari Sujata and another versus Vinay Bhagnal and others, whereby compensation to the tune of ₹ 25,44,800/- with interest @ 12% per annum from the date of filing of the claim petition till its realization and costs assessed at ₹ 10,000/- came to be awarded in favour of the claimants and the insurer came to be saddled with liability (for short "the impugned award").

2. The claimants, the driver and the owner-insured of the offending vehicle have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

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

4. Learned counsel for the appellant-insurer argued that the accident has taken place due to the overloading of the offending bus, thus, the owner-insured has committed a willful breach. Further argued that the interest awarded is on the higher side.

5. By the medium of the claim petition, the claimants have claimed compensation to the tune of ₹ 30,00,000/-, as per the break-ups given in the claim petition.

6. The claim petition was resisted by the respondents on the grounds taken in the respective memo of objections.

7. On the pleadings of the parties, following issues came to be framed by the Tribunal:

> *"1. Whether death of Kaushalaya Sharma was caused on account of rash and negligent driving by respondent No. 2, as alleged? OPP*
>
> *2. If issue No. 1 is decided in affirmative whether the petitioners are entitled for compensation, if so the amount thereof? OPP*
>
> *3. In case compensation is awarded, it is to be paid by respondent No. 3 being indemnifier of respondent No. 1, as alleged? OPR-1&2*
>
> *4. Whether the offending vehicle was being driven by respondent No. 2 without driving licence and in violation of the terms and conditions of the insurance policy, as alleged? OPR-3*
>
> *5. Relief."*

8. The claimants have examined Dr. Ashok Handa as PW-1, Shri Ajay Sharma as PW-3, Constable Pritam Singh as PW-4, Shri Kewal Krishan as PW-5 and one of the claimants, namely Sujata, herself appeared in the witness box as PW-2. The owner-insured, namely Shri Vinay Bhagnal, and the driver, namely Shri Ramesh Kumar, themselves stepped into the witness box as RW-1 and RW-3, respectively, and examined Shri Surender Kumar as RW-2, HC Ranjit Singh as RW-4 and Shri Anokhi Ram as RW-5.

9. It is apt to record herein that the insurer has not examined any witness, thus, the evidence led by the claimants, the driver and the owner-insured of the offending vehicle has remained unrebutted so far it relates to the insurer.

Issue No. 1:

10. The Tribunal, after scanning the evidence, oral as well as documentary, held that the claimants have proved that the driver of the offending vehicle, namely Shri Ramesh Kumar, had driven the offending vehicle, i.e. bus, bearing registration No. HP-64-8097, rashly and negligently on 4th May, 2009, near the place Nai Natti at about 4.05 P.M. and caused the accident, in which deceased-Kaushalaya Sharma sustained injuries and

succumbed to the injuries. There is no challenge to the said findings. 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 determine issues No. 3 and 4.

Issue No. 3:

12. It was for the owner-insured and the driver of the offending vehicle to plead and prove that the offending vehicle was insured, have placed on record the documents, which do disclose that the offending vehicle was duly insured at the time of the accident and its seating capacity was '42'. Their evidence has remained unrebutted. Accordingly, the findings returned by the Tribunal on issue No. 3 are upheld.

Issue No. 4:

13. It was for the insurer to plead and prove that the driver of the offending vehicle was not having a valid and effective driving licence and the offending vehicle was being driven in contravention of the terms and conditions contained in the insurance policy of the mandate of Sections 147 and 149 of the Motor Vehicles Act (for short "MV Act"), have not led any evidence, thus, have failed to discharge the onus. Accordingly, the findings returned by the Tribunal on issue No. 4 are also upheld.

Issue No. 2:

14. I have gone through the discussions made in paras 9 to 12 of the impugned award, the amount awarded appears to be inadequate. The deceased was working as a teacher at the time of the accident and the last pay drawn by her was ₹ 23,765/- in terms of the salary certificate Ext. PW-3/A. After deducting one third towards her personal expenses, the Tribunal held that the claimants have lost source of dependency to the tune of ₹ 15,800/- per month. Further held that the deceased was 47 years of age at the relevant point of time and applied the multiplier of '13', is just and appropriate in view of the Second Schedule appended with 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 **(2009) 6 Supreme Court Cases 121,** which was upheld by a larger Bench of the Apex Court in **Reshma Kumari & Ors. versus Madan Mohan & Anr.,** reported in **2013 AIR SCW 3120.** Accordingly, the findings recorded by the Tribunal on issue No. 2 are upheld.

15. I deem it proper to record herein that the Tribunal has fallen in an error in awarding interest @ 12% per annum.

16. It is beaten law of land that the rate of interest should be awarded as per the prevailing rates, in view of the judgments rendered by the Apex Court in cases titled as **United India Insurance Co. Ltd. and others versus Patricia Jean Mahajan and others,** reported in **(2002) 6 Supreme Court Cases 281; Santosh Devi versus National Insurance Company Ltd. and others,** reported in **2012 AIR SCW 2892; Amrit Bhanu Shali and others versus National Insurance Company Limited and others,** reported in **(2012) 11 Supreme Court Cases 738; Smt. Savita versus Binder Singh & others,** reported in **2014 AIR SCW 2053; Kalpanaraj & Ors. versus Tamil Nadu State Transport Corpn.,** reported in **2014 AIR SCW 2982; Amresh Kumari versus Niranjan Lal Jagdish Pd. Jain and others,** reported in **(2015) 4 Supreme Court Cases 433, and Mohinder Kaur and others versus Hira Nand Sindhi (Ghoriwala) and another,** reported in **(2015) 4 Supreme Court Cases 434,** and discussed by this Court in a batch of FAOs, **FAO No. 256 of 2010,** titled as **Oriental Insurance Company versus Smt. Indiro and others,** being the lead case, decided on 19.06.2015.

17. Having said so, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of.

18. Registry is directed to release the awarded amount in favour of the claimants strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in their respective bank accounts. Excess amount, if any, be released in favour of the insurer.

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

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13.4.2016:

Present: Mr. Praneet Gupta, Advocate, for the appellant.

Mr. Rupinder Singh, Advocate, for respondents No. 1 and 2.

Mr. I.N. Mehta, Advocate, for respondents No. 3 and 4.

Inadvertently, the rate of interest, to which the claimants are entitled to, has not been recorded in the judgment, dated 8th April, 2016. It is provided that the claimants are entitled to interest @ 7.5% per annum from the date of filing of the claim petition till its realization. This order shall form part of the judgment, dated 8th April, 2016.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

M/s Tube Expansion and Equipments Pvt. Ltd. ...Petitioner

Versus

District Magistrate, District Solan and others. ...Respondents

CWP No. 627 of 2016
Judgment reserved on: 29.3.2016
Date of Decision: 11.4.2016.

Constitution of India, 1950- Article 226- Lease hold rights were granted to the petitioner company for a period of 95 years by HIMUDA- respondent No. 3 availed credit limit from the bank and petitioner executed deed of mortgage in favour of bank- subsequently, accounts of respondent No. 3 were declared as Non-Performing Assets- notice was issued to the petitioner company bringing to its notice the default in payment made by respondent No. 3- petitioner was called upon to pay the amount within six days failing which property would be possessed and put to auction – it was contended that once the objections were filed to the notice, no action can be taken until the objections are decided- no action can be taken unless the owner is made a party- held, that SARFAESI Act is a self contained mechanism and a person has to invoke the remedies provided by the SARFAESI Act- writ petition to question the action taken under the Act is not maintainable- further, owner has to object to the issuance of the notice and the petitioner cannot be permitted to espouse the claim of the owner- petition dismissed with liberty to the petitioner to avail remedy provided under SARFAESI Act. (Para-5 to 16)

Cases referred:
Keshav Lal Khemchand & Sons (P) Ltd. Vs. Union of India (2015) 4 SCC 770.
Harshad Goverdhan Sondagar Versus International Assets Reconstruction Company Limited and others (2014) 6 SCC 1
SPS Steels Rolling Mills Ltd. Versus State of Himachal Pradesh and others, I L R 2015 (III) HP 1387 (D.B.)
M/s Cecil Instant Power Company Versus Punjab National Bank and others, ILR, 2016 (II) HP 537 (D.B.)

For the Petitioner:	Mr.N.K. Sood, Senior Advocate with Mr.Sumit Raj Sharma, Advocate.
For the Respondents:	Mr. Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.J.K. Verma, Deputy Advocate General, for respondent No. 1.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

This writ petition has been filed with the following prayer:-

"a. That the order of possession passed by the Respondent No. 1 on application of Respondent No. 2 dated 15.10.2015 Annexure P-9 be set aside and quashed.

2. The petitioner Company was allotted lease hold rights for a period of 95 years in regard to Industrial Plot No. 32, Sector-1, Industrial Area, Parwanoo, by virtue of lease deed dated 29.3.1973 by H.P. Housing and Urban Development Authority (for short 'HIMUDA'). Respondent No. 3, who also happens to be one of the vendors for the petitioner availed credit limit from the Bank of Baroda (for short the 'Bank'), respondent No. 2 herein and the petitioner stood guarantor by executing a deed of mortgage without possession in favour of the bank on 22.5.2008.

3. On 8.11.2010 supplemental memorandum of entry was executed by the petitioner Company towards mortgage in favour of the bank. Later, on 2.9.2011 a tripartite agreement was executed between the petitioner, respondent No. 3 and HIMUDA, thereby leasing out a part of the industrial plot No. 32 in favour of respondent No. 3.

4. Subsequently, the accounts of respondent No. 3 were declared as Non-Performing Assets (for short 'NPA'). Consequently, the bank on 2.7.2014 issued notice to the petitioner Company under Section 13(2) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short 'SARFAESI' Act), bringing to its notice the default in payment made by respondent No. 3. The petitioner Company was called upon to settle the accounts by remitting the entire amount due i.e. `13,61,32,996.01 within sixty days, failing which the property of the petitioner lying mortgaged with the bank shall be possessed and put to auction.

5. The petitioner is now aggrieved by the order passed by the District Magistrate, Solan, (Annexure P-9), whereby the Tehsildar Kasauli, District Solan has been directed to handover the possession of the secured assets to the secured creditor, i.e. respondent No. 2.

6. Mr.N.K. Sood, Senior Advocate, assisted by Mr.Sumit Raj Sharma, Advocate has vehemently argued that once respondent No. 3 had filed objections to the notice under Section 13(2) of the SARFAESI Act, then no further action in the matter can be taken till and so long the decision thereof is not objectively taken by respondent No. 2 bank, in terms of judgment passed by Hon'ble Supreme Court in ***Keshav Lal Khemchand & Sons (P) Ltd. Vs. Union of India (2015) 4 SCC 770.***

7. He has further argued that no action under Section 14 of the SARFAESI Act could have been taken by the District Magistrate, unless the owner of the property i.e. HIMUDA had been arrayed as a party, since respondent No. 3 is holding the property in question under the lease agreement. He in support of this submission has placed reliance on the decision of the Hon'ble Supreme Court in ***Harshad Goverdhan Sondagar Versus International Assets Reconstruction Company Limited and others (2014) 6 SCC 1.***

8. Before considering the aforesaid submissions, it needs to be re-asserted that the SARFAESI Act is a self contained mechanism and the aggrieved party has to invoke only the remedies provided by the SARFAESI Act. This was so held by this Court in ***CWP No. 2783 of 2015, titled SPS Steels Rolling Mills Ltd. Versus State of Himachal Pradesh and others, decided on 25th June, 2015***, in the following terms:-

> *"5. It appears that action has been drawn against the writ petitioner in terms of Section 13 (4) of The Securitisation and Reconstruction of Financial Assets and Enforcements of Security Interest Act, 2002 (for short "SARFAESI Act"). SARFAESI Act is self-contained mechanism and the aggrieved party has to invoke the remedies provided by the SARFAESI Act. The writ petitioner has remedy of appeal as per the mandate of Section 17 of the SARFAESI Act. It is apt to reproduce relevant portion of Section 17 of the SARFAESI Act herein:*
>
> > *"**17. Right to appeal**. - (1) Any person (including borrower), aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorised officer under this Chapter, may make an application along with such fee, as may be prescribed to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measures had been taken:*
> >
> > *Provided that different fees may be prescribed for making the application by the borrower and the person other than the borrower.*
> >
> > *Explanation. - For the removal of doubts it is hereby declared that the communication of the reasons to the borrower by the secured creditor for not having accepted his representation or objection or the likely action of the secured creditor at the stage of communication of reasons to the borrower shall not entitle the person (including borrower) to make an application to the Debts Recovery Tribunal under sub-section (1) of section 17.*
> >
> > *....."*
>
> *6. The Apex Court in a series of judgments in the cases titled as **United Bank of India versus Satyawati Tondon and others,** reported in **(2010) 8 Supreme Court Cases 110**; **Union Bank of India and another versus Panchanan Subudhi**, reported in **(2010) 15 Supreme***

Court Cases 552*; **Indian Bank versus M/s. Blue Jaggers Estate Ltd. & Ors.,** reported in **2010 AIR SCW 4751****; **Kanaiyalal Lalchand Sachdev and others versus State of Maharashtra and others,** reported in **(2011) 2 Supreme Court Cases 782****; **Standard Chartered Bank versus V. Noble Kumar and others with Senior Manager, State Bank of India and another versus R. Shiva Subramaniyan and another**, reported in **(2013) 9 Supreme Court Cases 620****; **J. Rajiv Subramaniyan and another versus Pandiyas and others**, reported in **(2014) 5 Supreme Court Cases 651****; and **Keshavlal Khemchand and sons Private Limited and others versus Union of India and others**, reported in **(2015) 4 Supreme Court Cases 770**, has discussed the issue and held that the writ petition is not maintainable.*

*7. This Court in **CWP No. 4779 of 2014**, titled as **M/s Indian Technomac Company Ltd. versus State of H.P. & ors.**, decided on 04.08.2014, held that when an alternate remedy is available, writ petition is not maintainable. The said judgment of this Court has been upheld by the Apex Court on 22.08.2014 in SLP (C) No. 22626-22641 of 2014.*

*8. The Apex Court in a latest judgment in the case titled as **Union of India and others versus Major General Shri Kant Sharma and another**, reported in 2015 **AIR SCW 2497,** held that when an alternate efficacious remedy is available to the writ petitioner, he should not be allowed to give a slip to law.*

*9. The Apex Court in the case titled as **Sadashiv Prasad Singh versus Harender Singh and others**, reported in **(2015) 5 Supreme Court Cases 574**, held that the writ petition is not maintainable when a remedy of appeal is available to the writ petitioner. It is apt to reproduce para 23.3 of the judgment herein:*

> *"23.3. Thirdly, a remedy of appeal was available to Harender Singh in respect of the order of the Recovery Officer assailed by him before the High Court under Section 30, which is being extracted herein to assail the order dated 5-5-2008:*
>
> *"30. **Appeal against the order of Recovery Officer.** - (1) Notwithstanding anything contained in Section 29, any person aggrieved by an order of the Recovery Officer made under this Act may, within thirty days from the date on which a copy of the order is issued to him, prefer an appeal to the Tribunal.*
>
> *(2) On receipt on an appeal under sub section (1), the Tribunal may, after giving an opportunity to the appellant to be heard, and after making such inquiry as it deems fit, confirm, modify or set aside the order made by the Recovery Officer in exercise of his powers under Sections 25 to 28 (both inclusive)."*
>
> *The High Court ought not to have interfered with in the matter agitated by Harender Singh in exercise of its writ jurisdiction. In fact, the learned Single Judge rightfully dismissed the writ petition filed by Harender Singh."*

*10. Learned counsel for the writ petitioner has placed reliance on the judgment rendered by the Apex Court in a case titled as **KSL and Industries Limited versus Arihant Threads***

***Limited and others**, reported in **(2015) 1 Supreme Court Cases 166**, is not applicable in the facts and circumstances of this case.*

11. Having said so, the writ petition is not maintainable."

9. Once the SARFAESI Act is held to be a self contained mechanism, the question would, therefore, arise as to whether the writ petition is maintainable, especially when the petitioner has an alternative and efficacious remedy available to it under Section 17 of the SARFAESI Act. This question too has recently been considered in detail by us in ***CWP No. 618 of 2016, titled M/s Cecil Instant Power Company Versus Punjab National Bank and others, decided on 23rd March, 2016,*** wherein it was held:-

"11. The question relating to entertaining of petitions under Articles 226 and 227 of the Constitution of India against recovery of dues to banks has been under consideration before the Hon'ble Supreme Court from time to time.

*12. In the case of **Punjab National Bank** vs**. O.C. Krishnan and others (2001) 6 SCC 569**, the Hon'ble Supreme Court held that where there is an alternative remedy available, judicial prudence demands that the Court refrains from exercising its jurisdiction under the constitutional scheme. This would be evident from the observations contained in paras 5 and 6 of the judgment which read thus:*

"5.In our opinion, the order which was passed by the Tribunal directing sale of mortgaged property was appealable under Section 20 of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (for short "the Act"). The High Court ought not to have exercised its jurisdiction under Article 227 in view of the provision for alternative remedy contained in the Act. We Jo not propose to go into the correctness of the decision of the High Court an I whether the order passed by the Tribunal was correct or not has to be decided before an appropriate forum.

6. The Act has been enacted with a view to provide a special procedure for recovery of debts due to the banks and the financial institutions. There is hierarchy of appeal provided in the Act, namely, filing of an appeal under Section 20 and this last track procedure cannot be allowed to be derailed either b> taking recourse to proceedings under Articles 226 and 227 of the Constitution or by filing a civil suit, which is expressly barred. Even though a provision court under Articles 226 and 227 of the Constitution, nevertheless when there is an alternative remedy available judicial prudence demands that the court refrains from exercising its jurisdiction under the said constitutional provisions. This was a case where the High Court should not have entertained the petition under Article 227 of the Constitution and should have directed the respondent to take recourse to the appeal mechanism provided by the Act."

*13. In **United Bank of India** vs. **Satyawati Tondon and others (2010) 8 SCC 110** after referring to various precedents on the subject, the Hon'ble Supreme Court held that Section 13 of the SARFAESI Act contains detailed mechanism for enforcement of security interest as would be evident from the following observations:*

"12. Section 13 of the SARFAESI Act contains detailed mechanism for enforcement of security interest. Sub-section (1) thereof lays down that notwithstanding anything contained in Sections 69 or 69-A of the

Transfer of Property Act, any security interest created in favour of any secured creditor may be enforced, without the intervention of the court or tribunal, by such creditor in accordance with the provisions of this Act. Sub-section (2) of Section 13 enumerates first of many steps needed to be taken by the secured creditor for enforcement of security interest. This sub-section provides that if a borrower, who is under a liability to a secured creditor, makes any default in repayment of secured debt and his account in respect of such debt is classified as non- performing asset, then the secured creditor may require the borrower by notice in writing to discharge his liabilities within sixty days from the date of the notice with an indication that if he fails to do so, the secured creditor shall be entitled to exercise all or any of its rights in terms of Section 13(4).

13. Sub-section (3) of Section 13 lays down that notice issued under Section 13(2) shall contain details of the amount payable by the borrower as also the details of the secured assets intended to be enforced by the bank or financial institution. Sub-section (3-A) of Section 13 lays down that the borrower may make a representation in response to the notice issued under Section 13(2) and challenge the classification of his account as non-performing asset as also the quantum of amount specified in the notice. If the bank or financial institution comes to the conclusion that the representation/objection of the borrower is not acceptable, then reasons for non- acceptance are required to be communicated within one week.

14. Sub-section (4) of Section 13 specifies various modes which can be adopted by the secured creditor for recovery of secured debt. The secured creditor can take possession of the secured assets of the borrower and transfer the same by way of lease, assignment or sale for realising the secured assets. This is subject to the condition that the right to transfer by way of lease, etc. shall be exercised only where substantial part of the business of the borrower is held as secured debt. If the management of whole or part of the business is severable, then the secured creditor can take over management only of such business of the borrower which is relatable to security. The secured creditor can appoint any person to manage the secured asset, the possession of which has been taken over. The secured creditor can also, by notice in writing, call upon a person who has acquired any of the secured assets from the borrower to pay the money, which may be sufficient to discharge the liability of the borrower.

15. Sub-section (7) of Section 13 lays down that where any action has been taken against a borrower under sub-section (4), all costs, charges and expenses properly incurred by the secured creditor or any expenses incidental thereto can be recovered from the borrower. The money which is received by the secured creditor is required to be held by him in trust and applied, in the first instance, for such costs, charges and expenses and then in discharge of dues of the secured creditor. Residue of the money is payable to the person entitled thereto according to his rights and interest. Sub-section (8) of Section 13 imposes a restriction on the sale or transfer of the secured asset if the amount due to the secured creditor together with costs, charges and

expenses incurred by him are tendered at any time before the time fixed for such sale or transfer.

16. Sub-section (9) of Section 13 deals with the situation in which more than one secured creditor has stakes in the secured assets and lays down that in the case of financing a financial asset by more than one secured creditor or joint financing of a financial asset by secured creditors, no individual secured creditor shall be entitled to exercise any or all of the rights under sub-section (4) unless all of them agree for such a course.

17. There are five unnumbered provisos to Section 13(9) which deal with pari passu charge of the workers of a company in liquidation. The first of these provisos lays down that in the case of a company in liquidation, the amount realised from the sale of secured assets shall be distributed in accordance with the provisions of Section 529-A of the Companies Act, 1956. The second proviso deals with the case of a company being wound up on or after the commencement of this Act. If the secured creditor of such company opts to realise its security instead of relinquishing the same and proving its debt under Section 529(1) of the Companies Act, then it can retain sale proceeds after depositing the workmen's dues with the liquidator in accordance with Section 529-A.

18. The third proviso requires the liquidator to inform the secured creditor about the dues payable to the workmen in terms of Section 529-A. If the amount payable to the workmen is not certain, then the liquidator has to intimate the estimated amount to the secured creditor. The fourth proviso lays down that in case the secured creditor deposits the estimated amount of the workmen's dues, then such creditor shall be liable to pay the balance of the workmen's dues or entitled to receive the excess amount, if any, deposited with the liquidator. In terms of the fifth proviso, the secured creditor is required to give an undertaking to the liquidator to pay the balance of the workmen's dues, if any.

19. Sub-section (10) of Section 13 lays down that where dues of the secured creditor are not fully satisfied by the sale proceeds of the secured assets, the secured creditor may file an application before the Tribunal under Section 17 for recovery of balance amount from the borrower. Sub-section (11) states that without prejudice to the rights conferred on the secured creditor under or by this section, it shall be entitled to proceed against the guarantors or sell the pledged assets without resorting to the measures specified in clauses (a) to (d) of sub-section (4) in relation to the secured assets.

20. Sub-section (12) of Section 13 lays down that rights available to the secured creditor under the Act may be exercised by one or more of its officers authorised in this behalf. Sub-section (13) lays down that after receipt of notice under sub-section (2), the borrower shall not transfer by way of sale, lease or otherwise (other than in the ordinary course of his business) any of his secured assets referred to in the notice without prior written consent of the secured creditor.

21. In terms of Section 14, the secured creditor can file an application before the Chief Metropolitan Magistrate or the District

Magistrate, within whose jurisdiction the secured asset or other documents relating thereto are found for taking possession thereof. If any such request is made, the Chief Metropolitan Magistrate or the District Magistrate, as the case may be, is obliged to take possession of such asset or document and forward the same to the secured creditor.

22. *Section 17 speaks of the remedies available to any person including borrower who may have grievance against the action taken by the secured creditor under sub-section (4) of Section 13. Such an aggrieved person can make an application to the Tribunal within 45 days from the date on which action is taken under that sub-section. By way of abundant caution, an Explanation has been added to Section 17(1) and it has been clarified that the communication of reasons to the borrower in terms of Section 13(3-A) shall not constitute a ground for filing application under Section 17(1).*

23*. Sub-section (2) of Section 17 casts a duty on the Tribunal to consider whether the measures taken by the secured creditor for enforcement of security interest are in accordance with the provisions of the Act and the Rules made thereunder. If the Tribunal, after examining the facts and circumstances of the case and evidence produced by the parties, comes to the conclusion that the measures taken by the secured creditor are not in consonance with sub-section (4) of Section 13, then it can direct the secured creditor to restore management of the business or possession of the secured assets to the borrower. On the other hand, if the Tribunal finds that the recourse taken by the secured creditor under sub-section (4) of Section 13 is in accordance with the provisions of the Act and the Rules made thereunder, then, notwithstanding anything contained in any other law for the time being in force, the secured creditor can take recourse to one or more of the measures specified in Section 13(4) for recovery of its secured debt.*

24. *Sub-section (5) of Section 17 prescribes the time-limit of sixty days within which an application made under Section 17 is required to be disposed of. The proviso to this sub-section envisages extension of time, but the outer limit for adjudication of an application is four months. If the Tribunal fails to decide the application within a maximum period of four months, then either party can move the Appellate Tribunal for issue of a direction to the Tribunal to dispose of the application expeditiously.*

25*. Section 18 provides for an appeal to the Appellate Tribunal.*

26*. Section 34 lays down that no Civil Court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Tribunal or Appellate Tribunal is empowered to determine. It further lays down that no injunction shall be granted by any Court or other authority in respect of any action taken or to be taken under the SARFAESI Act or the DRT Act. Section 35 of the SARFAESI Act is substantially similar to Section 34(1) of the DRT Act. It declares that the provisions of this Act shall have effect, notwithstanding anything inconsistent therewith contained in any other law for the time being in force or any instrument having effect by virtue of any such law."*

The Hon'ble Supreme Court thereafter took serious note of the fact that the High Courts overlooked the settled law and continued to entertain petitions under Article 226 of the Constitution when an effective remedy was available to the aggrieved person and this rule applied with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of the banks and other financial institutions. It shall be apt to reproduce the following observations as contained in paragraph 43:

> *"43. Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute."*

Not only this, the Hon'ble Supreme Court showed its serious concern that despite repeated pronouncements by it, the High Courts were still ignoring the availability of statutory remedies under the DRT and the SARFAESI Act and exercising jurisdiction under Article 226 of the Constitution, by passing orders which had serious adverse impact on the rights of the bank and other financial institutions to recover their dues as would be evident from the following observations:

> *"55. It is a matter of serious concern that despite repeated pronouncement of this Court, the High Courts continue to ignore the availability of statutory remedies under the DRT Act and SARFAESI Act and exercise jurisdiction under Article 226 for passing orders which have serious adverse impact on the right of banks and other financial institutions to recover their dues. We hope and trust that in future the High Courts will exercise their discretion in such matters with greater caution, care and circumspection."*

14. In line with the aforesaid observation, the Hon'ble Supreme Court in ***Kanaiyalal Lalchand Sachdev and others*** *vs.* ***State of Maharashtra and others (2011) 2 SCC 782*** *held as under:*

> *"25. In the instant case, apart from the fact that admittedly certain disputed questions of fact viz. non-receipt of notice under Section 13(2) of the Act, non-communication of the order of the Chief Judicial Magistrate etc. are involved, an efficacious statutory remedy of appeal under Section 17 of the Act was available to the appellants, who ultimately availed of the same. Therefore, having regard to the facts obtaining in the case, the High Court was fully justified in declining to exercise its jurisdiction under Articles 226 and 227 of the Constitution."*

10. Adverting to the first contention raised by the petitioner by placing reliance upon the judgment of Hon'ble Supreme Court in ***Keshav Lal Khemchand & Sons (P) Ltd.*** (supra), wherein it has been held that the express language of Section 13(3A) of the Act obligates the secured creditor to examine representation/objection, if any, made by the borrower on receipt of notice contemplated under Section 13(2) and communicate reasons to the borrower, if such representation is not accepted by the secured creditor. Suffice it to say that this ground is not available to the petitioner. Firstly the petitioner is not the borrower and secondly even the representation under Section 13(2) has not been filed at its instance, but has admittedly been filed by respondent No. 3. Therefore, if at all any person can be considered to be aggrieved by non-communication of the decision it would be respondent No. 3 and not the petitioner.

11. That apart, the petitioner has even failed to place on record the objections, so submitted by respondent No. 3. Yet, regardless of the same, we on the basis of the material placed on record would rather assume that the objections have been decided because it is only thereafter that the further proceedings under Section 14 of the SARFAESI Act have been resorted to by respondent No. 2.

12. Coming to the other contention regarding exception being taken to the notice issued by the District Magistrate, even here it is either HIMUDA or respondent No. 3, who alone can be considered to be the parties aggrieved and the petitioner cannot be permitted to espouse the cause of either the HIMUDA or respondent No. 3. Even the ratio of the judgment of the Hon'ble Supreme Court in ***Harshad Goverdhan Sondagar's*** case, upon which much reliance has been placed by the petitioner, would again not be attracted to the facts of the present case, as the case relates to third party objections, wherein the lessee had approached the Hon'ble Supreme Court for the redressal of his grievances. The Hon'ble Supreme Court categorically held that since the Debt Recovery Tribunal has power to restore possession of secured assets only to the borrower vide Section 17(3), any such lessee of borrower whose property is intended to be sold would have no remedy under Section 17 to protect his possession under a valid or subsisting lease, therefore, the remedy of such lessee would only be under Articles 226 and 227 of the Constitution. Whereas, in the instant case, as already observed above, neither respondent No. 3, who is the alleged lessee nor HIMUDA who is the lessor have approached the Court. The petitioner is not a person aggrieved and therefore, has no locus standi to question the order of the District Magistrate.

13. That apart, we otherwise find no justifiable reason to entertain the writ petition preferred against notice issued under Sections 13(2) or 13 (4) of the SARFAESI Act and also against the alleged non-communication of reasons by the secured creditor to the borrower about non-acceptance of the representation or objection. Such communication cannot be considered to be an order or an action adversely affecting the borrower, but can only be considered to be a step forward for taking recourse to one or more measures provided under Section 13(4) of the SARFAESI Act.

14. It is only when such measure under Section 13(4) of the Act are taken that the borrower is aggrieved and even then the borrower can take recourse to the provisions of appeal provided under Section 17 of the SARFAESI Act, but in that event also a writ under Article 226 of the Constitution of India at the stage of notice under Section 13(2) or at the stage of communication of rejection of representation/objection under Section 13(3A) of the Act is not maintainable, as this would hamper the process of recovery, thereby defeating the very purpose of enactment of the SARFAESI Act.

15. At this stage, we may also notice that the respondent bank has already taken symbolic possession and then after possession, notice would be required to be issued under

Rule 8(1) of the Security Interest (Enforcement) Rules, 2002, prohibiting the borrower from creating any encumbrance or third party right. In the said notice, public at large is informed not to deal with the property after issuance of notice. If the property in question is eventually bought by way of sale or auction or otherwise, the petitioner would still be entitled to 30 days notice to place its representation by clearing the outstanding loan amount. The stage is yet to come. If the petitioner is still aggrieved, the remedy available to it is under Section 17 of the Act and not by way of this writ petition.

16. Since we have held the petition to be not maintainable, we are, therefore, not entering into and deciding the other questions, more particularly regarding the liability of the petitioner who is the guarantor and not the principal debtor. Therefore, leaving all questions of fact and law open, we decline to entertain the writ petition and the same is dismissed as such. However, it shall be open to the petitioner to avail the remedy provided under the SARFAESI Act and raise all contentions including the contention raised in this petition. It is further made clear that the time spent in this litigation shall not come in the way of the petitioner, while computing limitation.

With the aforesaid observations, the petition is disposed of, so also the pending application(s), if any.

****

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

CMPMO No. 306 of 2014 a/w
connected matters.
Reserved on :29.3.2016.
Decided on: 11th April, 2016.

1. **CMPMPO No. 306 of 2014**
M/S Him Cylinder Private Limited. .....Petitioner
Versus
Janak Raj ....Respondent.
2. **CMPMPO No. 316 of 2014**
M/S Him Cylinder Private Limited. .....Petitioner
Versus
Parveen Kumar ....Respondent.
3. **CMPMPO No. 138 of 2015**
M/S Him Cylinder Private Limited. .....Petitioner
Versus
Janak Raj ....Respondent.

Industrial Disputes Act, 1947- Section 36(4)- Reference was made to the Tribunal by the workmen- notice was issued to the employer who put in appearance through an advocate- no objection was raised against appearance of the Advocate- an application was filed by the employer to seek leave for representation by an advocate which was dismissed by the Tribunal- held, that employer was required to obtain the consent of the Authorized representative of the workmen and the leave of the tribunal for representation by advocate – no consent was taken from Representative nor leave was taken from the Tribunal- however, not raising any objection for representation amounted to implied permission from the workmen- Tribunal had wrongly dismissed the application- petition allowed.

(Para-5 to 14)

Cases referred:
Paradip Port Trust, Paradip vs. Their Workmen AIR 1977 SC 36,
Samarendra Das vs. M/s Win Medicine Pvt. Ltd. 2014 LLR 345
T.K. Varghese vs. Nichimen Corporation 2001(90) FLR 91,
Salvation Army versus Sunil J. Ingle 2005(107) FLR 932,

For the petitioner(s): Mr. Sanjeev Kuthiala, Advocate.
For the Respondents: Mr. Vivek Singh Attri vice Mr. Varun Chandel, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

Since common questions of fact and law stand raised for consideration in all the petitions, hence they are taken up together for disposal.

2. The Labour Court-cum-Industrial Tribunal, Dharamshala (hereinafter referred to as "Tribunal") stood transmitted by the labour Commissioner, H.P the hereinafter extracted references for rendering of adjudications thereupon:-

CMPMO No. 306 of 2014& CMPMO No.138 of 2015:

"Whether termination of the services of Sh. Janak Raj S/o Sh. Uttam Chand, R/o V.P.O. Kalruhi, Tehsil Amb, District Una, H.P. w.ef. 12-7-2012 by and Employer/Factory Manager. M/s Him Cylinders Limited, Plot No.1 to 4, Industrial Area Amb, District Una, H.OP. (present office), the Employer/Managing Director, M/S Him Cylinders, D-9 Udyog Nagar, Rohatak Road, New Delhi-110041 (Corporate Office), without complying with the provisions of the Industrial Disputes Act, 1947, is legal and justified? If not, what amount back wages, seniority, past service benefits and compensation the above worker is entitled to from the above employer?"

CMPMO No.316 of 2014

"Whether termination of services of Sh. Praveen Kumar S/o Sh. Bishan Dass, Village Bhavran/Kangrui, Tehsil Amb, Distt. Una, H.P. by the Managing Director, M/s Him Cylinder Ltd. Plot No.1-4, Industrial Area, Amb, Tehsil Amb, Distt. Una, H.P. during December, 2011 without complying with the provisions of the Industrial Disputes Act, 1947, as alleged by workman, is legal and justified? If not, what amount of back wages, salary, seniority, past service benefits and compensation the above worker is entitled to from the above employer/management?"

3. Claim petitions stood instituted before the learned Tribunal by the workmen/respondent(s) herein (hereinafter referred to as 'workmen') through their authorized representatives. On the respondent/petitioner herein standing served On 14.10.2013 /11.11.2013 /21.5.2015,respectively, an appearance/representation on its behalf was put in before the learned Tribunal by Sh. Onkar Singh, Advocate. Continuously therefrom appearances on behalf of the petitioner herein stood recorded before it by Shri Onkar Singh, Advocate uptill the decision rendered by the Tribunal on an application preferred before it under Section 36(4) of the Industrial Disputes Act, 1947 (hereinafter referred to as the Act) by the A.R. for the workmen for debarring Sh. Onkar Singh, Advocate to record his appearance before it as counsel for the respondent/petitioner herein (hereinafter referred to as 'management/employer').

4. The A.R. for the workmen omitted to thereat record his protest against the representation of the management before the learned Tribunal by Sh. Onkar Singh, Advocate, even at the time of furnishing of reply(s) by the management through their legal practitioner before the learned Tribunal to the respective claim petitions standing instituted before it by the workmen besides at the time of striking of issues inter se the parties at lis, evidently no demur emanated on the part of the A.R. for the workmen qua the unauthorized representation of the management before the learned Tribunal through a legal practitioner aforesaid arising from the factum of his not falling within the categories of persons ordained in sub clauses (a), (b) & (c) of sub-section (2) of Section 36 of the Act, categories whereof of persons alone stand validly empowered to represent it before the learned Tribunal, hence enjoining the legal practitioner for validating his representation on behalf of the management before the learned Tribunal to prior thereto obtain an express consent of the AR for the workmen which however remained un-purveyed by the latter to the legal practitioner, hence may be invalidated his representation on behalf of the management before the learned Tribunal.

5. For reiteration, a grievance stood ventilated therein of Sh. Onkar Singh, Advocate though competent to make a representation on behalf of the employer/management before the learned Tribunal, yet such representation on its behalf standing ingrained with an aura of legal sanctity only in the event of a prior express consent to his appearance before it for espousing the stand of the employer in repudiation to the claim petition projected before the Tribunal by the workmen, standing purveyed by the AR for the workmen to the legal practitioner, besides cumulatively the leave of the learned Tribunal while being statutorily imperative for validating its representation by Sh. Onkar Singh, Advocate before it, standing afforded whereas with the A.R. for the workmen not previously expressly consenting to the representation on behalf of the employer before the learned Tribunal by a legal practitioner nor the Tribunal granting leave to the appearance/representation of the employer/management before it by a legal practitioner, entailed the consequences of an embargo constituted under sub section (3) of Section 36 of the Act to stand attracted qua Onkar Singh, Advocate, his not falling within the categories of the persons enumerated in sub-clauses (a), (b) & (c) and sub-section (2) of Section 36 therein. The apposite application ventilating the grievances aforesaid of the A.R. for the workmen stood replied to by the employer/petitioner herein. The apposite provisions of sub clauses (a), (b) & (c) of sub-section (2) of Section 36 of the Act stand extracted hereinafter.

> "36.Representation of parties. (1) A workman who is a party to a dispute shall be entitled to be represented in any proceedings under this Act by- (a) [any member of the executive or other office-bearer] of a registered trade union of which he is a member;
>
> (b) [any member of the executive or other office-bearer] of a federation of trade unions to which the trade union referred to in Clause (a) is affiliated;
>
> (c) where the worker is not a member of any trade union, by [any member of the executive or other office-bearer of any trade union connected with, or by any other workman employed in the industry in which the worker is employed and authorised in such manner as may be prescribed :
>
> [Provided that, where there is a recognised union for any undertaking under any law for the time being in force, no workman in such undertaking shall be entitled to be represented as aforesaid in any such proceeding (not being a proceeding in which the

legality or propriety of an order of dismissal, discharge, removal, retrenchment, termination of service, or suspension of an employee is under consideration) except by such recognised union.

(2) An employer who is a party to a dispute shall be entitled to be represented in any proceeding under this Act by–

(a) an officer of an association of employers of which he is a member;

(b) an officer of a federation of association of employers to which the association referred to in Clause (a) is affiliated;

(c) whether the employer is not a member of any association of employers, by an officer of any association of employers connected, with, or by any other employer engaged in, the industry in which the employer is engaged and authorised in such manner as may be prescribed.

(3) No party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceeding under this Act or in any proceedings before a Court.

(4) In any proceeding before a Labour Court, Tribunal or National Tribunal, a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and with the leave of the Labour Court, Tribunal or National Tribunal as the case may be."

6. Another application(s) constituted under Section 36(4) of the Act stood instituted before the Tribunal by the employer for leave being granted to it for its standing represented before it by Sh. Onkar Singh, Advocate. The said application(s) was/were contested by the workmen by instituting a reply(s) thereto.

7. The Tribunal on a consideration of material before it, under a common order(s), allowed the application(s) preferred before it under Section 36(2) of the Act by the A.R for the workmen, whereas it dismissed the application(s) preferred before it by the employer/management under Section 36(4) of the Act. The employer stands aggrieved by the order(s) rendered by the Tribunal, hence has concerted to assail it by instituting writ petition(s) therefrom before this Court.

8. The expostulations of law in **AIR 1977 SC 36, Paradip Port Trust, Paradip vs. Their Workmen** , the relevant paragraphs whereof stand extracted hereinafter, though cast an obligation upon an employer to elicit a prior express consent from the A.R. for the workmen for its standing represented by a legal practitioner before the learned Tribunal for hence validating any representation on its behalf by a legal practitioner. Also it is mandatory for the management for validating its representation before the Tribunal by a legal practitioner to seek the apposite leave of the learned Tribunal for the purpose aforesaid. Both the mandatory indispensable requirements of meteing of prior express consent of the A.R. for the workmen for validating the representation of the management before the learned Tribunal by a legal practitioner also the apposite leave of the learned Tribunal for the purpose aforesaid stood not satiated. Obviously, the learned Tribunal was constrained to render the impugned order(s).

> " 15. The parties, however, will have to conform to the conditions laid down in section 36(4) in the matter of representation by legal practitioners. Both the consent of the opposite party and the leave of the Tribunal will have to be secured to enable a party to seek representation before the Tribunal through a legal practitioner qua legal practitioner. This is a clear significance of section 36(4) of the Act.

16. If, however, a legal practitioner is appointed as an officer of a company or corporation and is in their pay and under their control and is not a practicing advocate the fact that he was earlier a legal practitioner or has a legal degree will not stand in the way of the company or the corporation being represented by him. Similarly if a legal practitioner is an officer of an association of-employers or of a federation of such associations, there is nothing in section 36(4) to prevent him from appearing before the Tribunal under the provisions of section 36(2) of the Act. Again, an office bearer of a trade union or a member of its executive, even though he is a legal practitioner, will be entitled to represent the workmen before the Tribunal under section 36(1) in the former capacity. The legal practitioner in the above two cases will appear in the capacity of an officer of the association in the case of an employer and in the capacity of an office bearer of the union in the case of workmen and not in the capacity of a legal practitioner. The fact that a person is a legal practitioner will not affect the position if the qualifications specified in section 36(1) and section 36(2) are fulfilled by him.

17. It must be made clear that there is no scope for enquiry by the Tribunal into the motive for appointment of such legal practitioners as office bearers of the trade unions or as officers of the employers associations. When law provides for a requisite qualification for exercising a right fulfillment of the qualification in a given case will entitle the party to be represented before the Tribunal by such a person with that qualification. How and under what circumstances these qualifications have been obtained will not be relevant matters for consideration by the Tribunal in considering an application for representation under section 36(1) and section 36(2) of the Act. Once the qualifications under section 36(1) and section 36(2) are fulfilled prior to appearance before Tribunals, there is no need under the law to pursue the matter in order to find out whether the appointments are in circumvention of section 36(4) of the Act. Motive of the appointment cannot be made an issue before the Tribunal.

21. We have given anxious consideration to the above submission. It is true that " and" in a particular context and in view of the object and purpose of a particular legislation may be read as "or" to give effect to the intent of the legislature. However, having regard to the history of the present legislation, recognition by law of the unequal strength of the parties in adjudication proceedings before a Tribunal, intention of the law being to discourage representation by legal practitioners as such, and the need for expeditious disposal of cases, we are unable to hold that "and" in section 36(4) can be read as "or".

22. Consent of the opposite party is not an idle alternative but a ruling factor in section 36(4). The question of hardship, pointed out by the Solicitor General, is a matter for the legislature to deal with and it is not for the courts to invoke the theory of injustice and other consequences to choose a rather strained interpretation when the language of section 36 is clear and unambiguous.

23. Besides, it is also urged by the appellant that under section 30 of the Advocates Act, 1961, every advocate shall be entitled "as of right" to practise in all courts, and before only tribunal section 30(i) and (ii). This right conferred upon the advocates by a later law will be properly safeguarded by reading the word "and" as "or" in section 36(4), says counsel. We do not fail to see some difference in language in section 30(ii) from the provision in section 14(1) (b) of the Indian Bar Councils Act, 1926, relating to the right of advocates to appear before courts and tribunals. For example, under section 14(1) (b)of the Bar

> Councils Act, an advocate shall be entitled as of right to practise save as otherwise provided by or under any other law in any courts (other than High Court) and tribunal. There is, however, no reference to "any other law" in section 30(ii) of the Advocates Act. This need not detain us. We are informed that section 30 has not yet come into force. Even otherwise, we are not to be trammeled by section 30 of the Advocates Act for more than one reason. First, the Industrial Disputes Act is a special piece of legislation with the avowed aim of labour welfare and representation before adjudicatory authorities therein has been specifically provided for with a clear object in view. This special Act will prevail over the Advocates Act which is a general piece of legislation with regard to the subject matter of appearance of lawyers before all courts, tribunals and other authorities. The Industrial Disputes Act is concerned with representation by legal practitioners under certain conditions only before the authorities mentioned under the Act.Generalia Specialibus Non Derogant. As Maxwell puts it:
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> "Having already given its attention to the particular subject and provided for it, the legislature is reasonably presumed not to intend to alter that special provision by a subsequent general enactment unless that intention be manifested in explicit language ..... or there be something in the nature of the general one making it unlikely that an exception was intended as regards the special Act. In the absence of these conditions, the general statute is read as silently excluding from its operation the cases which have been provided for by the special one." Maxwell on Interpretation of Statues, 11th Edition, page 169.
>
> 24.Second, the matter is not to be viewed from the point of view of legal practitioner but from that of the employer and workmen who are the principal contestants in an industrial dispute. It is only when a party engages a legal practitioner as such that the latter is enabled to enter appearance before courts or tribunals. Here, under the Act, the restriction is upon a party as such and the occasion to consider the right of the legal practitioner may not arise.
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> 26. A lawyer, simpliciter, cannot appear before an Industrial Tribunal without the consent of the opposite party and leave of the Tribunal merely by virtue of a power of attorney executed by a party. A lawyer can appear before the Tribunal in the capacity of an office bearer of a registered trade union or an officer of associations of employers and no consent of the other side and leave of the Tribunal will, then, be necessary."

9. A rummaging of the entire record of the case(s) explicitly bespeaks the factum of no prior express consent standing meted by the A.R. for the workmen, to the employer for validating its representation before the Tribunal by Sh. Onkar Singh, Advocate. Furthermore, the learned Tribunal also not contemporaneously alongwith lack of prior express consent standing meted by the AR for the workman to the management for validating its representation through a legal practitioner before the learned Tribunal granting leave to legal practitioner nominated by the management for representing its cause before the learned Tribunal constrained a conclusion from it of its representation before it by Onkar Singh, Advocate being legally un-sanctimonious. However, even in the absence of an prior express consent standing not purveyed by the A.R. for the workmen to Sh. Onkar Singh, Advocate for hence satiating the initial condition foisted in sub section (4) of Section 36 of the Act, nonetheless the absence of an prior express consent by the A.R. for the workmen to the employer for validating its representation before it through the aforesaid would not ipso facto render open any inference of the initial condition contemplated in sub section (4) of Section 36 of the Act qua purveying of an prior express consent by the A.R for

the workmen to the employer/petitioner herein for legitimizing its representation before it by a legal practitioner to hence stand unsatiated nor would the non-meting of an express prior consent by the A.R. for the workman to the management for validating its representation before it by a legal practitioner per se render unauthorized the representation on its behalf before the Tribunal by Sh. Onkar Singh, Advocate, as implied consent by the A.R. for the workmen to the representation of the management/employer/petitioner herein before the learned Tribunal by a legal practitioner as marshalable from the apposite facts besides surrounding circumstances has also been held in a judgment of Delhi High Court reported in **2014 LLR 345 Samarendra Das vs. M/s Win Medicine Pvt. Ltd**. the relevant paragraphs whereof stands extracted hereinafter to legitimize the representation of the management before the Tribunal by a legal practitioner.

> "4. The Labour Court while dismissing the application, relied upon the judgment of the Division Bench of this Court titled as M/s Bhagat Brothers vs. Paras Nath Upadhyay, decided on August 13, 2008 in LPA No.212/2008 wherein in para 7 and 9, the Division Bench held as under:-
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> "7. Section 36(4) does not prescribe that the consent must be given in a particular manner or in a particular form. In a given case the consent of a party, which is the basis for grant of leave to the other party for being represented by an advocate in a proceeding under the Industrial Disputes Act, could be inferred from the surrounding circumstances as also the conduct the consenting party. Section does not insist upon a written consent.
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> Consent can be implied. Consent once given cannot be revoked at a later stage because there is no provision in the Industrial Disputes Act enabling such withdrawal or revocation.
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> 9. Since there was no objection raised on the first date of the proceedings to the appearance of a legal practitioner on behalf of the other side, the consent is to be taken as implied consent. As the Labour Court has also allowed Mr. J.K. Singhal, the legal practitioner, to appear on behalf of the appellant company, it will have to be deemed that the Labour Court had granted leave to Mr. Singhal to appear for the appellant-management, though there was no specific or express consent given by the respondent workman or his representative and through the Labour Court had not specifically granted leave to Mr. Singhal to appear fro the appellant-management. From the conduct of the Union representative as well as from the fact that Mr. Singhal was allowed to appear in the matter before the Labour for several dates, leave will have to be inferred having been granted."…….
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> 8. On a specific query to the learned counsel for the respondent as to whether Advocates appears in robes before the Labour Court, the answer was in affirmative. I find that the surrounding circumstances and the conduct of the petitioner was such that consent can be implied inasmuch as there was no objection raised by the respondent on the first day when Mr. Saurabh Munjal, Advocate had appeared on July 108, 2011. I find, even on September 15, 2011, Mr. Jitesh Pandey, Advocate appeared on behalf of the respondent, there was no objection taken by the petitioner. I also find Mr. Saurabh Munjal and Mr. Jitesh Pandey, Advocates appeared thereafter in the presence of the workman on November 29, 2011 and January 07, 2012. Further, since the objection has been taken when the case was listed for cross examination, the objection is clearly an afterthought. In view of the aforesaid factual position, I agree with the conclusion arrived at by the Labour Court and I dismiss the writ petition being without any merit."

10. The view as propounded therein was earlier taken by the Bombay High Court in a judgment reported in **2001(90) FLR 91, T.K. Varghese vs. Nichimen Corporation;** the relevant portion whereof stands extraction hereinafter:

> "There is no absolute bar for the legal practitioner to appear before the Labour Court/Tribunal as it is under Section 36(3) in the conciliation proceedings. No party can withhold appearance of a legal practitioner by denying "consent" without any justification and arbitrarily for any rhyme or reason. If a party is represented by an office bearer etc. of a Trade Union or an Association, it cannot refuse to grant consent to the other side without any reasonable cause and justification to engage a legal practitioner and the Labour Court/Tribunal can always consider the bona fides of such a party withholding consent and can always grant "leave" to the other parties to be represented by a legal practitioner in the interest of justice notwithstanding the refusal of consent by the other side."

11. However before proceeding to apply the raison d'etre or the ratio decidendi encapsulated in the judgments aforesaid of even implied consent of the A.R. for the workmen to the representation of the management before the Tribunal by a legal practitioner as garnerable from surrounding circumstances besides the conduct of the parties appearing before the Tribunal standing on a formidable legal footing, even in the absence of an express prior consent standing purveyed by the A.R. for the workmen to the management for legitimising the representation of the employer before the Tribunal by a legal practitioner, it is imperative to proceed to discern from the material available on record qua any personification embodied therein of any implied consent standing meted by the A.R. for the workmen to the appearances recorded on behalf of the management before the learned Tribunal by a legal practitioner. An incisive rummaging of the record is loudly communicative of the factum of Sh. Onkar Singh, Advocate on notice standing served upon the employer putting in appearance on its behalf before the Tribunal and his appearance on behalf of the employer before the Tribunal remaining un-protested by the A.R. for the workmen uptill reply(s) stood furnished by the petitioner herein through its legal practitioner to the claim petitions standing instituted by the workmen before the learned Tribunal. Evidently with no protest to the appearance of Sh. Onkar Singh, Advocate for representing the cause of the employer/management before the learned Tribunal forthcoming at the instance of the A.R for the workmen in proceedings before the Tribunal uptill reply(s) to the claim petitions stood furnished by it before it besides even when at the stage of striking of issues there was no demur on the part of A.R for the workmen to the representation of the management before the learned Tribunal by a legal practitioner obviously is per se evidence of acquiescence by the A.R. for the workmen to the representation of the employer/management before the Tribunal through a legal practitioner. Acquiescence as emanable from the aforesaid material existing on record tantamounts to implied consent of the AR for the workmen to the representation of the management before the learned Tribunal by a legal practitioner. Necessarily when express prior consent for reasons aforestated though not standing purveyed by the A.R. for the workmen to the representation of the employer before the Tribunal through a legal practitioner rather when implied consent is also a legally approbated mode as encapsulated in judicial dicta to foist tenability to the representation of the employer/petitioner herein before the Tribunal by a legal practitioner, as a sequitur, with the material aforestated manifesting the purveying of implied consent by the A.R. for the workmen to the representation of the employer before the learned Tribunal by a legal practitioner, the recording of findings in the impugned order of lack of express prior consent debarring the legal practitioner to make representations, before the learned Tribunal on behalf of the management, is wholly unwarranted.

12. Dehors the above with the foisting of tenability to the meteing of implied consent by the A.R. for the workmen to the representation of the employer before the Tribunal even the refusal by the learned Tribunal of leave to the legal practitioner for espousing the cause of the employer before it stands also foisted upon fragile and tenuous grounds rather when this Court holds with firmness of implied consent standing meted by the A.R for the workmen to the management/petitioner herein for it standing represented before the learned Tribunal by a legal practitioner concomitantly leads to an inference of the refusal by the learned Tribunal under the impugned order to the legal practitioner representing the management/employer before it, standing anchored upon wholly shaky and nebulous reasons. The fragility of the reasons afforded by the learned Tribunal to reject application(s) preferred before it by the employer under Section 36(4) of the Act for leave being granted to it for its cause before it being espoused by a legal practitioner intrinsically entwined with the reasoning afforded hereinabove of implied consent by the A.R. for the workmen as emenable from a close discernment of the material on record standing purveyed by him to the representation of the management before the learned Tribunal by a legal practitioner besides with the apposite implied consent standing on a firm legal pedestal for validating its representation by a legal practitioner before the Tribunal obviously while also impinging upon the soundness of the reasoning afforded by the learned Tribunal to hold qua the A.R for the workmen sustaining the grounds manifested in the apposite application, hence imperatively the fragility of the reasoning afforded by the learned Tribunal in its impugned order contrarily entails this Court to conclude of the AR for the workmen evidently without any reasonable cause rather arbitrarily withholding his express consent to the representation by the legal practitioner on behalf of the management before the Tribunal whereupon this Court rather stands enjoined to allow the application preferred by the Management before the Tribunal under Section 36(4) of the Act for leave being granted to it for validating its representation before the Tribunal by a legal Practitioner.

13. In other words, with an immense gap or hiatus occurring inter-se the representation before the learned Tribunal on behalf of the management by a legal practitioner vis-à-vis an application standing preferred before it by the AR for the workmen for debarring him for want of an express prior consent standing meted by him for hence sanctifying his representation on behalf of the management before the learned Tribunal whereas the hiatus or the gap intra-se the aforesaid representation on behalf of the management before the Tribunal by a legal practitioner besides its representation before it by a legal practitioner remaining unprotested earlier thereto vis-à-vis the belated preferment of an apposite application by the A.R. for the workmen before the Tribunal rather evinces an inference of an implied consent standing purveyed by the AR for the workmen for the representation of the management before the learned Tribunal by a legal practitioner, rendering the withholding of an express consent by the AR for the workmen to the management for its representation by a legal practitioner for espousing its cause before the learned Tribunal to stand imbued with a vice of arbitrariness as well as it being without any reasonable cause. Concomitantly, it was incumbent upon the learned Tribunal to discountenance the aforesaid concert of the AR for the workmen, its contrarily countenancing the said concert has committed a gross illegality.

14. Furthermore the factum of the Tribunal permitting the legal practitioner to put in an un-protested appearance before it under a power of attorney for espousing before it the cause of the management, is a copious manifestation of hence leave standing granted by the Tribunal to the legal practitioner to record before it his appearance on behalf of the employer rendering unnecessary the preferment of an application before it by the petitioner herein under Section 36(4) of the Act for leave being granted to it for the purpose aforesaid. The view aforesaid taken by this Court has earlier been taken by the Bombay High Court in

2005(107) FLR 932, **Salvation Army** versus **Sunil J. Ingle**, relevant paragraphs whereof stand extracted hereinafter.

> " **[4]** Section 36 of the Industrial Disputes Act, 1947 deals with the representation of parties. Sub section (1) provides that a workman who is a party to a dispute shall be entitled to be represented in any proceeding under the Act by any of those persons who meet the qualifications in Clauses (a) , (b) and (c). A provision is similarly made in relation to the representation to an employer in sub-section (2). Sub-section (3) then provides that no party to a dispute shall be entitled to be represented by a legal practitioner in any conciliation proceeding under the Act or in any proceedings before the Court. Sub-section (4) provides that in any proceeding before a Labour Court, Tribunal or National tribunal a party to a dispute may be represented by a legal practitioner with the consent of the other parties to the proceedings and with the leave of the labour Court, Tribunal or National Tribunal, as the case may be. Therefore, two requirements must be fulfilled before a legal practitioner can appear in such proceedings vis. (i) the consent of the other party to the proceedings and (ii) the leave of the Court or Tribunal as the case may be.
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> **[6]** Having regard to this settled position in law, what emerges in the present case is that on 27th March, 2002, the Advocate appearing on behalf of the petitioner filed his Vakalatnama (Exh. C-3). There was no objection to the vakalatnama. On that day, the petitioner filed an application questioning the jurisdiction of the Labour Court (Exh. C-4) and the matter was adjourned by consent for the reply of the respondent to 10th April 2002. The taking of the vakalatnama on the record is indicative of the leave which must be read and regarded as having been granted by the Labour Court. There was no objection to the filing of the Vakalatnama and to the appearance of the advocate on 27th March, 2002. In view of the law laid down by the Division Bench of this court in Engineering Mazdoor Sabha (supra) , it was clearly not open to the respondent to raise an objection, having failed to raise it on the very first day of the appearance of the advocate. Before the Labour Court, the judgment of the Division Bench of this Court in Engineering Mazdoor Sabha (supra) and of a Learned Single Judge in T. K. Varghese (supra) were cited. The labour Court declined to follow the settled position in law which emerges from these judgments for the specious reason that the respondent objected to the appearance of the Advocate on the next date of hearing. The order of the Labour court is manifestly in error and the interference of this Court under Article 227 of the Constitution is warranted. Before concluding it would be necessary to record that the respondent has not appeared in these proceedings. Counsel appearing for the petitioner stated that on several of the previous hearings, the matter had to be adjourned since the respondent had remained absent and that in pursuance of the directions of this Court telegraphic intimation has been furnished to the respondent from time to time."

In sequel, the apposite application preferred by the petitioner(s) warranted acceptance.

15. The counsel for the workmen herein contends with the force of the superior legal acumen with which a legal practitioner stands foisted vis-à-vis the A.R. for the workmen would lend an edge to or foist in the employer a leverage to underpin the cause of the workmen espoused before the Tribunal by the A.R. for the workmen rendering it to be an unequal legal battle intra se them. However, the said ground succumbs in the face of no

material existing on record, of the A.R. for the workman being a raw hand or his being inexperienced, hence not possessing the requisite legal expertise to efficaciously espouse the cause of the workmen before the Tribunal. In the absence of the aforesaid material existing on record, this Court holds with aplomb of the enriched legal experience of the legal practitioner representing the management before the learned Tribunal not baulking or thwarting the efficacious espousal of the cause of the workmen herein before the learned Tribunal through their A.R, who too when not exemplified by any germane material existing on record to be inexperienced or a raw hand, is to be hence construable to be possessed of the requisite legal acumen for giving a competitive fight to the legal practitioner representing the management before the learned Tribunal.

In view of above, the petitions are allowed and impugned order(s) stands quashed and set aside. Records be sent back forthwith.

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

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

Cr. Appeal No. 199 of 2010.
Reserved on: April 08, 2016.
Decided on: April 11, 2016.

Indian Penal Code, 1860- Section 376, 366 and 417- Prosecutrix was learning tailoring- she did not return to her home- on inquiry a colleague told the father of the prosecutrix that she was seen with the accused- matter was reported to the police- FIR was registered- prosecutrix was recovered- accused was tried and acquitted by the trial Court- prosecutrix stated that she was overpowered by accused and was raped in Nallah- she went to the shop and when she was returning she was again raped at the same place- she was taken to the house of B, where she was again raped- prosecutrix was aged 20 years at the time of incident- she had not revealed this incident to any person, not even to B- she met many person on the way- she stayed in the house of the accused- when the wife of the accused came, prosecutrix was forced to leave the house of the accused – prosecutrix had voluntarily gone with the accused – trial Court had rightly acquitted the accused- appeal dismissed.

(Para- 4 to 16)

For the appellant: Mr. Ramesh Thakur, Dy. Advocate General.
For the respondents: None.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 27.2.2010, rendered by the learned Sessions Judge, Kinnaur, Sessions Division at Rampur Bushahr, H.P., in Sessions Trial No. 21 of 2007, whereby the respondent-accused (hereinafter referred to as

the accused), who was charged with and tried for offences punishable under Sections 376, 366 and 417 IPC has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 14.9.2006, complainant Tej Ram, father of the prosecutrix, informed the matter in the Police Station disclosing therein that his daughter (prosecutrix) aged 20 years did not return home who had been learning tailoring work at Village Lagoti from one Vijay Kumar. She used to go daily from her house. On 9.9.2006, she did not return to her house. He thought that she might have gone to the house of his sister but on 11.9.2006 when he visited Vijay Kumar, Tailor Master, he was informed that the prosecutrix did not join her tailoring classes since 10.9.2006 and another girl who was also learning tailoring in the same shop disclosed that the prosecutrix was seen with Pradeep resident of Kua on 9.9.2006. The complainant claimed that his daughter had been taken away by Pradeep Kumar by alluring her to get married, against her consent. FIR was registered. The prosecutrix was recovered from the house of Gian Chand at village Chalathar. She was medically examined and case property was taken into possession. The case was investigated and challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 12 witnesses. The accused was also examined under Section 313 Cr.P.C. He denied the prosecution allegations and pleaded innocence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Ramesh Thakur, Dy. Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. I have heard the learned Dy. Advocate General for the State and also gone through the judgment and records of the case carefully.

6. PW-1 Gian Chand deposed that he was permanent resident of village Chalathar. At about 1:00 PM about two years and six months back, the prosecutrix had visited his house. He interrogated her. She informed that the accused Pradeep Kumar had enticed her away with a view to marry her and had committed sexual intercourse with her. He informed the father of the prosecutrix, namely, Tej Ram. On the next day, i.e. 14.9.2006, the police visited his house along with Tej Ram and took the prosecutrix vide memo Ext. PW-1/A. In his cross-examination, he deposed that the prosecutrix had informed him that the accused had taken her and dropped her near her house and the accused left. The prosecutrix has stayed in his house on 13.9.2006 and she was taken by her father on the next day.

7. PW-2 (name withheld) is the prosecutrix. According to her, she was learning tailoring and stitching work in the shop of Vijay Kumar in Village Lagoti. On 9.9.2006, she left her house for the shop. When she was passing through the area of Harlu Nallah at about 9:00 AM, the accused appeared from behind the bushes and caught hold of her. The area of Harlu Nallah is away from the village abadi and no one was there at that time. The accused forcibly took her to a place behind the bushes and had forcibly broken the string of her salwar. She cried for help but no one was there to take care of her. The accused also tried to gag her mouth. Thereafter, the accused laid her on the ground and forcibly committed sexual intercourse with her. He released her with threatening not to disclose the matter to anyone. She then visited the tailoring shop of Vijay Kumar. After working for the day in the shop, she was on her way from Village Lagoti to her house. In the evening at about 4:00 PM, the accused again met her in the same area and again forcibly committed sexual intercourse with her without her consent and against her will. Her salwar got torn

when the accused had committed sexual intercourse with her for the first time. After the second act of rape the accused took her to village Tharwin to the house of Bimla Devi. The accused informed Bimla Devi that they had been away to Kullu for appearing in examination. The accused further informed that he was from Village Didi Dhar and she was informed of village Ropa. Smt Bimla Devi offered them shelter in a separate room. The accused committed sexual intercourse with her for the third time at the house of Smt. Bimla Devi on the night intervening 9.9.2006 and 10.9.2006. The accused then took her to his house in village Mool on 10.9.2006. The mother of the accused was present in the house. The accused left for his another house in village Kua on 11.9.2006. The accused and his wife were putting up in village Kua. The accused thereafter did not return to his house in village Mool. The mother of the accused left for village Kua on 12.9.2006. She was asked to stay in village Mool. The mother of the accused returned to her house on 12.9.2006. She was told that quarrel has taken place between the accused and his wife. On 13.9.2006, the wife of the accused visited village Mool and started quarrelling with her. She was beaten up badly and turned her out of the house. She had to run for life and took shelter in the house of one Gian Chand (PW-1). She was interrogated by Gian Chand. Thereafter her father and police reached there on 14.9.2006. She was handed over to the police vide memo Ext. PW-1/A. The police took into possession her clothes and sent her for medical examination to CHC Ani on 15.9.2006. In her cross-examination, she deposed that she informed the police that the accused tried to gag her mouth. (Confronted with statement under Section 161 Cr.P.C. wherein it is not so recorded). She informed the police that accused was from Didi Dhar and she was stated to be from Village Ropa. (Confronted with statement under Section 161 Cr.P.C. wherein it is not so recorded). She had told the police that the accused had threatened her. (Confronted with statement under Section 161 Cr.P.C. wherein it is not so recorded). She also admitted that FIR Ext. PW-2/C was recorded after more than a month. Village Lagoti is at a distance of 2-3 hours' walk from village Tharwin. She also admitted that the wife of the accused had dragged her out of the house and her mother-in-law on 13.9.2006. She has not told anything about this incident to Smt. Bimla Devi after departure from her house.

8. PW-3 Tej Ram is the father of the prosecutrix. According to him, on 9.9.2006 the prosecutrix left for the tailoring shop of Vijay Kumar. She did not return back. On 11.9.2006, he visited the shop of Vijay Kumar who confirmed that the prosecutrix was not attending to her work w.e.f. 10.9.2006. He was informed by apprentice girl at the shop of Vijay Kumar that the accused was noticed with his daughter on 9.9.2006. On 13.9.2006 Gian Chand informed that his daughter was at his house. He reported the matter to the police vide FIR Ext. PW-3/A. She accompanied the police to the house of PW-1 Gian Chand. The prosecutrix was recovered from the house of PW-1 Gian Chand where she told that the accused had forcibly taken her to bushes in the area of Harlu Nallah. He committed sexual intercourse with her. In his cross-examination, he admitted that he lodged FIR Ext. PW-3/A after the prosecutrix was recovered.

9. PW-4 Bimla Devi testified that the accused and the prosecutrix visited her house. They wanted to stay for the night. The accused informed her that they had been on way from Kullu to their house and wanted shelter for the night. She provided food to them. The prosecutrix had kept mum when she was interrogated by her. The accused and the prosecutrix were provided bed by her in a separate room. They left unannounced on 10.9.2006 in the early hours. In her cross-examination, she admitted that when separate room was provided, the prosecutrix did not object to the same. She did not refuse to stay with the accused.

10. PW-5 Dhian Singh deposed that the police has taken piece of cloth Ext. P-2 of the bed sheet vide memo Ext. PW-2/B and sealed in a cloth parcel with seal. He told that his wife informed him that the accused and the prosecutrix stayed in their house on the night intervening 9.9.2006 and 10.9.2006.

11. PW-6 Dr. Rina Sharma, has medically examined the prosecutrix. She issued MLC Ext. PW-6/A. According to her, the possibility of sexual intercourse with the prosecutrix could not be ruled out at the time of occurrence. In her cross-examination, she admitted that on the basis of rupture of hymen, she could not say when exactly the sexual intercourse had taken place for the first time.

12. PW-9 Vijay Kumar testified that he was running tailoring shop in the name and style of Verma Tailor at Lagoti for several years. The prosecutrix was learning tailoring and stitching work. On 9.9.2006, the prosecutrix visited his shop for learning, however, on the next day, she did not attend the shop. She was also absent on 11.9.2006. Thereafter, the father of the prosecutrix visited his shop and informed that the accused had enticed the prosecutrix away.

13. PW-11 Insp. Daya Sagar deposed that on 14.9.2006, the father of the victim Tej Ram reported the matter to the police and FIR Ext. PW-3/A was registered. The victim was recovered from the house of Gian Chand at village Gharathal vide memo Ext. PW-1/A. She was medically examined and her clothes were taken into possession. In his cross-examination, he admitted that what emerged during the investigation was that before registration of the FIR, the victim had stayed in the house of the accused for 4 days. He also admitted that the family members of the accused were residing in the same house. The prosecutrix and the accused also stayed in the house of Bimla Devi on 9.9.2006.

14. The case of the prosecution, precisely, is that the prosecutrix, when she was going to Village Lagoti on 9.9.2006, was overpowered by the accused, who raped her in Harlu Nallah. Thereafter, she went to the shop of Vijay Kumar. When she was coming back around 4:00 PM on the same day, the accused again met her at the same place and he again raped her. Thereafter, the accused took her to village Tharwin to the house of Bimla Devi. She was offered separate room by Bimla Devi. The accused again committed sexual intercourse with her for the third time in the house of Bimla Devi. Thereafter, the accused took her to his house in village Mool on 10.9.2006.

15. The age of the prosecutrix at the time of incident was 20 years. In case, she had been raped forcibly and against her will by the accused, she should have narrated the incident to PW-9 Vijay Kumar (tailor master), in whose shop she was learning tailoring and stitching work. He could have informed her parents. The prosecutrix had travelled with the accused from Village Lagoti to village Tharwin where she stayed in the house of Bimla Devi. She should have disclosed the incident to Bimla Devi. She, instead of disclosing the incident to Bimla Devi agreed to live in separate room. She must have met number of persons on the way from Village Lagoti to village Tharwin, to whom she could disclose the incident. She instead of coming back from the house of Bimla Devi accompanied the accused to his house at village Mool on 10.9.2006. She stayed in the house of the accused till 13.9.2006. It is only when the wife of the accused came back to village Mool, the prosecutrix was forced to leave the house of the accused. PW-2, the prosecutrix has categorically stated in her statement that she was forcibly dragged out of the house of the accused by the wife of the accused. Thereafter, she came and stayed in the house of Gian Chand from where she was recovered. The prosecutrix, being major, has accompanied the accused voluntarily from Village Lagoti to village Tharwin and from village Tharwin to village Mool.

16. The prosecutrix has gone missing on 9.9.2006, however, surprisingly enough, the father of the prosecutrix visited the shop of Vijay Kumar only on 11.9.2006. PW-3 Tej Ram, father of the prosecutrix, in his statement has admitted that the FIR Ext. PW-3/A was only registered when the prosecutrix was recovered. PW-11 Insp. Daya Sagar has admitted that the prosecutrix has remained in the house of accused for 4 days. The family members of the accused were also present in the house. In case, it was the case of forcible sexual intercourse, the prosecutrix would have told the family members of the accused, including his mother, who were present in the house at village Mool.

17. Thus, the prosecution has failed to prove the case against the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 27.2.2010.

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

****

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

Deepti Gupta & ors ...Applicants/Defendants 1 to 4
Versus
Karam Singh ....Non applicant/Plaintiff.

OMP No. 399 of 2015 in
C.S No.49 of 2015
Reserved on: 1.4.2016
Decided on: 12.4.2016.

Code of Civil Procedure, 1908- Order 7 Rule 11- Application for rejection of the plaint has been filed pleading that suit has been valued at Rs. 70,00,00/- for the purpose of Court fees and jurisdiction, Court fees of Rs. 72,560/- has been paid on the same but this valuation is contrary to paras-6 and 7 of the plaint, wherein it has been pleaded that market value of the suit property is more than rupees Six crores and plaintiff is required to affix the court fees on the market value assessed by the plaintiff at Rs. 6 crores- held, that deficiency of court fee is not a ground to reject the plaint- plaint can only be rejected if the plaintiff fails to pay the deficient court fee despite having been called upon to do so- suit has been filed for cancellation of the deed- if the executant wants the deed to be annulled, he has to seek cancellation of the deed and to pay ad valorem Court fee on the consideration, but if a non-executant seeks annulment of deed then he has to pay court fees as per Article 17(iii) of the Second Schedule of the Act- if the non-executant is not in possession, he has to seek consequential relief of possession and has to pay Court fees as provided under Section 7(iv) (c) of the Act- in the present case, plaintiff has sought the cancellation of the deed and he has to pay the court fee on the amount mentioned in the deed and not on the market value – the price mentioned in the deed is 70 lakh and, therefore, Court fee has correctly been paid on that amount. (Para-4 to 15)

Cases referred:

Devta Satya Narain & anr Vs. Land Chand & ors 2006 (3) Shim.LC 92
Rachna Sharma Vs. Meena Kumari Sharma, 2013 (1) Him L.R. 318
Niranjan Kaur Vs. Nirbigan Kaur, AIR 1981 Punjab & Haryana 368
Manohar Lal Vs. Ram Avtar (1990) 1 Revenue Law Reporter 431

Suhrid Singh @ Sardool Singh Vs.Randhir Singh, AIR 2010 SC 2807

For the Applicants Defendants 1 to 4.	Mr. J.C. Katoch and Ms. Anjali Soni Verma, Advocates.
For the Non applicant/ Plaintiff	Mr.Adarsh Kumar Vashisht, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

OMP No. 399 of 2015

Applicants have sought rejection of the plaint by moving this application under order 7 Rule 11 of CPC on the ground that the same is under valued. It is alleged that though plaintiff in paragraph 13 of the plaint has alleged the value of the suit for the purposes of court fee and jurisdiction at Rs.70,00,000/- (Rs.Seventy lacs only) and affixed a court fee of Rs.72,560/-, but this valuation is contrary to the pleadings set out in paras 6 and 10 of the plaint, wherein it is specifically averred that the real market value of the suit property is more than Rs.6,00,00,000/-(Rs.Six crores only) and, therefore, the plaintiff is bound to affix the court fee on the market value assessed by the plaintiff at Rs.6,00,00,000/- .

2. In reply to the application non applicant/ plaintiff has raised preliminary objection regarding the maintainability of the application on the ground of concealment and concoction of material facts and on merits it is averred that since price mentioned in the sale deed is of Rs.70,00,000/-, therefore, the plaintiff was only required to affix the court fee on the said amount even though the market value has been averred to be Rs.6,00,00,000/-. It is further contended that since the suit seeks setting aside of the sale deed in question, therefore, it is the valuation affixed on the instrument i.e. sale deed which would determine the valuation of the suit, which in turn would form the basis of affixing the court fees.

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

3. At the outset, I may observe that deficiency of court fee, even if proved, cannot be a ground for rejecting the plaint unless the person by whom such fee is payable in whole or part, as the case may be, is allowed an opportunity to make good the deficiency. This is so prescribed in Section 149 of Code of Civil Procedure, which reads thus:-

> *"149. Power to make up deficiency of court fees.- Where the whole or any part of any fee prescribed for any document by the law for the time being in force relating to court fees has not been paid, the court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such court fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance.*

4. Learned counsel for the applicants Mr. J.C. Katoch and Ms. Anjali Soni Verma, Advocates, have vehemently argued that since subject matter of the plaint is a land and building, then the court fee shall have to be affixed on the market value, comprising of land and building, which as per the plaintiff himself is worth Rs.6,00,00,000/-. In support of this contention, reliance has been placed on the judgments of this court; in ***Devta Satya Narain & anr*** Vs. ***Land Chand & ors 2006 (3) Shim.LC 92; Rachna Sharma*** Vs. ***Meena***

Kumari Sharma, 2013 (1) Him L.R. 318 and ***Khawaja Khallilullah*** Vs.***Mrs. Shamem Butt & ors (CMPMO No. 20 of 2012, decided on 1.4.2013).***

5. On the other hand, learned counsel for the plaintiff/non applicant has relied upon the decision of the Full Bench of learned Punjab and Haryana High Court in ***Niranjan Kaur*** Vs***. Nirbigan Kaur, AIR 1981 Punjab & Haryana 368.***

6. In *Devta Satya Narain's* case (supra), suit was filed for declaration that that 8 heads of property categorized (A) to (H) were owned and possessed by the plaintiff, and, therefore, the ***Pata Dwan*** (perpetual lease), executed by respondent No.1 therein be declared illegal, null and void and not binding on the plaintiffs. The defendants in the suit raised preliminary objection about improper valuation of the suit which led to the framing of issue No.8, which reads thus:

> *"Whether the suit has not been properly valued for the purposes of Curt fee and jurisdiction? OPD".*

7. Trial court, by referring to the provisions of H.P. Court fees Act, 1968, held that the suit ought to have been valued in accordance with the market value of the property and since it was not done, petitioner/plaintiff was directed to correct the valuation of the suit and pay the deficient court fee within 30 days from the date of passing of the order. It was this order which was challenged by way of Revision petition and this court held as under:

> *"6.Clause (c) of sub section (iv) of Section 7 of 1968 H.P. Act reads thus:*
>
> > *"for a declaratory decree and consequential relief; to obtain a declaratory decree or order, where consequential relief is prayed;"*
>
> *Sub – Section (iv) (supra) also provides that in all suits falling under clause (c) (supra), plaintiff shall state the amount at which he values the relief sought. Second proviso to sub section (iv) reads thus:*
>
> > *"Provided further that in suit coming under sub clause (c), in case where the relief sought is with reference to any property such valuation shall not be less than the value of the property calculated in the manner provided for by paragraph (v) of this section;"*
>
> *Sub section (v) of Section 7 of 1968 H.P. Act reads as under:*
>
> *"for possession of land, houses and gardens;*
> *In suits for the possession of land, houses and gardens- according to the value of the subject matter and such value shall be deemed to be –*
>
> > *where the subject matter is land, and– (a) to (d)……..*
> >
> > *(e) for houses and gardens; Where the subject matter is house or garden-*
> > *according to the market value of the house or garden;"*
>
> *7.Almost the entire section 7 of 1968 H.P. Act is in peri materia to the Central Court Fee Act, 1870, except that the second proviso to sub section (iv) is absent in the Central Act. The Central Act, therefore, does not have any provision identical or similar to the second proviso obtaining in 1968 H.P. Act.*
>
> *8.The point for consideration by this Court in the present petition, therefore, boils down to this:*

> *'In view of the second proviso to sub section (iv) of section 7 of 1968 H.P. Act (which is absent in the Central Act) in suits falling under clause (c) (supra), is it open to a plaintiff to value the suit if the relief sought is with reference to any property, in a manner other than provided in clause (v) of Section 7? In other words, is it open to a plaintiff in such a suit to fix the valuation of the suit other than based on the market value of the house or houses which are the subject matter of the suit?".*

9.Mr. Kuldip Singh, learned Senior counsel appearing for the petitioners submitted that I should not look at the frame of the suit only, but should go deeper into the substance of the plaint and by adopting this approach, I would find that the petitioners ' relief is restricted to only the challenge to a lease deed and there is nothing in the plaint relating to the property as such and the challenge being confined to a lease deed, the suit was properly valued based upon the annual rental of the property, i.e. Rs.1200/- per annum. In support of this contention, Mr. Kuldip Singh has relied upon two Single Bench judgments of Punjab High Court andDelhi High Court. His main reliance of course is upon the Single Bench judgment of Punjab High Courtin the case of Ram Kanwar Kidarmal and others v.Naurang Rai Kundan Lal and others, reported in AIR 1956 Punjab 251. *The Single Bench Delhi High Court judgment in the case of Union of India through Chief Commissioner Delhi State Vs. Sir Sobha Singh and Sons (P) Ltd., reported in ILR (1969) Delhi 120 merely, in turn, relies upon the ratio in the aforesaid Punjab High Court judgment. Punjab High Court judgment in the case of Ram Kanwar Kidarmal and others v. Naurang Rai Kundan Lal and others* (supra), *has construed the phrase "with reference to any property" occurring in an identical proviso in the Central Court Fees Act brought about by the Punjab Court Fees (Punjab Amendment) Act, 1953 as indicating and describing an interest which a person has in the property. By adopting this construction to the said proviso, the learned Single Judge of Punjab High Court in the aforesaid judgment was of the opinion that the word 'property' as occurring in the proviso should be construed to have been used in the sense of a right in the property and because the rights were in the nature of lease hold rights, court fee should be paid on the lease hold rights and not on the market value of the immovable property which might be the subject matter of the lease itself.*

10.To quote the learned Judge himself, I reproduce here-in-below the following observation in the aforesaid judgment which reads thus:

> *"It appears to me difficult to hold that this was the intention of the legislature. The legislature could not be imputed with the intention that court fee should be paid on full market value of the immovable property irrespective of the nature of the right involved in the litigation. The word "property" is not a term of art and strictly speaking means only the right which a person has in relation to something. The word "property" ordinarily indicates and describes an interest which a person has in something. It is also frequently used to denote the thing in relation to which the right of property exists.*
>
> *The only proper way to construe the phrase "with reference to any property" in the proviso is to construe it as indicating and describing an interest which a person has in the thing. Moreover, Cl. (v) of S. 7*

does not deal with value of movable property but a suit relating to movable property can also be governed by S. 7 (iv) (c), Court Fees act. In such a case then the proviso does not lay down any test for computation of the value of the property.

To hold that the word "property" in the Punjab Amendment relates only to immovable property and not to rights in movable or immovable property will be not only unjust but also inconvenient. I am, therefore, of the opinion that the word "property" in this amendment is used in the sense of a right in the property involved in the case. In the present case lease rights are involved which admittedly are property and therefore court fee must be paid on these rights and not on the market value of the immovable property which is the subject of the lease."

11.With utmost deference and highest respect, I do not agree with the aforesaid proposition of law, because I have failed to persuade myself to subscribe to the aforesaid view in the face of unambiguous and plain language employed in the second proviso (supra), as well as in clause (e) of sub section (v) of Section 7 (supra). By providing in the second proviso that if a plaintiff files a suit falling under clause (c) and if in such a suit the relief sought is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided in subsection (v). Whereas the learned Single Judge in the aforesaid Punjab judgment did give, assign and apply some meaning to the expression "with reference to any property", he did not at all consider clause (e) of sub section (v) which was of utmost importance by placing a combined interpretation upon the second proviso and clause (e) together, because any isolated reading of second proviso, without referring to clause (e) would not have reflected the true legislative intent.

12.Clause (e) clearly states that where the subject matter of a suit is a house or a garden, the value of the suit shall be the market value of the house and plot. The expression "market value of the house and garden" is unambiguous, because on its plain reading the legislative intent clearly becomes immediately discernible and that is, that in any suit filed or falling under clause (c) (supra), where the relief sought is with reference to any property, the suit has to be valued on the basis of the market value of the property. Howsoever one wishes, one cannot get out of this binding effect of the expression "market value of the house or garden" used in clause (e) (supra). I am, therefore, of the clear opinion that on a plain but combined reading of the second proviso and clause (e) (supra), whenever a suit is filed which falls under clause (c) (supra), and if the relief sought is with reference to any property, the suit has to be valued for the purposes of court fee and jurisdiction at the market value of the property and not otherwise. It is not open to any plaintiff in any such suit to value the suit differently.

13.Applying the aforesaid principle to the facts of the present case, Mr. Kuldip Singh's contention cannot be accepted, because a bare look at the cause title of the plaint, as well as its prayer part leaves no manner of any doubt that the petitioners- plaintiffs were not only seeking a declaratory relief qua the lease hold rights or qua the execution of a lease, but they were also seeking declaratory reliefs qua their own rights in the property concerned. The petitioners- plaintiffs were seeking the declaratory reliefs about their

ownership as well as possession to the extent of their ½ share in the property and also the relief that the mutations entered with respect to the property based upon the lease deed be declared as null and void, illegal etc. etc. The frame of the suit of course has to be in conformity with the substance of the plaint. There cannot be any quarrel to this proposition of law. If the frame of the suit as well as the substance of the plaint are read together, the inescapable conclusion which emerges in the present case is that the suit filed by the petitioners- plaintiffs was with reference to the property and the plaintiffs had no option but to value the suit for the purposes of court fee and jurisdiction in accordance with the market value of the property."

8. In *Rachna Sharma's* case (supra), respondent had filed a suit for declaration against the petitioner therein that he was the sole successor of one of the deceased co-owners and thus entitled to the suit land to the extent of 1/3rd share and, therefore, the mutation showing the petitioner as absolute owner of the share claimed by him was illegal, null and void and not binding upon him. Petitioner moved an application under order 7 Rule 11 read with Section 151 CPC and Section 7 of the HP Court Fees Act seeking direction to the respondent to make good the deficiency in the Court fees within a time frame, failing which the plaint be rejected. It was alleged that the plaint was required to be properly valued and stamped on *ad valorem* basis on the market value of the suit property, which include urban built up property. This court held

22. In the impugned order the learned Civil Judge has observed that the suit land comprised in khata/ khatauni No. 54/103 is assessed to land revenue which is Rs.4.84 and in khata/ khatauni No.60/12 to Rs.0.31 paise and after noticing Section 7 (v) (a) of the Act has held that respondent is not required to pay ad valorem court fee on the suit land. The learned Civil Judge has not considered Section 7 (v) (e) of the Act. The Section 7 (v) (e) of the Act provides where the subject matter is house or garden then according to the market value of the house or garden.

23. In the present case the respondent has challenged the Will of Rajinder Prakash Sharma and claimed herself to be his daughter. The suit property consists of land and built up structure. In the plaint, it has not been pleaded what is the land revenue of the landed property and what is the market value of the built up structure. In Suhrid Singh @ Sardool Singh (supra) while considering section 7(iv) (c) of the Court Fees Act, 1870, as amended in Punjab, which in substance is similar to the Act, the Supreme Court has held that where the relief is in regard to house, court fee shall be on the market value of the house, under clause (e) thereof. The respondent in the relief has prayed "co-owner in possession". The second proviso to section 7 (iv) of the Act provides, in suits coming in sub-clause (c), in cases where the relief sought is with reference to any property such valuation shall not be less than the value of the property calculated in the matter provided for by clause (v) of this section. Sub-clause (e) of section 7 (v) provides where the subject matter is house or garden- according to the market value of the house or garden.

24. In view of pleaded case of the respondent and relief claimed the suit for the purpose of court fee so far as built up structure is concerned, is required to be valued in accordance with section 7 (iv) (c) (v) (e) of the Act on the market value of the built up structure. The respondent has not valued the suit for the purpose of court fee in accordance with section 7(iv) (c)

(v) (e). The learned Civil Judge has erred in observing that respondent has affixed the requisite fee on the plaint. The impugned order is not sustainable."

9. In *Khawaja Khalliullah's* case (supra), respondent therein had filed suit for declaration that she is legal and rightful owner of building No.70/1, The Mall, Shimla and the revenue entries got effected by the petitioner and respondent No.4 qua property in their favour be declared null and void. The question of court fee again came up for consideration as the petitioner alleged that the property against which declaration of title was being sought was a five storeyed building situated on Mall Road, the market value of which was not less than Rs.2,00,00,000/-, and therefore, respondent No.1 was required to value the suit under Section 7(iv) (c) of the Act, whereas respondent claimed that her claim was with respect to her pre-existing right of ownership in the suit property and thus, the same had been correctly valued for the purpose of court fee and jurisdiction. In this background, the court held as under:

"26. The respondent No.1 in prayer (ii) of the plaint has used cleverly 'and/or'. The reading of the plaint reveals that consequential relief of injunction has been prayed in the plaint. In any case, the prayer of injunction during the pendency of the suit in the facts and circumstances of the case will also attract Section 7 (iv) (c) (v) (e) of the Act. The suit for mere declaration under Section 34 of the Specific Relief Act, 1963 is otherwise not maintainable. In view of the pleaded case of respondent No.1 and relief claimed the plaint for purpose of court fee and jurisdiction is required to be valued in accordance with Section 7 (iv) (c) (v) (e) of the Act on the market value of the suit property. The respondent No.1 has not valued the suit for the purpose of court fee in accordance with Section 7 (iv) (c) (v) (e) of the Act. The learned court below has exercised jurisdiction wrongly, illegally in dismissing the application in its entirety."

10. On the other hand, Mr. Adarsh Vashisht, learned counsel for the plaintiff/non applicant has vehemently argued that since the suit seeks cancellation of document and possession of land, the court fee payable is on the value of the instrument and not the market value of the property and has placed reliance upon the Full Bench judgment of the Learned Punjab & Haryana High Court in ***Niranjan Kaur*** Vs**. *Nirbigan Kaur, AIR 1981 Punjab & Haryana 368,*** wherein it was held:

7. It is well settled that the Court in deciding the question of Court-fee should look into the allegation made in the plaint to find out what is the substantive relief that is asked for. Mere astuteness in drafting the plaint will not be allowed to stand in the way of the court looking at the substance of the relief asked for. Thus, in each case the court has to find out the real relief claimed by the plaintiff in the suit, where the main relief is that of the cancellation of the deed, and the declaration if any is only a surplusage, the case would not be covered under Section 7(iv)(c) of the Act, because in a suit under that clause, the main relief quintal relief is just ancillary. In this respect, reference may again be made to Mt. Zeb-ul-Nisa's case (AIR 1941 Lah 97)(FB)(supra), where in it has been observed as follows:

"It seems obvious that the consequential relief referred to in section 7(iv)(c) could not mean a substantive relief, the valuation of which is separately provided for in the Court-fees Act. If it were so held, a plaintiff could easily evade payment of the necessary court-fee on the substantive relief by prefacing it with a declaration as to his rights. Every suit involves the establishment of certain rights of the plaintiff as a necessary preliminary to the grant of the relief claimed by him. But

the addition of a prayer for a declaration as to such rights cannot convert a suit for a substantive relief into one for a declaratory decree where consequential relief is prayed for within the meaning of Section 7(iv)(c) Court-fee Act. It is significant that the valuation of the relief in cases falling within the scope of Section 7(iv)(c) is left to the plaintiff. This is presumably because the consequential relief contemplated by the section is some ancillary relief to which the plaintiff becomes entitled as a necessary result of the declaration but for which no separate provision is made in the Act. The essence of the relief in such cases lies in the declaratory part and the consequential relief being merely an auxiliary equitable relief, its valuation seems to have been left to the plaintiff. The meaning of the expression; consequential relief' as used in section 7(iv)(c) Court-fees Act, was recently considered by a Full Bench of the Allahabad High Court (consisting of five Judges) in Kalu Ram v. Babu Lal, ILR 54 All 812 : (AIR 1932 All 485) and it was held that the expression 'consequential' relief means some relief, which would follow directly from the declaration given the valuation of which is not capable of being definitely ascertained and which is not specifically provided for anywhere in the Act and cannot be clamed independently of the declaration as a 'substantial relief'. It follows, therefore, that if the relief claimed in any case is found in reality to be tantamount to a substantial relief and not a mere "on sequential relief" in the above sense the plaintiff must pay Court-fee on the substantial relief'."

8. It is the common case of the parties that in case the main relief in the suit is held to be that of cancellation of the sale deed, then the case is not covered by Section 7(iv)(c) and the only provision applicable is Article 1, Schedule 1 of the Act. In order to bring the case under Section 7(iv)(c) of the act, the main and substantive relief son sequential relief should be ancillary thereto. Moreover, if no consequential relief is claimed or could be claimed in the suit then Section 7(iv)(c) will not be attracted, Action 7(iv)(c) clearly contemplated suits to obtain the declaratory decree or order where consequential relief is prayed. It further provides that in all such suits, the plaintiff shall state the amount at which he values the relief sought. A further proviso has been added thereto by the Punjab Act No. 31 of 1953, which reads as follows:

> *"Provided further that in suits coming under sub-clause (c) in cases where the relief sought is with reference to any property such valuation shall not be less than the value of the property calculated in the manner provided for by Clause (v) of this Section."*

9. In a Suit to obtain declaratory decree where no consequential relief is prayed, sub-clause (iii) of Article 17 of Schedule II of the Act, will be applicable but the suit filed by the plaintiff-petitioner was virtually to all intents and purposes, for the cancellation of the sale deed, executed by her, in favour of the defendant-respondent. She cannot claim possession unless the said deed is cancelled by a decree of the declared that the sale deed, got executed from her as a result of the fraud, was void and not binding on her, does not convert the suit into one for a declaration with the consequential relief of possession so as to fall within the provision of section 7(iv)(c) of the Act. To such a suit, the only article applicable is Article 1. Schedule 1 of the Act, and for that

proposition, further support can be had from a Full Bench decision of the Allahabad High Court in Kalu Ram's case (AIR 1932 All 485)(supra) *also wherein as regards the valuation of the relief as to the cancellation of the alienation it has been held that such a relief falls neither under Section 7(iv)(c) nor under Schedule II Article 17(iii), but under the residuary Article 1, Schedule 1 of the Act.*

10. In Jagat Singh's case (1970 Cur LJ 80)(supra) relied upon by he learned counsel for the respondent, it has been rightly held that the plaintiff has to get the alleged gift deed, to which he himself was a party, cancelled before he could seek possession of the land. The case was therefore, held to be covered by Article 1 Schedule 1 of the Act, and the plaintiff was required to pay ad valorem Court-fee on the value of the property involved. The said case is fully applicable to the facts of the present case.

11. Similarly, in Amer Kaur's case (1974 Cur LJ 71)(supra), the learned Judge rightly distinguished the decision of their Lordships of the supreme court in Shamsher Singh' case (AIR 1973 SC 2384)(supra) *and correctly held that when a suit is for the cancellation of an instrument with a consequential relief for injunction, it will not fall within the ambit of Section 7(iv)(c) of the Act.*

12. The contrary view taken in Chhota Singh's Case (AIR 1975 Punj & Har 316)(supra)*, has to be held to be erroneous because in that case, the plaintiff was a party to the gift deed, which was sought to be declared null and void on the ground of fraud etc. The learned Judge after noticing Shamsher Singh' case (supra), held therein that the said case was covered by Section 7(iv), which, in our view, has not been correctly interpreted by the learned Judge.*

13. Similarly, the view taken in Labh Singh' s case ((1978) 80 Punj he LR 29 (supra) *and in* Mohan Singh's case (1978) 80 Pun LR 622 (supra), *has to be held to be erroneous because in both cases, the plaintiff was a party to the deed which was sought to be declared void and ineffective against the plaintiffs right, the same having been got executed by undue influence and fraud etc. However, in Mohan Singh's case (supra), in addition to the Supreme Court judgment in* Shamsher Singh' case (AIR 1973 SC 2348)(supra), *further reliance was also placed on the decision of* Parbhu's Case (AIR 1965 Punj & Har 1)(FB)(supra) and Vishwa Nath's case (AIR 1952 Punj 335)(supra).

> *Parbhu's case (supra), related to the declaration that the previous decree for partition was null and void because the provision of order 1, Rule 8, Code of Civil Procedure, were not complied with whereas in wishwa Nath's case (supra), the plaintiff who was a minor had sought declaration, that the decree be declared null and void because the alienations upon which it was based, were without consideration and necessity. The plaintiff being the son was not bound to sue for setting aside the decree thus the same are distinguishable and are not applicable to the case in hand.*

14. Reference to the other cases cited at the bar, is not necessary. Every suit involves the establishment of certain rights of the plaintiff as a necessary preliminary for the grant of the relief claimed by him, but the addition of a prayer for a declaration as to such right cannot convert such a suit for a substantive relief into one for a "declaratory decree where a consequential relief is prayed for" within the meaning of Section 7(iv)(c) of the Act. Therefore, it will have to be seen in each case as to what, in effect, is the substantive

relief that has been claimed in the suit by the plaintiff and the determination thereof will decide the payment of the Court-fee.

15. As regards the present case, the plaintiff-petitioner claimed possession of the suit land after getting a declaration that the sale deed was null and void because of the alleged fraud etc. It significant to note that the plaintiff-petitioner herself being a party to the sale deed could not sue for a mere declaration that the sale deed was fraudulent and the vendees had not acquired any title thereunder. The sale deed had to be cancelled, otherwise, title in the land had already passed to the vendee under the deed. In the present case, the plaintiff-plaintiff had to get the sale deed, to which she was a possession of the land. Thus, the substantive relief being the cancellation of the sale deed, it is Article 1, Schedule I of the Act, which was applicable to the suit of the plaintiff-petitioner.

11. Learned counsel for the plaintiff has further relied upon the judgment of learned Single Judge of the Punjab and Haryana High Court in ***Manohar Lal* Vs. *Ram Avtar (1990) 1 Revenue Law Reporter 431,*** but the same need not be referred to as this judgment only followed what was laid down by the learned Full Bench in *Niranjan Kaur's case* (supra).

12. In ***Suhrid Singh @ Sardool Singh Vs.Randhir Singh, AIR 2010 SC 2807,*** the Hon'ble Supreme Court was dealing with the case under the Punjab Court Fee Act which is para materia with the H.P. Court Fee Act and it was held that in a suit seeking cancellation of sale deed of which the plaintiff was not the executant, the court fee need not be paid on the sale consideration mentioned in the sale deed, whereas in case a suit for declaration that the sale deed is null and void or for any other reason is filed by the executant, which in turn means suit for cancellation of sale deed, then he has to pay valorem court fee on the consideration stated in the sale deed. This court held as under:

"5. Court fee in the State of Punjab is governed by the Court Fees Act, 1870 as amended in Punjab (`Act' for short). Section 6 requires that no document of the kind specified as chargeable in the First and Second Schedules to the Act shall be filed in any court, unless the fee indicated therein is paid. Entry 17(iii) of Second Schedule requires payment of a court fee of Rs.19/50 on plaints in suits to obtain a declaratory decree where no consequential relief is prayed for. But where the suit is for a declaration and consequential relief of possession and injunction, court fee thereon is governed by section 7(iv)(c) of the Act which provides :

"7. Computation of fees payable in certain suits : The amount of fee payable under this Act in the suits next hereinafter mentioned shall be computed as follows :

(iv) in suits - x x x x (c) for a declaratory decree and consequential relief.- to obtain a declaratory decree or order, where consequential relief is prayed, x x x x x according to the amount at which the relief sought is valued in the plaint or memorandum of appeal.

In all such suits the plaintiff shall state the amount at which he values the relief sought:

Provided that minimum court-fee in each shall be thirteen rupees.

Provided further that in suits coming under sub-clause (c), in cases where the relief sought is with reference to any property

such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of this section."

The second proviso to section 7(iv) of the Act will apply in this case and the valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of the said section. Clause (v) provides that where the relief is in regard to agricultural lands, court fee should be reckoned with reference to the revenue payable under clauses (a) to (d) thereof; and where the relief is in regard to the houses, court fee shall be on the market value of the houses, under clause (e) thereof.

6. Where the executant of a deed wants it to be annulled, he has to seek cancellation of the deed. But if a non-executant seeks annulment of a deed, he has to seek a declaration that the deed is invalid, or non-est, or illegal or that it is not binding on him. The difference between a prayer for cancellation and declaration in regard to a deed of transfer/conveyance, can be brought out by the following illustration relating to `A' and `B' -- two brothers. `A' executes a sale deed in favour of `C'. Subsequently `A' wants to avoid the sale. `A' has to sue for cancellation of the deed. On the other hand, if `B', who is not the executant of the deed, wants to avoid it, he has to sue for a declaration that the deed executed by `A' is invalid/void and non- est/ illegal and he is not bound by it. In essence both may be suing to have the deed set aside or declared as non-binding. But the form is different and court fee is also different. If `A', the executant of the deed, seeks cancellation of the deed, he has to pay ad-valorem court fee on the consideration stated in the sale deed. If `B', who is a non-executant, is in possession and sues for a declaration that the deed is null or void and does not bind him or his share, he has to merely pay a fixed court fee of Rs. 19.50 under Article 17(iii) of Second Schedule of the Act. But if `B', a non- executant, is not in possession, and he seeks not only a declaration that the sale deed is invalid, but also the consequential relief of possession, he has to pay an ad-valorem court fee as provided under Section 7(iv)(c) of the Act. Section 7(iv)(c) provides that in suits for a declaratory decree with consequential relief, the court fee shall be computed according to the amount at which the relief sought is valued in the plaint. The proviso thereto makes it clear that where the suit for declaratory decree with consequential relief is with reference to any property, such valuation shall not be less than the value of the property calculated in the manner provided for by clause (v) of Section 7.

7. In this case, there is no prayer for cancellation of the sale deeds. The prayer is for a declaration that the deeds do not bind the "co-parcenery" and for joint possession. The plaintiff in the suit was not the executant of the sale deeds. Therefore, the court fee was computable under section 7(iv)(c) of the Act. The trial court and the High Court were therefore not justified in holding that the effect of the prayer was to seek cancellation of the sale deeds or that therefore court fee had to be paid on the sale consideration mentioned in the sale deeds.

8. We accordingly allow these appeals, set aside the orders of the trial court and the High Court directing payment of court fee on the sale consideration under the sale deeds dated 20.4.2001, 24.4.2001, 6.7.2001 and 27.9.2003 and direct the trial court to calculate the court fee in accordance with Section

7(iv)(c) read with Section 7(v) of the Act, as indicated above, with reference to the plaint averments."

13. Evidently the following principles can be culled out from the aforesaid decision.

> *(i) if the executant of a document wants the deed to be annulled, he has to seek cancellation of the deed and to pay advalorem Court fee on the consideration stated in the said sale deed;*
>
> *(ii) But if a non-executant seeks annulment of deed i.e. when he is not party to the document, he is to seek a declaration that the deed is invalid, non-est, illegal or that it is not binding upon him. In that eventuality , he is to pay the fixed court fee as per Article 17(iii) of the Second Schedule of the Act;*
>
> *(iii) But if the non-executant is not possession and he seeks not only a declaration that the sale deed is invalid, but also a consequential relief of possession, he is to pay the ad valorem court fee as provided under Section 7(iv) (c) of the Act and such valuation in case of immovable property shall not be less than the value of the property as calculated in the manner provided for by Clause (v) of Section 7 of the Act.*

14. The preposition of law involved in this case has, infact, not been dealt with by this Court in any of the three cases relied upon by the applicant and, therefore, the ratio laid down in these judgments is not at all applicable to the instant case. Whereas, identical issues has come up before the Full Bench of the Punjab & Haryana High Court in *Niranjan Kaur's case (supra)* and while dealing with identical provisions of the Court Fee Act, it was categorically held that where the plaintiff seeks cancellation of the instrument, of which he is the executant, before he can seek possession of the land, then the case would be covered under Article-1 Schedule-1 and, therefore, the plaintiff would be required to pay *ad valorem* court fee on the value mentioned in the instrument.

15. That apart, similar reiteration of law has thereafter been made by the Hon'ble Supreme Court in *Suhrid Singh's* case (supra), wherein it has been held that if the executant of the deed seeks cancellation of the deed, he has to pay *ad valorem* court fee on the consideration stated in the sale deed and not on the market value of the subject market.

In view of the aforesaid discussion, I find no merit in this application. The same is accordingly dismissed, leaving the parties to bear their own costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Rahul Bhardwaj and others .....Petitioners.

Versus

State of Himachal Pradesh and others .....Respondents.

CWP No.776 of 2016.
Judgment reserved on: 11.04.2016.
Date of decision: April 12 ,2016.

Constitution of India, 1950- Article 226- Petitioners are eligible for admission to the Post Graduation Courses- All India Medical Entrance Examination is conducted by the National Board of Examination and out of the total seats available in the various Medical Institutions in the country, 50% are filled-up on All India Basis, while the remaining 50% are filled-up in a manner prescribed by the States or the Institutions- respondent issued a prospectus-cum-application form stating that 66.6% State Quota seats will be filled-up by in- service Medical Officers and there will be a single merit to fill up 66.6% State Quota Seats- petitioners have sought quashing of the clause on the ground that respondents have failed to maintain the proportion of representation of in-service regular and contractual Medical Officers and have illegally treated the contractual Medical Officers as in-service candidates- held, that issue in question was already determined by the Court in ***Dr. Vivek Kumar Garg and others*** *versus* ***State of Himachal Pradesh and others,*** **I L R 2015 (III) HP 1111 (D.B.),** wherein it was held that in-service group consists of two further sub-groups i.e. one sub-group consisting of regularly appointed Medical officers and second sub-group consisting of Contractual and Rogi Kalyan Samiti ('RKS') appointees- distribution of seats between regular and those appointed on contract basis is to be made in the ratio proportionate to their number- prospectus has been issued in strict compliance of the direction passed by the Court in ***Dr. Vivek Kumar Garg's*** case- petition dismissed.

(Para-2 to 11)

Case referred:

Dr.Vivek Kumar Garg and others versus State of Himachal Pradesh and others, I L R 2015 (III) HP 1111 (D.B.)

For the Petitioners	:	Mr.Sunil Mohan Goel, Advocate.
For the Respondents	:	Mr.Shrawan Dogra, Advocate General with Mr. Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr. J.K. Verma, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The issue involved in this writ petition hinges around the question whether the contractual Medical Officers can be treated to be and considered alongwith "in-service candidates" against 66.6% quota seats meant for them in the admission to the Post Graduation Courses.

Facts in brief may be noticed.

2. All the petitioners are eligible for being considered for admission to the aforesaid course. An All India Medical Entrance Examination is conducted by the National Board of Examination and out of the total seats which are available in the various Medical Institutions in the country, 50% of these are filled-up on All India Basis while the remaining 50% are filled-up in a manner which is prescribed by the respective States or the Institutions. The National Board of Examination in December, 2015, conducted the All India Post Graduate Medical Entrance Examination in which the petitioners secured 899.1858/1500, 1026.8073/1500, 855.1582/1500 and 918.4094/1500 marks, respectively in the said examination.

3. The respondents in March, 2016, issued a prospectus- cum-application form for counselling and admission for Post Graduate MD/MS Courses and Clause 3.1(A) thereof reads thus:-

"3.1(A) HPHS (In-service GDO) Group

(i) **66.6**% State Quota seats will be filled-up by in- service Medical Officers (Regular/Contract/RKS). There will be a single merit to fill up 66.6% State Quota Seats."

4. The petitioners have sought quashing of the aforesaid clause on the ground that the respondents have failed to maintain the proportion of representation of "in-service regular" and "contractual Medical Officers" and have illegally treated even the "contractual Medical Officers" as "in-service candidates". According to the petitioners the "contractual Medical Officers" are nothing more than that backdoor entrants, who are appointed without any due selection on the basis of the walk-in-interviews and thereafter cannot be considered as "in-service candidates" alongwith the petitioners.

5. In reply to the petition, the respondents have categorically stated that the issue in question already stands adjudicated by this Court in a batch of writ petitions, the lead case being, ***CWP No.1776 of 2015***, titled as, ***Dr.Vivek Kumar Garg and others*** *versus* ***State of Himachal Pradesh and others***, decided on 18.06.2015, wherein this Court while construing clause 3.1(A) categorically held all the "in-service candidates" to be comprising of one class/group and the action of the State Government in creating, classifying and then dividing these homogenous class/group was quashed.

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

6. Clause 3.1 (A) of the earlier prospectus-cum-application form issued for the academic session 2015-18 reads thus:-

"ELIGIBILITY & DISTRIBUTION OF SEATS

3.1 (A) HPHS(In-service GDO) Group.

(i) 66.6% of the State Quota Seats will be filled up by in-service Medical Officers. The in-service group will consist of two sub-groups i.e. one sub-group consisting of regularly appointed Medical officer and second sub-group consisting of Contractual and Rogi Kalyan Samiti appointees. The distribution of seats between regular and those appointed on contract basis including Rogi Kalyan Samiti appointees will be made in the ratio proportionate to their total number as on 31.10.2014. For the academic session 2015-18, the distribution of seats between above two sub-groups will be in the ratio of 2:1."

7. While construing the clause 3.1(A) (supra), this Court in ***CWP No.1776 of 2015***, titled as ***Dr.Vivek Kumar Garg and others*** *versus* ***State of Himachal Pradesh and others*** decided on 18.06.2015 had specifically held that in-service group consists of two further sub-groups i.e. one sub-group consisting of regularly appointed Medical officers and second sub-group consisting of Contractual and Rogi Kalyan Samiti ('RKS') appointees. The distribution of seats between regular and those appointed on contract basis including Rogi Kalyan Samiti is to be made in the ratio proportionate to their total number. It was further held that the criteria for filling up the seats was on merit alone and though the State had created the aforesaid two sub-groups, nonetheless, all the Medical Officers appointed either on regular basis, contractual basis or by 'RKS' and have been permitted to sit in the examination would loose birthmark of their initial recruitment either as Medical Officers appointed on regular basis,contractual basis or by 'RKS' and they have to be treated as one class/group. The action of the State Government in creating and classifying and by dividing the HPHS in-service GDOs appointed either on regular, contractual basis or

appointed by 'RKS' was held to be based on no intelligible differentia so as to distinguish one group of Medical Officers or the other group. It shall be apt to reproduce paras 13, 14 and 28 of the judgment which read thus:-

> "13. After the 3rd point, the process was to be repeated again. The respondent-State issued communication on 16.3.2015, whereby 4 point roster was to be applied for allotment of seats between GDO regular and GDO contract (including the RKS), on the basis of the respective in-position strength ratio of both the categories as on 31.10.2014. Initially as per para 3.5 (iii), the first two seats were to be allotted to GDO (Regular) and thereafter 3rd to GDO (Contract), but after the notification of 16.3.2015, the first two seats would go to GDO(Regular) and 3rd to GDO (Contract) and thereafter 4th to GDO (Regular).
>
> 14. It is settled law that for filling up the MD/MS/MDS seats, the criteria should be merit alone. The respondent-State has created two groups within the HPHS (In-service GDO) group, comprising of regularly appointed Medical Officers and contractual/Rogi Kalyan Samiti appointees. The respondent-State has also created sub-groups in the In-service GDO (MO Dental) Group seats, comprising of two sub-groups; one sub-group comprising of regularly appointed Medical Officers and other comprising of contractual/Rogi Kalyan Samiti appointees. All the Medical officers appointed either on regular basis, contractual or by RKS, discharge the same duties. Once they have been permitted to sit in the examination, they would loose birthmark of their initial recruitment either as Medical Officers appointed on regular basis or contractual or appointed by the RKS. They have to be treated as one class/group. The respondent-State has created the classification within the classification by dividing the HPHS in-service GDOs appointed either on regular basis or on contractual basis or appointed by RKS for the purpose of distribution/allotment of seats. There is no intelligible differentia so as to distinguish one group of Medical officers from the other group. They are all Medical officers and possess essential qualifications to sit in the Post Graduate Courses on the basis of All India Test. The respondent- State has further perpetuated the illegality by introducing new roster as per Annexure P-8 on 16.3.2015, whereby the candidates belonging to GDO (Regular), irrespective of their merit would get the first and second seat. The 3rd seat would go to contractual and the 4th again to regularly appointed GDO. The best available method as per the settled law would have been to fill up the MD/MS/MDS courses, strictly as per the marks obtained by in-service candidates, irrespective of their category.
>
> 28. Accordingly, the Writ Petitions are allowed. The allotment of seats/roster points on the basis of sub-groups comprising of regularly appointed Medical Officers, contractual and Rogi Kalyan Samiti appointees and sub groups comprising of regular Medical Officers (Dental) and second group comprising of contractual and Rogi Kalyan Samiti appointees as per clause 3.1(A) (i) of the Prospectus-cum-Application Form for counselling and admission for postgraduate Degree(MD/MS) Courses and clause 3.6(b)(iii) of the Prospectus-cum-Application Form for counselling and admission for postgraduate Degree(MDS) Courses for the academic session 2015-18, respectively, are quashed and set aside. The admissions made to MD/MS/MDS courses on the basis of the first counselling, second counselling and 3rd counselling under clause 3.1(A)(i) of both the Prospectus

under HPHS (In-service GDO) Group and in-service GDO (MO Dental) Group seats are also quashed and set aside. The respondents are directed to re-do the entire selection process by filling up the MD/MS/MDS seats, strictly as per the merit list on the basis of All India Post Graduate Medical Entrance Examination and All India Post Graduate Dental Entrance Examination, within a period of one week from today in order to adhere to the time schedule framed by the Hon'ble Supreme Court of India qua HPHS (In-service GDO) Group and in-service GDO (MO Dental) Group. Pending application(s), if any, shall also stand disposed of."

8. Notably, one of the candidates preferred Special Leave Petition (Civil) No.17052/2015 against the aforesaid decision in case titled as Kirti Rana and another versus Vivek Kumar Garg and others before the Hon'ble Apex Court and an interim order to the following effect was passed on 01.07.2015:-

"Learned Additional Advocate appearing for respondent Nos.4 to 8 makes a statement that following the time schedule fixed by this Court for making admissions to medical institutions, the State Government has already completed the process of admissions for the Academic Year 2015-16 and that whatever order is rendered by the Court can be applied for the future academic years. We appreciate such a stand made on behalf of the learned counsel for respondent Nos.4 to 8. Therefore, whatever admissions are made based on the prospectus already issued shall be maintained for the Academic Year 2015-2016."

9. It is, thus, clear that the prospectus now issued for the academic session 2016-2019 has been issued in strict compliance to the directions passed by this Court in ***Dr.Vivek Kumar Garg's case*** (supra) and in terms of the undertaking furnished before the Hon'ble Apex Court on 01.07.2015.

10. Having held out before the Hon'ble Supreme Court that the admissions on the basis of the judgment rendered by this Court would be applied for future academic years and the same having been accepted by the Hon'ble Supreme Court, the official respondents are bound by the undertaking and in case the petitioners were aggrieved then they should have sought their remedy elsewhere.

11. The issue raised in this petition is squarely covered by the judgment rendered by a Co-ordinate Bench of this Court in ***Dr.Vivek Kumar Garg's case*** (supra) and the same is binding upon this Court. The instant petition is, therefore, totally misconceived and not maintainable and is, therefore, dismissed alongwith all pending application(s), if any, leaving the parties to bear their own costs.

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

Smt. Raj Kumari .....Petitioner.

Versus

M/s Shakun Infrastructure Development Private Limited ....Respondent.

Civil Revision Nos. 20 and 21 of 2014.
Reserved on : 29.3.2016.
Decided on: 12th April, 2016.

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Defendant purchased the suit land by means of sale deed- another sale deed was executed in favour of the plaintiff- it was contended by the plaintiff that sale deed was executed in favour of vendee of the defendant by a minor and he was not competent to execute the sale deed- however, this plea was not taken in the plaint but was taken only in the reply to the application under Order 39 Rules 1 and 2 filed by the defendant- parties are recorded to be joint owners in the suit land- a certificate showing that amount of Rs. 4,27,888/- was paid by the plaintiff to defendant for sale of plots carved out on the suit land, was brought on record which shows acquiescence on part of plaintiff- defendant was put in possession as per sale deed – plaintiff had not come to the Court with clean hands- petition dismissed. (Para-3 to 7)

For the Petitioner(s):	Mr. Satyan Vaidya, Sr. Advocate with Mr.Vivek Sharma, Advocate.
For the Respondent(s):	Mr. G.D Verma, Sr. Advocate with Mr. P.S Goverdhan, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J

Both the petitions stand directed by the plaintiff-petitioner herein (common in both) against the orders rendered by the learned Additional District Judge-1, Solan, whereby the latter Court affirmed the orders of the learned Civil Judge (Jr. Div), Nalagah, District, Solan, H.P., dismissing the application preferred before it by the petitioner herein under Order 39 Rule 1 and 2 CPC whereunder she claimed the hereinafter extracted relief:-

> " it is, therefore, prayed that this Hon'ble Court may be pleased to issue an order of ad-interim injunction restraining the respondents not to raise construction in, change the nature of, cut and remove standing tress and alienate and dispossess her from suit land i.e (1) land measuring 15 Bigha, comprised in Kh/kht. Nos. 21 min/21 min, bearing khasra Nos. 205(3-03), 211 (3-18), 218(6-08) and 219 (1-11), Kita-4(ii) land measuring 9 Bigha 13 Biswa, comprised in Kh/kht. Nos 23 min/23 min, bearing khasra Nos. 214 (1-07), 216 (0-04) and 217 (8-02), kita-3 i.e. total land measuring 24 Bigha 13 biswa pertaining to and situated in the area of village Judi Kalan, HB No. 210, prg. Dharampur, Tehsil Baddi, Distt. Solan, H.P, as is detailed in the jamabandi for the year 2001-02, during the pendency and final disposal of the main case in the interest of justice and equity."

2. Also the learned Additional District Judge 1, Solan affirmed the orders rendered by the learned Civil Judge(Jr. Div), Nalagarh, District Solan, H.P whereby the latter trial Court allowed the application preferred before it by the defendant/respondent herein embodying therein the hereinafter extracted relief"

> "It is, therefore, prayed that the respondent may be retrained from causing interference in the ownership and possession fo the applicant in the suit land comprised in khasra No. 205, 211, 218, 219, 214, 216 and 217 total measuring 24 Bigha 13 Biswas situated in Mauja Juddi kalan, Tehsil Baddi, District Solan, H.P and also restrained the respondent from making alienation, creating charge and third party interest on the suit land, further causing damage and waste to the suit land and also in the working and business of the applicant either by herself through her agents, servants,

attorney, family members or any person claiming under her in any manner whatsoever till the final disposal of the counter claim."

3. For adjudging the legal soundness of the adjudication of the learned trial Court assailed before this Court at the instance of the petitioner herein (hereinafter referred to as the 'plaintiff'), it is imperative to bear in mind the rudimentary principles governing the affording of or denial of the relief of ad-interim injunction as claimed before it respectively by the parties at contest. The rudimentary principles governing the affording or denial of relief of ad-interim injunction by the Court whereat they stood respectively espoused by the parties at lis stand extracted hereinafter:-

1) that the applicant/plaintiff has to prove prima facie case.

II) The applicant/plaintiff has to prove that irreparable loss would cause to him/her in case, temporary injunction is not granted.

III) The applicant/plaintiff has to established that balance of convenience lies in his/her favour.

4. The respondent herein (hereinafter referred to as the 'defendant') acquired title over and upon the suit land under sale deed Nos. 1395 of 12.6.2006, whereunder suit land and other land measuring 38 Bigha and 17 biswas stood alienated by Mr. Arjun Behal to the defendant besides possession thereof also stood delivered to it. However, subsequently under sale deed No. 543 of 5.6.2010 the plaintiff acquired title to the suit land. The plaintiff concerted to dislodge the title acquired over and upon the suit land by the defendant under sale deeds No.1395 of 12.6.2006 on the score of the vendee thereunder acquiring title under sale deeds No. 2218 and 2219 of 8.8.2005 from the then minor Balbir Singh rendering the acquisition of title thereunder by the vendee of sale deeds No. 2218 and 2219 of 8.8.2005 to standing vitiated besides nullifying the acquisition of title over and upon the suit land by the defendant under sale deed No. 1395 of 12.6.2006. Even though, for succoring the factum of nullity hence ingraining the acquisition of title over and upon the suit land by the defendant under the aforesaid sale deed is canvassed to stand harbored upon a revision by the Assistant Collector concerned of the order recording/attesting mutation of ownership qua over and upon the suit land in favour of the defendant on the anvil of sale deed No. 1395 of 12.6.2006. Nonetheless as tenably reasoned by both the Courts below with revision of mutation aforesaid not perse divesting title qua over and upon the suit land acquired by the defendant under sale deed No. 1395 of 12.6.2006 title whereto rather stands acquired thereunder besides their validity standing stripped of legal efficacy only when sale deeds No. 2218 and 2219 of 8.8.2005 and 1395 of 12.6.2006 stand declared to be nonest by a decree of a Civil Court, appears to be both weighty as well as legally sound**.** With the Civil Court yet to adjudicate upon the factum of sale deed Nos. 2218 and 2219 of 8.8.2005 though standing vitiated with a purported vice of nullity their standing respectively executed by a vendor who given his minority thereat was legally incapacitated to alienate title qua it to Mr. Arjun Behal besides qua the factum of the aforesaid Arjun Behal the vendee thereunder obviously as a natural corollary being alike incapacitated to when no valid title stood vested in him under sale deeds No. 2218 and 2219 of 2005, to pass title acquired thereunder to the defendant under sale deed No. 1395 of 2006, the latter sale deed being also hence nonest. Consequently, extantly it would be inapt to conclude, predominantly with no material yet existing on record in display of execution of sale deed Nos. 2218 and 2219 of 8.8.2005 suffering nullification for lack of title inhering in the vendor thereunder arising from the factum of his thereat being a minor hence incapacitated to execute it, any inference of consequential vitiation imbuing the execution of sale deed No. 1395 of 12.6.2006 by Mr. Arjun Behl in favour of the defendant is not evokable. The

apposite pleadings qua the aforesaid facets remain un-constituted besides remain unembodied in the plaint. Lack of apposite incorporation qua the aforesaid facets by the plaintiff in the plaint does also foist a prima-facie conclusion of the said objection qua the nullificatory effect begotten by sale deeds 2218 and 2219 of 8.8.2005 cascading upon the validity of sale deed No.1395 of 12.6.2006 as constituted only in the reply of the plaintiff to application under Order 39 Rules 1 and 2 preferred by the defendant before the learned trial Court, is insufficient, to constrain the learned trial Court to render a decree qua the sale deeds aforesaid being nonest merely for the reasons constituted by the plaintiff in her reply to the application aforesaid preferred before the learned trial Court by the defendant. In aftermath with there existing a manifestation of nullity ingraining the aforesaid sale deeds only in the reply furnished by the plaintiff to an application filed before the learned trial Court by the defendant contrarily its non-depiction in the plaint when would defacilitate the trial Court to render a decree qua the validity of the sale deeds aforesaid, necessarily with no decree being hence renderable by the learned trial Court in nullification of the sale deeds aforesaid, the stand qua their invalidation as stands espoused only in the reply furnished by the plaintiff to the apposite application of the defendant before the learned trial Court would not invest in her potent empowerment to canvass the said factum before this Court for dislodging the title acquired by Arjun Behal under sale deeds No. 2218 and 2219 of 8.8.2005 and title acquired therefrom by the defendant under sale deed No. 1395 of 12.6.2006. Prima-facie at this stage, the plaintiff has no prima-facie case. Moreover when the plaint instituted is merely for relief of permanent prohibitory injunction besides when no material also stands adduced at this stage by the plaintiff/petitioner, of the suit land while standing recorded joint inter-se the parties at lis wherein both hold rights as co-khatedhars, carrying an area more than the one constituted in the plaint as well as in the application moved before the learned trial Court by the plaintiff/petitioner herein for hence enabling this Court to conclude qua given the overlapping of land title whereon stands acquired by both the plaintiff and the defendant, of hence in case relief of ad-interim injunction stands refused, she in the event of the suit of the plaintiff standing decreed would in case the defendant is extantly permitted to subject the suit land to construction would stand precluded to hold possession of any portion of the land title whereto stands acquired by her under sale deed No.543 of 2010. Dehors the validity of sale deeds No.2218, 2219 of 8.8.2005 and 1395 of 12.6.2006 in the absence of aforesaid material, this Court is constrained to conclude of even in the face of suit of the plaintiff standing decreed there would be yet ownership rights available to her for theirs being exercised over upon the suit land even when the defendant is extantly permitted to subject it to use. Even otherwise the suit land being joint both the competing/contesting parties hold unity of tile and community of possession qua each inch of the land held by both as co-khatedars. The extant non-severance of the joint status of joint land, severance whereof would stand sequelled only on its standing partitioned by metes and bounds, would also not forestall the defendant to subject it to exclusive use unless worthy material standing placed on record connoting the factum of the land subjected to use by the defendant being in excess to its share therein or of its being the best and valuable piece of land. However the aforesaid material is amiss. In aftermath, even in the absence of severance of joint status of the suit land by its standing partitioned by metes and bounds the defendant cannot be refused permission to subject it to use.

5. The material as exiting on record comprised in certificate disclosing the factum of a sum of Rs.4,27,888/- standing defrayed as commission to the plaintiff by the defendant on account of sale of plots carved out on the suit land is a manifestation of acquiescence by the plaintiff of the defendant holding possession of the suit land preeminently with the knowledge of the plaintiff**.** An omission on the part of the plaintiff to unfold the said factum by casting apposite averments both in the suit as well as in the

application instituted under Order 39 Rule 1 and 2 CPC before the learned trial Court is significatory of hers indulging in the vice of *suggestio fallsi* and *suppressio veri* which misdemeanors of the plaintiff debars her to claim the equitable relief of injunction foisted upon the principle of one who claims equity must come to the Court with clean hands. In sequel, with the plaintiff/petitioner herein coming for the reasons aforesaid to the Court with unclean hands, she stands debarred to claim the equitable relief of injunction.

6. Be that as it may, with no material existing on record with a display therein of Balbir Singh the vendor of Arjun Behl wherefrom the defendant under sale deed No.1395 of 12.6.2006 acquired title to the suit land not putting both in possession of the suit land or on his subsequently acquiring possession thereto his handing over its possession to the plaintiff at the time contemporaneous to the execution of a sale deed in her favour, renders open an inference of in coagulation with the defendant developing and improving the suit land by raising construction thereon for sale whereof the plaintiff stood paid commission by the defendant of balance of convenience inhering in the defendant.

7. Lastly, the factum of the plaintiff's receiving commission for selling the constructions raised on the suit land by the defendant constrains this Court to conclude that in the event of the defendant being restrained to carry construction over/upon the suit land, a large part of which already stand subjected to construction at its instance, would put it to irreparable loss.

8. Since the aforesaid rudimentary principles governing the granting of or declining of the relief of ad-interim injunction for the reasons afore-stated stand clinched in favour of the defendant, this Court is constrained to hold of there being no merit in these petitions. Consequently, both the petitions are dismissed and the impugned order is maintained and affirmed. Records be sent back forthwith.

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

State of H.P. ....Petitioner

Vs.

Des Raj ...Respondent

Cr. Appeal No.411 of 2011.
Decided on: 12th April, 2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.550 Kgs. of charas- he was tried and acquitted by the trial Court- held, in appeal that independent witnesses have not supported the prosecution version- two views have appeared on the record- one is favourable to the accused and the other is favourable to the prosecution- in these circumstances, benefit has to be given to the accused- it was not proved that prosecution had complied with the requirement of Section 50 of N.D.P.S. Act- official witnesses had improved upon their versions- prosecution had not complied with the Section 42 of N.D.P.S Act- in these circumstances, prosecution case was not proved – trial Court had rightly appreciated the evidence- appeal dismissed. (Para-10 to 26)

Cases referred:
Noor Aga Vs. State of Punjab, (2008) 16 SCC 417

State of H.P. Vs. Rajesh Dhiman and another, 2012(3) Shim. LC 1583
State of H.P. Vs. Hanacho alias Stewart, Latest HLJ 2004(HP) (DB) 642.

For the petitioner: Mr. Virender Verma, Additional Advocate General with Mr. Pushpinder Jaswal, Deputy Advocate General.
For the respondents:Mr. Ajay Sharma, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary. (Oral)

The State has come up in appeal against the judgment dated 16th June, 2011, passed by learned Special Judge, Fast Track Court, Chamba, District Chamba, in Session Trial No.12/2011, whereby the respondent, hereinafter referred to as "the accused", has been acquitted of the Charge under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985, hereinafter referred to as "the Act", in short.

2. The challenge to the impugned judgment is on the grounds, inter alia, that learned trial Judge has failed to appreciate the evidence available on record in its right perspective and recorded the findings qua acquittal of the accused in a perfunctory and slipshod manner and also on flimsy grounds. The testimony of the prosecution witnesses is stated to have been discarded without assigning any reason.

3. The present is a case where PW-13 ASI Jeet Singh has allegedly recovered Charas, weighing 2.550 Kgs. on 28.2.2011 at 12.15 p.m., near Petrol Pump, Banikhet, within the jurisdiction of Police Station, Dalhousie, in the presence of independent witnesses PW-2 Shri Purshotam and PW-3 Shri Vijay Kumar and also the official witnesses, PW-1 Constable Suneel Kumar and PW-4 Jaram Singh. Before that PW-13 ASI Jeet Singh had allegedly received a secret information around 11 a.m., to the effect that the accused a resident of village Khurla Kingra, Jallandhar, Punjab, a drug peddler, has gone towards Chamba side on 27.2.2011 on Scooter No.PB-08-Y-4842. Also that he used to carry Charas by hiding the same beneath the fuel tank of his scooter and that if ***Naaka*** is arranged, he can be nabbed alongwith Charas. The information so received was reduced into writing and forwarded to Superintendent of Police, Chamba, through PW-4 HHC Jaram Singh and PW-6 HHC Palwinder Singh.

4. PW-13 ASI Jeet Singh formed a Police Party comprising PW-1 Suneel Kumar and PW-4 HHC Jaram Singh and left for laying ***Naaka*** at Banikhet. PW-2 Purshotam and PW-3 Vijay Kumar were associated as independent witnesses, who met him near Petrol Pump at Banikhet. They both were apprised about the information he received. The ***Naaka*** was laid near Petrol Pump. It is at about 12.15 p.m., a scooter bearing registration No.PB-08-Y-4842, being driven from Chamba side, arrived at the place of ***Naaka***. The scooter was stopped. It was being driven by the accused. On inquiry, he disclosed his name as Desh Raj and also disclosed his address. He was apprised that a secret information has been received qua he was carrying Charas and that his personal search and also the search of the scooter is required to be conducted. The information was given to the accused orally as well as in writing. He was also informed that he may opt to give his personal search before a Magistrate or a gazetted officer. He, however, opted for being searched by the police itself. Consent Memo. Ext.PW1/A to this effect was prepared. The personal search of the accused was conducted vide memo. Ext.PW1/B. Nothing incriminating, however, was recovered during his personal search. Thereafter, search of the scooter was conducted in the presence of the witnesses vide memo. Ext.PW1/D. One bag light green in colour was found kept

beneath the petrol tank of the scooter. On opening the bag, black coloured contraband in the shape of round and sticks was found kept therein. The same was smelling of Charas. The recovered contraband was weighed and found to be 2.550 kgs. Memo. Ext.PW1/F qua the articles recovered during personal search of the accused was prepared. Test Memo. Ext.PW9/C was also prepared. The accused was apprised about the offence he committed and the provisions of sentence for the same and also the grounds of arrest vide Memo. Ext.PW1/E. As per the option, he exercised, his wife Asha Kumari, was informed about his arrest.

5. The accused produced his driving licence Ext.P6 and RC of the scooter Ext.P5 before the Investigating Officer. The Charas recovered from the accused was sealed in a parcel, after separating a portion of it for the purpose of sample. Rukka Ext.PW13/A was prepared and sent to Police Station for registration of FIR through PW-4 HHC Jaram Singh. On receipt of the Rukka, FIR Ext.PW9/A was registered and the case file handed over to the Investigating Officer by PW-4 on the spot.

6. It is about 8.30 p.m., the accused alongwith Charas was brought to Police Station. The parcels containing Charas were deposited with the Additional SHO Viswas Kumar, who resealed the same with seal "O" in the presence of PW-8 Constable Hem Raj. Memo. Ext.PW8/A was also prepared in this regard. Additional SHO had deposited the parcels containing the case property, sample seal, NCB forms etc. etc. with PW-12 Arun Kumar, MHC Police Station, Dalhousie, at about 8.40 p.m. MHC made necessary entries in the Malkhana Register. The abstract whereof Ext.PW12/A was produced in evidence. The sample parcel alongwith sample seals, NCB Forms and docket were handed over to PW-11 Constable Rajinder Kumar, vide RC No.24/11 and he was directed to deposit the same in Forensic Science Laboratory at Junga. The said witness had deposited the same in the laboratory and produced the receipt before MHC. Special Report Ext.PW5/B was also prepared and sent to Superintendent of Police, Chamba on receipt of Chemical Examiner's report Ext.PX. Since the sample sent for analysis was found to be the extract of cannabis and as such Charas, therefore, final report under Section 173 Cr. P.C. was filed against the accused in the trial Court.

7. Learned trail Judge, on consideration of the police report and the documents annexed therewith has framed the charge under Section 20 of the Act against the accused.

8. The prosecution was called upon to produce evidence in order to substantiate the charge against the accused. On finding that the present is not a case of no evidence, the accused was examined under Section 313 of the Code of Criminal Procedure. He, however, opted for not producing any evidence in his defence.

9. Learned trial Judge, on appreciation of the evidence available on record and also taking into consideration the arguments addressed on both sides, has arrived at a conclusion that the prosecution has failed to make out a case against the accused beyond all reasonable doubt and as a result thereof, the accused has been acquitted.

10. There are two sets of witnesses examined by the prosecution in order to sustain the charge against the accused person i.e. PW-2 Purshotam and PW-3 Vijay Kumar, the independent witnesses; whereas PW-1 Constable Suneel Kumar, PW-4 HHC Jaram Singh and PW-13 ASI Jeet Singh, Investigating Officer, the official witnesses. The 3rd set of witnesses consists of PW-10 Inspector Govind Ram, SHO, Police Station, Dalhousie, who on receipt of the Chemical Examiner's report Ext.PX has prepared and filed the Challan in the Court; PW-5 HC Subhash Chand, Reader to S.P. Chamba; who had received the Special Report Ext.PW5/A and presented the same before S.P. at his residence on the same day at

3.10 p.m.; PW-6 HHG Palwinder who had taken the Special Report Ext.PW5/A to the Reader of S.P. PW5; PW-7 HHC Chaman Singh, who has proved the copy of Rapat Rojnamcha No.5 Ext.PW5/A; PW8 Constable Hem Raj in whose presence the case property was produced before Additional SHO by PW-13 ASI Jeet Singh, Investigating officer; PW-9 SI Viswas Kumar, is Additional SHO, who has proved the case qua re-sealing of the parcels containing recovered Charas, when produced before him and PW-12 is HC Arun Kumar, to whom PW-9 Viswas Kumar, Additional SHO, had entrusted the case property alongwith NCB-1 Form and the sample seal for safe custody in the Malkhana and it is he who forwarded one sample parcel to FSL, Junga, for chemical analysis alongwith NCB-1 Form through PW-11 Constable Rajinder Kumar.

11. The fact, however, remains that the prosecution case has not been supported by the so called independent witnesses PW-2 Purshotam and PW-3 Vijay Kumar, and as regards the official witnesses, PW-1 Constable Suneel Kumar and PW-4 Jaram Singh, they no doubt have supported the manner in which the search and seizure has taken place on the spot, however, on account of the independent witnesses having turned hostile to the prosecution as well as certain discrepancies found during investigation of the case, learned trial Judge, has acquitted the accused of the charge.

12. The only question, needs consideration in this appeal is that learned trail Judge has failed to appreciate the evidence available on record in its right perspective and on that account, the findings of acquittal as recorded are perverse and the impugned judgment is not legally sustainable.

13. As noticed above, there are two sets of witnesses, i.e. independent and officials. The independent witnesses no doubt have admitted their presence on the spot, however, as per their version they were not present there at the time when search and seizure had taken place and rather at a stage when the contraband, allegedly Charas, was already lying there in a bag. PW-2 Purshotam while stating that the accused in their presence had disclosed his name as Raj Kumar, resident of Jallandhar before the Police, also admits the presence of accused on the spot. They, however, have not supported the prosecution case qua the manner in which the search and seizure has taken place on the spot and turned hostile.

14. The official witnesses no doubt have supported the case as disclosed from the perusal of the final report filed under Section 173 Cr. P.C. and the documents annexed therewith. However, in view of the evidence having come on record, by way of testimonies of the independent witnesses and the official witnesses, there emerge two possible views on record. It is well settled at this stage that in a case where on the basis of evidence available on record two possible views emerge on record, the view favouring the accused has to be believed and benefit of doubt to be given to him and not to the prosecution. Otherwise also, in the Act, there is provision of stringent punishment if an offender is found to have committed the offence.

15. Therefore, the proof to connect the accused with the commission of the offence must be beyond all reasonable doubt and the initial burden to bring the guilt home to an accused booked for the commission of an offence under the Act lies on the prosecution. In case the prosecution succeeds to prove the charge beyond all reasonable doubt against the accused, it is only in that situation that the presumption as envisaged under Sections 35 and 54 of the Act can be raised. We are drawing support to substantiate the findings so arrived at from the judgment of Apex Court in ***Noor Aga Vs. State of Punjab, (2008) 16 SCC 417***. This judgment reads*:*

"56. The provisions of the Act and the punishment prescribed therein being indisputably stringent flowing from elements such as a heightened standard for bail, absence of any provision for remissions, specific provisions for grant of minimum sentence, enabling provisions granting power to the Court to impose fine of more than maximum punishment of Rs.2,00,000/- as also the presumption of guilt emerging from possession of Narcotic Drugs and Psychotropic substances, the extent of burden to prove the foundational facts on the prosecution, i.e., `proof beyond all reasonable doubt' would be more onerous. A heightened scrutiny test would be necessary to be invoked. It is so because whereas, on the one hand, the court must strive towards giving effect to the parliamentary object and intent in the light of the international conventions, but, on the other, it is also necessary to uphold the individual human rights and dignity as provided for under the UN Declaration of Human Rights by insisting upon scrupulous compliance of the provisions of the Act for the purpose of upholding the democratic values. It is necessary for giving effect to the concept of `wider civilization'. The courts must always remind itself that it is a well settled principle of criminal jurisprudence that more serious the offence, the stricter is the degree of proof. A higher degree of assurance, thus, would be necessary to convict an accused. In State of Punjab v. Baldev Singh, (1999) 3 SCC 977, it was stated:

> "It must be borne in mind that severer the punishment, greater has to be the care taken to see that all the safeguards provided in a statute are scrupulously followed."

[See also Ritesh Chakravarty v. State of Madhya Pradesh, JT 2006 (12) SC 416]

57. It is also necessary to bear in mind that superficially a case may have an ugly look and thereby, prima facie, shaking the conscience of any court but it is well settled that suspicion, however high may be, can under no circumstances, be held to be a substitute for legal evidence.

58. Sections 35 and 54 of the Act, no doubt, raise presumptions with regard to the culpable mental state on the part of the accused as also place burden of proof in this behalf on the accused; but a bare perusal the said provision would clearly show that presumption would operate in the trial of the accused only in the event the circumstances contained therein are fully satisfied. An initial burden exists upon the prosecution and only when it stands satisfied, the legal burden would shift. Even then, the standard of proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the guilt of accused on the prosecution is "beyond all reasonable doubt" but it is `preponderance of probability' on the accused. If the prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was

> essential so as to shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the element of possession will have to be proved beyond reasonable doubt.
>
> 6. Whether the burden on the accused is a legal burden or an evidentiary burden would depend on the statute in question. The purport and object thereof must also be taken into consideration in determining the said question. It must pass the test of doctrine of proportionality. The difficulties faced by the prosecution in certain cases may be held to be sufficient to arrive at an opinion that the burden on the accused is an evidentiary burden and not merely a legal burden. The trial must be fair. The accused must be provided with opportunities to effectively defend himself."

16. Analyzing the given facts and circumstances of this case and also the evidence available on record, it is not proved beyond all reasonable doubt that the police party headed by PW-13 Jeet Singh had nabbed the accused at the place of occurrence in the presence of independent witnesses PW-2 Purshotam and PW-3 Vijay Kumar, as the said witnesses did not support this part of the prosecution case.

17. Similarly, the compliance of Section 50 of the Act, in the manner, as claimed, has also not been proved, because the independent witnesses irrespective of admitting their signatures on the consent memo. Ext.PW1/A, have not supported this aspect of the prosecution case nor the recovery of Charas in their presence vide seizure memo. Ext.PW1/D, because as per their version they arrived at the place of occurrence at such a stage, when the contraband, allegedly Charas, was allegedly lying there in a bag. The accused belongs to Punjab, whereas both the independent witnesses are residents of District Chamba. Being so, it cannot be said that they had acquaintance with each other and as such it cannot be said that the independent witnesses had helped the accused. Nothing is also on record, suggesting that they are persons of tainted character or undependable. Thus, due weightage has to be given to their version that they were not present at the spot, when search and seizure in the manner, as claimed by the prosecution, has taken place. Therefore, irrespective of the official witnesses having supported the prosecution case, the testimony of PW-2 Purshotam and PW-3 Vijay Kumar, has rendered the entire prosecution story highly doubtful.

18. It is again well settled that in a case where the independent witnesses have turned hostile to the prosecution, whereas the official witnesses have supported its case, the testimony of official witnesses should not be discarded, if otherwise inspires confidence. In that situation, the testimony of official witnesses is required to be scrutinized with all circumspection and precaution. In this regard also, we are drawing support from the judgment rendered by a co-ordinate Bench of this Court in ***State of H.P. Vs. Rajesh Dhiman and another, 2012(3) Shim. LC 1583***.

19. Now, if coming to the official witnesses, they are PW-1 Suneel Kumar and PW-4 HHC Jaram Singh. No doubt they have supported the prosecution case qua the manner, the search and seizure has taken place on the spot, however, their testimony in cross-examination leads to the only conclusion that they have improved their version in their statements recorded under Section 161 Cr. P.C, because in the statement of PW-1 Suneel Kumar recorded under Section 161 Cr. P.C., nothing is there that the bag containing Charas was recovered from the space beneath the fuel tank. He even was confronted also with his statement recorded under Section 161 Cr. P.C. He has also not stated before the

police that the independent witnesses met the police party near petrol pump nor that the dickey of the scooter was opened by the accused. He has also not stated that PW13 ASI Jeet Singh informed him about the secret information he received. Nothing has also come in his statement that the independent witnesses had told the ASI that they had come to temple.

20. Similarly, in the statement of PW-3 recorded under Section 161 Cr. P.C., nothing has come therein that he had seen the bag from the hole meant for air and that the bag was concealed beneath the fuel tank. Nothing is also there in his statement that the accused was asked to open the dickey. Therefore, it is not safe to place reliance on their testimonies also.

21. Otherwise also, it is well settled that the requirement of associating the independent witnesses during the search and seizure, is not a mere formality, but to ensure fairness in respect of search and seizure and ultimately to prove the manner in which the search and seizure allegedly taken place during the course of trial. We have drawn support in this regard from the judgment, again of our own High Court in ***State of H.P. Vs. Hanacho alias Stewart, Latest HLJ 2004(HP) (DB) 642.***

22. Consent of the accused has also not been obtained in accordance with law, as he was never apprised that he has a legal right of being searched before a Magistrate or a gazetted officer. The information to the effect whether he intends to give his search to a Magistrate or a gazetted officer given to the accused is not sufficient to infer the compliance of the provisions contained under Section 50 of the Act.

23. Another glaring discrepancy is non-compliance of Section 42 of the Act, because in the Rapat Rojnamcha Ext.PW5/A, nothing has come as to how the Investigating Officer PW-13 ASI Jeet Singh believed that the contraband was likely to be destroyed or pilferaged and that it is for this reason, it was not possible to obtain the search warrant. The reasons so recorded also seem to be not forwarded to the Superintendent of Police Chamba or any other superior police officer. No doubt the special report Ext.PW5/A was sent to the Superintendent of Police Chamba, however, it is not sufficient to infer the compliance of Section 42 of the Act. Therefore, such procedural lapses have also rendered the prosecution story highly doubtful.

24. The evidence, as has come on record by way of remaining prosecution witnesses, including the I.O., is formal and could have at the most been used as link evidence, had the prosecution been otherwise able to prove its case beyond all reasonable doubt.

25. The crux of what has been said hereinabove, therefore, would be that the prosecution has miserably failed to persuade us to reverse the judgment of acquittal and convict the accused on the testimony of the official witnesses for the reason that since they have improved their earlier version while in the witness box vis-à-vis procedural discrepancies noticed supra, their version cannot be believed to be true and correct. As a matter of fact, the prosecution has miserably failed to bring the guilt home to the accused by producing cogent and reliable evidence. The present rather is a case where from the perusal of evidence, two possible views emerge on record and as per the settled principles in criminal administration of justice, the view which favours the accused should be believed to be correct and the benefit of doubt to be given to him.

26. The trial Court has appreciated the evidence available on record in its right perspective while recording the findings of acquittal against the accused. The findings so recorded cannot be said to be perverse or illegal. We thus find no reason to interfere with the impugned judgment and the same rather deserves to be upheld.

For all the reasons recorded hereinabove, this appeal fails and the same is accordingly dismissed. Personal bonds furnished by the accused shall stand cancelled and surety bonds discharged.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Amrish Rana ..... Appellant

Versus

State of Himachal Pradesh .....Respondent

Cr. Appeal No. 447/2009
Reserved on: April 12, 2016
Decided on: April 13, 2016

Indian Penal Code, 1860- Section 304 Part I- Accused inflicted injuries on the person of A who died – accused was tried and convicted by the trial Court- prosecution version was duly proved by PW-2- it was corroborated by PW-6 to PW-8 and PW-10- cause of death was shock and haemorrhage- accused had given beatings on the vital part of the body- incident had taken place inside the jail- no independent witness could have been examined- statements of official witnesses are natural and confidence inspiring - they have duly corroborated the prosecution version- accused was rightly convicted by the trial Court- appeal dismissed.

(Para-26 to 29)

Case referred:
Nankaunoo vs. State of Uttar Pradesh, (2016) 3 SCC 317

For the appellant : Mr. Anoop Chitkara, Advocate.
For the respondent : Mr. M.A. Khan, Additional Advocate General.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The present appeal has been filed against Judgment/Order dated 5.9.2009/7.9.2009 rendered by learned Sessions Judge, Kangra at Dharamshala in Sessions Case No. 43-D/VII-2007, whereby appellant-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 302 IPC, has been convicted under Section 304 Part I IPC and convicted to undergo simple imprisonment, for 10 years and to pay a fine of Rs.25,000/-, and, in default of payment of fine, to further undergo simple imprisonment, for one year.

2. Case of the prosecution, in a nutshell, is that accused was facing trial under Section 302 IPC. On 20.4.2006, at about 6.10 PM at Sub Jail Dharamshala, the accused inflicted injuries on the person of Anoop Kumar son of Hans Raj who died on 21.4.2006 at 1 PM in PGI Chandigarh. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 23 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence.

Accused examined one witness in his defence. Trial Court convicted and sentenced the accused under Section 304 Part I as noticed herein above. Hence, this appeal.

4. Mr. Anoop Chitkara, 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 that Judgment/Order of conviction dated 5.9.2009/7.9.2009.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Dr. Naresh Gupta testified that on 20.4.2006, the police had filed an application Ext. PW-1/A before him for ascertaining if Anoop Kumar was conscious and fit to make statement. He examined Anoop Kumar and found that he was unconscious and not fit to make statement. He had suffered injury in the area of head.

8. PW-2 Pankaj Sharma deposed that he was working as Jail Warder in District Jail, Dharamshala with effect from 20.8.2005. On 20.4.2006, he was on duty in the office. He usually worked with Vikram Katoch, Assistant Superintendent District Jail. At about 6.10 PM, when he was working in the office and Vikram Katoch was also present there, Divesh Kumar, Head Warder had rushed to their office room and informed them that the accused and another prisoner Anoop were engaged in a fight. Accused and Anoop stood convicted under Section 302 IPC and had been serving life sentence in District Jail, Dharamshala. Sh. Anoop was locked up in Cell No.2, whereas, the accused person stood locked up in high security prison in 'B' Block in the jail complex. On receipt of information supplied by Shri Divesh Kumar, Head Warder, Vikram Katoch and he left their room after locking the room and reached the main gate of the jail. They got the gate opened and rushed to Cell No. 2. At that time, Gopal Head Warder, Pawan HHG and Naresh Warder were present in Cell No. 2 where Anoop was lying unconscious with injuries on the left side of the head. They picked him up and took to the jail gate. At that time, Jail Pharmacist had reached the jail. He examined the deceased and asked to take him to Zonal Hospital, Dharamshala. They arranged for a vehicle and took him to Zonal Hospital. Medical Officer at Zonal Hospital examined the deceased and referred him for expert medical treatment to PGI, Chandigarh. Police was informed and police took deceased to PGI Chandigarh on the night intervening 20.4.2006 and 21.4.2006. On 19.4.2006 also, the accused was not following jail manual and pronouncing his authority. Anoop did not accept his authority. Incident dated 19.4.2006 was reported to the jail administration and report was recorded in daily diary. Police visited District Jail on 21.4.2006 and collected documentary information relating to confinement of the accused and deceased in District Jail. In his cross-examination, he admitted that the accused had made allegations that he was supplying mobile phones to the inmates and under trials. He also admitted that there was a wall of 20 feet height between Cell No. 2 and high Security prison 'B' block. He also admitted that deceased stood committed to 'B' block of separate cell of high security prison.

9. PW-3 Parkash Chand testified that he was working as Home Guard. He was detailed for duty in District Jail, Dharamshala during the said period. On 20.4.2006, he was working as a Warder and was in the corner of Cell No. 2 and the high security prison. He heard noise coming from Cell No. 2 at about 6.15 PM. He did not rush to Cell No. 2 to find out the cause of noise and alarm. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that on 20.4.2006 at about 6 PM, Shri Divesh Kumar, Head Warder, Naresh, Gopal Singh warders and Kuldeep HHG were on duty outside Cell No. 2 in District Jail, Dharamshala alongwith him. He denied the suggestion that on

alarm being raised, Divesh, Naresh, Kuldeep, Gopal and he had rushed to Cell No. 2 and had seen accused person running after the deceased and that thereafter accused cause numerous injuries with fist blows and kicking to the deceased in Cell No. 2. He denied the suggestion that Divesh, Naresh, Gopal, Kuldeep and he rescued the deceased from the grip of the accused person with great difficulty and thereafter, accused person had rushed to his cell inside high security prison. He did not know if Anoop Kumar became unconscious and had injuries on his head. He further denied the suggestion that he was examined by the police on 29.7.2006. He also denied that he had informed the police that accused had badly belaboured Sh. Anoop in his presence. (confronted with his statement under Section 161 CrPC wherein portion A to A is stated wrong by the witness). He further denied the suggestion that he was scared of accused person and thus resiled from previous statement.

10. PW-4 Suresh Kumar deposed that he was a Pharmacist in District Jail, Dharamshala from 2000 to 2007. On 20.4.2006, he was present in his quarter within jail complex. He was sent for by the jail officials at about 6.15 PM. He rushed to the District Jail and examined the deceased. Deceased stood committed to District Jail as a life convict and had been undergoing sentence there. Anoop was found unconscious by him at the gate of the jail. He asked jail officials to immediately take him to Zonal Hospital, Dharamshala for treatment.

11. PW-5 Vikram Katoch, Assistant Jail Superintendent is a material witness. He testified that on 20.4.2006, at about 6.10 PM, he was present in his office and Pankaj Sharma, Head Warder was also present with him. At that time, Head Warder Divesh Kumar came to his office and informed him that quarrel had taken place between accused and deceased, and deceased was lying unconscious in the jail. He immediately rushed to jail and asked the Head Warder to close the jail. Thereafter, he, Pankaj and Kirti Kumar rushed to Cell No. 2, where Anoop Kumar was lodged. He noticed bluish marks on the head above his ear. He removed Anoop Kumar from that cell with the help of staff from his cell and took him out of jail near main gate. He managed a vehicle and immediately took Anoop to Zonal Hospital, Dharamshala. Anoop was admitted in the emergency ward of hospital. CT scan of Anoop was conducted in the hospital. Anoop was unconscious and his condition did not improve. Doctor referred him to PGI Chandigarh. He was asked to arrange for `18,000/- for his treatment. He returned to his office on that evening and made complaint Ext. PW-5/A and sent the same to the SHO, Police Station, Dharamshala for registration of case. On 21.4.2006, he was deputed by SDM Dharamshala, who was holding charge of Superintendent of Jail to Chandigarh. He reached PGI Chandigarh in the evening and found Anoop Kumar dead. He intimated about death to the SDM through telephone. Local police had also reached. Post-mortem of the deceased was conducted at Chandigarh. Dead body was handed over to the brother of the deceased. On 20.4.2006, accused was lodged in 'B' Block i.e. New Jail whereas deceased was lodged in 'A' Block Cell No. 2 i.e. old jail. They used to lodge prisoners of the jail in their cells after sunset. In the month of April, they lodged them in jail at about 6.30 to 6.45 PM. On 21.4.2006, on the request of police he had handed over history ticket of accused duly attested from original consisting of four pages, copies of lock up register having two sheets and certified copies of duty register Ext. PW-5/D in two sheets were also taken into possession in the presence of Kuldeep Singh and Pankaj Sharma. In his cross-examination, he admitted the suggestion that the District Jail had facility of Medical Officer and Pharmacist. He also admitted the suggestion that MO and Pharmacist were available in the Jail, around the clock. He admitted that Anoop was taken to the hospital without being checked by MO of the Jail.

12. PW-6 Divesh Kumar testified that accused was convicted in a case under Section 302 IPC and was lodged in District Jail, Dharamshala. Deceased was also convicted

under Section 302 IPC and was lodged in District Jail, Dharamshala. On 20.4.2006, he was on duty in the District Jail, Dharamshala from 12 noon to sunset i.e. the time when prisoners are kept in lockup. At about 6.10 PM, he was inside the jail premises. He heard noise of quarrel from *Chakki* No.2 i.e. room of jail. He immediately rushed to *Chakki* No. 2 alongwith Naresh Warder. When they reached in that room, Gopal Singh Head Warder, HHC Kuldeep and HHG Prakash Chand also met them who were also on duty on that day. He noticed accused giving fist blows and kicks to the deceased inside the room. He could not tell which portion of body was hit by kicks and fist blows. He alongwith other officials intervened and saved Anoop Kumar from the accused. Accused had been taken out of that room by them and thereafter accused had gone to barrack No. 2. Anoop Kumar was serious at that time and he was unconscious. He noticed bluish injury mark on the head of Anoop Kumar above his left ear. He had also noticed one scratch on the cheek of Anoop Kumar. On that day, Vikram Katoch, Assistant Superintendent Jail-cum-Deputy Superintendent Jail as Superintendent of Jail was on leave and SDM was holding charge of the Superintendent of Jail. He rushed to the office of Vikram Katoch and informed him about the incident. He informed Vikram Katoch at 6.10 PM in his office. Thereafter, Vikram Katoch with Pankaj Sharma, Pawan Kumar, Dalip Kumar and him came to the room of Anoop Kumar. They removed Anoop Kumar from that room to the outer gate of District Jail, Dharamshala. He was ordered by Vikram Katoch to close the jail after lodging the prisoners inside their rooms. In his cross-examination, he admitted that there are two jail buildings, one is old and the other is new. He also admitted that there was a wall in between old and new jails. There was also a gate where gate keeper remained on duty. He denied that gate is always locked. He admitted that the accused had made many complaints against the jail authorities about manhandling and of misbehaviour. He did not remember the exact date on which his statement was recorded by the police.

13. PW-7 Gopal Singh, Head Warder deposed that on 20.4.2006, he was on duty in District Jail, Dharamshala from 12 noon till 6.30-6.45 PM. At about 6 PM, he heard noise of quarrel coming from cell No. 2 where deceased was lodged. At that time, prisoners were not locked in their rooms and they were out of their rooms. Thereafter he alongwith Divesh Kumar, Naresh Warder, HHG Kuldeep and HHG Prakash had gone to Cell No. 2. They noticed accused giving beatings to the deceased with fist blows and slaps. Accused had inflicted injuries on the head of deceased above his left ear. They intervened and separated accused and deceased. Thereafter accused had gone to new jail, where he was lodged. Anoop Kumar became unconscious. Thereafter, Vikram Katoch came to the spot with Pankaj. Vikram Katoch ordered to lodge prisoners inside their rooms. Vehicle was arranged and injured was taken to the District Hospital for treatment. He accompanied Anoop Kumar to District Hospital, Dharamshala. Anoop Kumar was admitted in the hospital and was further referred to PGI Chandigarh for treatment, where he died. In his cross-examination, he has admitted that accused made many complaints against jail authorities for misbehaviour etc. He admitted the suggestion that between two jails, there was a wall having a gate connecting them. He admitted that the gate was guarded by a gate keeper. He admitted that register is maintained at the gate.

14. PW-8 Naresh Singh deposed that on 20.4.2006, he assumed his duty at 6 PM and his duty was upto 10 PM. At that time, Gopal Singh and Divesh Kumar were Head Warders and HHG Kuldeep and Parkash Chand were also on duty in the jail. At that time, prisoners were not lodged in their lockup. At about 6.05 PM, he heard noise of quarrel from *Chakki* No.2. Anoop had been lodged in that Cell. On hearing the noise of quarrel, he went towards *Chakki* No.2 and noticed accused was beating Anoop Kumar with fist blows and kicks. There were no other prisoners in the room. They intervened and saved deceased from the hands of the accused. Accused had gone to barrack thereafter. He noticed bluish mark

on the head of Anoop Kumar above ear. Anoop Kumar had become unconscious by that time. Thereafter, Divesh informed Assistant Superintendent Jail Vikram Katoch, in his office. Vikram Katoch with Warder Pankaj and Divesh came to *Chakki* No.2. Anoop Kumar had been taken to the outer gate of jail by them from where Anoop Kumar was taken to District Hospital, Dharamshala by Vikram Katoch. In his cross-examination, he admitted that about 60 prisoners were present in the new jail complex. He also admitted that Anoop and Rajinder were lodged in old jail.

15. PW-10 Kuldeep Singh has also corroborated the statement of PW-8. According to him also, he was on duty in central beat of jail. He heard noise of quarrel from Cell No. 2. He immediately rushed to *Chakki* No. 2 and saw accused and deceased fighting inside *Chakki* No. 2. He saw accused giving beatings to Anoop Kumar. He noticed accused giving 1-2 fist blows on the head of deceased Anoop Kumar. Head Warder Gopal also reached there. At that time there were only accused and deceased in *Chakki* No. 2. Thereafter, Head Warder Divesh and HHG Joginder also reached there. They separated accused and Anoop Kumar. Thereafter accused had gone toward Block 'B' of the jail. Anoop was lying on the floor and was not able to speak. Thereafter, Head Warder Divesh had gone to the office of Assistant Superintendent of Jail to inform Vikram Katoch. Vikram Katoch with Pankaj Warder and Head Warder Divesh came to Cell No.2. Anoop Kumar was taken by the staff to the outer gate of jail. He remained there in the jail upto 10 PM.

16. PW-12 Om Prakash deposed that the deceased Anoop Kumar was also undergoing life imprisonment. Behaviour of accused towards jail officials was not good. He wanted to create unlawful authority on the other inmates of the prison. Deceased being a local person did not accept the authority of accused. On 12.6.2006, Inspector SHO R.P. Jaswal had visited District Jail, Dharamshala and on his request he had supplied to him attested photocopies of application for conducting post-mortem examination Ext. PW-12/A.

17. PW-13 Dr. Dilavar Singh deposed that he was posted as Medical Officer in District Jail, Dharamshala from 2004. His official residence was within jail campus. On 20.4.2006 at about 7 PM, he was present in his quarter when Assistant Superintendent of Jail, Vikram Katoch telephonically informed him that Anoop and accused had quarreled and condition of Anoop was serious and he had been removed to the District Hospital, Dharamshala. He visited District Hospital, Dharamshala. When he reached there, Anoop was unconscious. He was taken for CT Scan. He was further referred to PGI Chandigarh for treatment and management.

18. PW-15 Dr. Pardeep Kumar conducted post mortem examination on the body of the deceased. According to his opinion, cause of death was due to shock and haemorrhage as a result of injury to the brain, which was sufficient to cause death in the ordinary course of nature. All the injuries were ante mortem in nature. Probable time which had elapsed between injuries and death was within 24 hours and between death and post mortem examination was within 48 hours as per record.

19. PW-17 SI Ranjit Singh, deposed that he was posted as ASI /Investigating Officer in the Police Station, Dharamshala. On 20.4.2006 at 9.05 PM, SHO Om Parkash had deputed him alongwith Constable Sanjeev Kumar in Zonal Hospital, Dharamshala on the basis of Rapat No. 26 of daily diary, copy of which is Ext. PW-16/A. He reached the hospital and found that Anoop Kumar was under treatment. He moved application Ext. PW-1/A for obtaining MLC and opinion of the Doctor whether injured was fit to make statement or not. Doctor declared Anoop Kumar not fit to make statement. He telephonically informed SHO Om Parkash about this position. Thereafter, as per the direction of SHO PS Dharamshala,

he went to the District Jail, Dharamshala and reached there at about 10.15 PM on 20.4.2006. Assistant Superintendent of Jail Vikram Katoch met him in Jail.

20. PW-18 ASI Surjit Kumar deposed that on 21.4.2006 at about 9 AM, on the order of SHO Police Station, Dharamshala, ASI Ranjit Singh had handed over case file to him for further investigation. He went to the jail on the same day and associated jail officials in the investigation. He prepared site plan of the Jail which is Ext. PW-18/A.

21. PW-19 Dr. Veena deposed that she medically examined Anoop Kumar son of Hans Raj, who was brought from District Jail, Dharamshala. Attendants of convict had brought him with alleged history of short scuffle. Patient was unconscious and not responding to external stimuli on verbal command. He was admitted in male surgical ward for further treatment and investigation. She issued MLC Ext. PW-19/A. According to her, probable time of injuries was within six hours and weapon used was blunt.

22. PW-21 Dr. V.D. Dogra, Assistant Professor, Medicine Department, testified that patient was brought by the police in unconscious state with alleged history of quarrel in the jail at Dharamshala. Patient was not responding to command or deep stimuli. Pupils were bilaterally dilated and fixed and not moving all the four limbs. Patient was referred to PGI Chandigarh. He visited District Jail, Dharamshala on the same day. He took into possession photostat attested copies of two sheets of daily diary Register of Jail with effect from 19.4.2006 to 20.4.2006. History ticket of accused three in number, history ticket of deceased Anoop Kumar, one sheet, register of Barrack lodging of accused and deceased were also taken into possession. He moved an application for preparing inquest papers. CD of post mortem examination had also been got prepared through private videographer.

23. PW-22 Inspector RP Jaswal deposed that on 21.4.2006, after receiving information from PGI Chandigarh that injured Anoop Kumar had succumbed to his injuries, he took over the case file of the case from ASI Surjit Kumar

24. PW-23 Inderjit Singh Sandhu, Additional Director, Industries and Commerce, deposed that on 22.4.2006, he received a request letter bearing No. 974-75 from Superintendent, District Jail, Dharamshala for conducting inquest proceedings. On this request, inquest proceedings were conducted by him on the same day at PGI Chandigarh, in the presence of Shri Pawan Kumar son of Shri Hans Raj and Desh Raj son of Late Kishori Lal.

25. DW-1 Rajinder Kumar deposed that he was convict in a murder case. His appeal was pending before the Hon'ble Supreme Court of India. During April, 2006, he was lodged in District Jail, Dharamshala. There were two blocks in the Jail known as new and old blocks. He was in old jail alongwith Anoop Kumar alongwith other prisoners. On 19.4.2006, in the morning Anoop had verbal altercation with him about the work assigned to him by the jail administration. Complaint was lodged with jail administration about the quarrel and on inquiry jail administration called both of them to the office and tried to prevail over them and on his request, Anoop was lodged in a cell in the old jail by the administration on 19.4.2006. On 20.4.2006, around 5 PM, when he was going to attend the call of nature inside the old block, Anoop came to him and started quarreling with him and due to that he had been lodged in a cell from the barrack. In the meantime, guard of the jail administration came there and separated them. After some time Anoop climbed the lintel of a barrack which was being raised in the old block. Later he came to know that Anoop had sustained injury on his person. They had lifted him to the main gate of jail and thereafter, Anoop was taken to the hospital. In between two blocks of the jail, there was a wall which was having a gate and sentry used to guard that gate. In his cross-examination, he admitted

that he has not lodged any complaint against Anoop Kumar. Volunteered that the guard took them to the office of jail administration on that day. No inquiry was conducted in black and white. Duty guards were Kuldeep and Guleria. Volunteered that he did not remember their names. In his cross-examination, he admitted that Gopal Dass, Dinesh HW and Joginder HHG came on the spot.

26. Accused was undergoing life sentence at District Jail, Dharamshala. Incident had taken place in the evening on 20.4.2006. PW-2 Pankaj Sharma has deposed that he was on duty in his office with Vikram Katoch. At 6 PM, when he was working in the office, Shri Divesh Kumar Head Warder had rushed to their office room. He informed that the accused person and Anoop Kumar were engaged in a fight. Anoop stood locked up in Cell No.2, whereas, the accused person stood locked up in the high security prison in 'B' Block in the jail complex. On receipt of information, he alongwith Vikram Katoch left their room and reached the spot. At that time, Gopal Head Warder, Pawan HHG and Naresh Warder were present in Cell No. 2 where Anoop was lying unconscious with injuries on the left side of the head. They picked him up and took him to the zonal Hospital Dharamshala. Thereafter, he was referred to PGI Chandigarh. Statement of PW-2 Pankaj Sharma has been corroborated by PW-5 Vikram Kotoch. He deposed that he was present in the office with Pankaj Sharma. They were informed by Divesh Kumar that a quarrel had taken place between Amrish Rana and Anoop Kumar. Anoop Kumar was lying unconscious. He immediately rushed to the spot. He was taken out of jail near the main gate. Vehicle was managed. He was rushed to District Hospital, Dharamshala and thereafter referred to PGI Chandigarh. PW-6, Divesh Kumar is an eye witness of the incident. According to him, at 6.10 PM, he was inside the jail premises. He heard noise of quarrel from *Chakki* No. 2. He rushed to *Chakki* No. 2 alongwith Naresh. When he reached the spot, Gopal, Head Warder, HHC Kuldeep and HHG Prakash Chand also met him. They were on duty on that day. They noticed accused giving fist blows and kicks to the deceased inside the room. He alongwith others intervened and saved Anoop Kumar from the hands of accused. Anoop was unconscious. Statement of PW-6 Divesh Kumar has been duly corroborated by PW-7 Gopal. He noticed accused inflicting injuries to the deceased. According to him, accused inflicted injury on head above left ear. They intervened and separated Anoop Kumar from the accused. PW-8 Naresh Singh has also seen accused giving fist and kick blows to the deceased in *Chakki* No.2. He had seen the accused giving kicks and fist blows to the deceased. Similarly, PW-10, Kuldeep Singh was also on duty and he has seen accused giving beatings to the deceased. Similarly, PW-2 Pankaj Sharma, PW-5 Vikram Katoch were on duty on 20.4.2006. They immediately rushed to the spot when informed by PW-6 Divesh Kumar about the incident. PW-6 Divesh Kumar, PW-7 Gopal Singh, PW-8 Naresh Singh and PW-10 Kuldeep have all seen the accused beating the deceased. Deceased had become unconscious. He was removed from the Cell. He was taken to Zonal Hospital, Dharamshala and thereafter referred to PGI Chandigarh. Post-mortem was conducted by PW-15 Dr. Pardeep Kumar, Medical Officer, PGI Chandigarh. Cause of death was due to shock and haemorrhage as a result of injury to the brain, which was sufficient to cause death in ordinary course of nature. All the injuries were ante mortem in nature. Probable time which had elapsed between injuries and death was within 24 hours and between death and post mortem examination was within 48 hours as per record. PW-19 Dr. Veena has issued MLC Ext. PW-19/A. According to her, probable time of injuries was within six hours and weapon used was blunt. PW-21 Dr. V.D. Dogra deposed that as per consultation with Consultant Medicine on duty, patient required surgical evacuation, hence, patient was referred to PGI Chandigarh.

27. Mr. Anoop Chitkara, Advocate has vehemently argued that the accused had no intention to cause death. It was a case of sudden provocation. However, there is no merit in the contention. The accused had the intention to kill the deceased since he has given

blows on the vital organs of the body. He has purposely given beatings on the head. Witnesses have also noticed the injuries on the body of deceased. There were abrasions over left cheek and contusions over left *frontotemporal* region. Injuries, according to PW-15 Dr. Pardeep Kumar were to cause death in the ordinary course of nature.

28. Their lordships of the Hon'ble Supreme Court in the case of ***Nankaunoo vs. State of Uttar Pradesh,*** reported in ***(2016) 3 SCC 317,*** have explained the difference between "intention" and "knowledge" and have held that knowledge is bare awareness and not the same thing as intention and such consequences shall ensue. As compared to "knowledge", "intention" requires something more than the mere foresight of the consequences, namely, the purposeful doing a thing to achieve a particular end. Their lordships have held as follows:

> "11. Intention is different from motive. It is the intention with which the act is done that makes a difference in arriving at a conclusion whether the offence is culpable homicide or murder. The third clause of Section 300 IPC consists of two parts. Under the first part it must be proved that there was an intention to inflict the injury that is present and under the second part it must be proved that the injury was sufficient in the ordinary course of nature to cause death. Considering the clause thirdly of Section 300 IPC and reiterating the principles in Virsa Singh's case, in Jai Prakash v. State (Delhi Administration) (1991) 2 SCC 32, para (12), this Court held as under:-
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> "Referring to these observations, Division Bench of this Court in Jagrup Singh case, (1981) 3 SCC 616 observed thus: (SCC p. 620, para 7) "These observations of Vivian Bose, J. have become locus classicus. The test laid down in Virsa Singh case, AIR 1958 SC 465 for the applicability of Clause Thirdly is now ingrained in our legal system and has become part of the rule of law." The Division Bench also further held that the decision in Virsa Singh case AIR 1958 SC 465 has throughout been followed as laying down the guiding principles. In both these cases it is clearly laid down that the prosecution must prove
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> (1) that the body injury is present,
>
> (2) that the injury is sufficient in the ordinary course of nature to cause death,
>
> (3) that the accused intended to inflict that particular injury that is to say it was not accidental or unintentional or that some other kind of injury was intended. In other words Clause
>
> Thirdly consists of two parts. The first part is that there was an intention to inflict the injury that is found to be present and the second part that the said injury is sufficient to cause death in the ordinary course of nature. Under the first part the prosecution has to prove from the given facts and circumstances that the intention of the accused was to cause that particular injury. Whereas the second part whether it was sufficient to cause death is an objective enquiry and it is a matter of inference or deduction from the particulars of the injury.
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> The language of Clause Thirdly of Section 300 speaks of intention at two places and in each the sequence is to be established by the prosecution before the case can fall in that clause. The 'intention' and 'knowledge' of the accused are subjective and invisible states of mind and their existence has to

be gathered from the circumstances, such as the weapon used, the ferocity of attack, multiplicity of injuries and all other surrounding circumstances.

The framers of the Code designedly used the words 'intention' and 'knowledge' and it is accepted that the knowledge of the consequences which may result in doing an act is not the same thing as the intention that such consequences should ensue.

Firstly, when an act is done by a person, it is presumed that he must have been aware that certain specified harmful consequences would or could follow. But that knowledge is bare awareness and not the same thing as intention that such consequences should ensue. As compared to 'knowledge', 'intention' requires something more than the mere foresight of the consequences, namely the purposeful doing of a thing to achieve a particular end."

29. Mr. Anoop Chitkara, Advocate has also argued that the prosecution has not examined independent witnesses. The fight has take place inside the District Jail, Dharamshala. There was no occasion for independent witnesses except official witnesses. Statements of official witnesses are confidence inspiring and natural. They have no enmity with the accused. Learned trial Court has rightly discarded the statement of DW-1 Rajinder. Single testimony of DW-1 Rajinder is not sufficient to rebut statements of eye witness PW-6 Divesh Kumar. Statements of witnesses have been duly corroborated by the medical officers.

30. Thus, there is no occasion for us to interfere with the well reasoned judgment/order of the learned trial Court.

31. Accordingly, there is no merit in the appeal and the same is dismissed. All pending applications are also dismissed.

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

Banshi Ram son of Shri Dittu Ram. ....Revisionist/Accused

Versus

Ram Chand son of Sh. Puran Chand ....Non-revisionist/Complainant

Criminal Revision Petition No. 229 of 2015
Order Reserved on 31.3.2016
Date of Order 13th April, 2016

Negotiable Instruments Act, 1881- Section 138- Accused had issued a cheque, which was dishonoured due to insufficient fund- he was tried and convicted by the trial Court- appeal was dismissed- held, in revision, that it was duly proved that cheque was issued by the accused which was dishonoured due to insufficient funds- plea that blank cheque was obtained as security was not established- accused had admitted liability by signing cheque - there is a presumption regarding consideration of the cheque which was not rebutted- in these circumstances, accused was rightly convicted by the trial Court – revision dismissed.

Cases referred:

Krishna Janardhan Bhat vs. Dattatraya G. Hegde, (2008)4 SCC 54
Don Ayengia vs. State of Assam and another, 2016)3 SCC (Weekly) page 1

Bhe Ram Vs. State of Haryana, AIR 1980 S.C.957
Rai Singh Vs. The State of Haryana, AIR 1971 S.C.
Jose Vs. The State of Kerla (Full Bench), AIR 1973 SC 944
Sudip Kr.Sen alias Biltu vs. State of West Bengal, AIR 2016 SC 310 (Weekly)
Anil Hada vs. Indian Acrylic Limited, AIR 2000 SC 145
Mallavarupu Kasivisweswara Rao vs. Thadi Konda Ramulu Firm, (2008)7 SCC 655

For the Revisionist: Mr. T.S. Chauhan, Advocate
For the Non-revisionist: Mr. Vikas Rathore, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present criminal revision petition is filed under Sections 397 and 401 Cr.P.C. against judgment dated 23.12.2013 passed by learned trial Court in RBT No. 39/3 of 2011/10 title Ram Chand vs. Banshi Ram and affirmed by learned Appellate Court vide judgment dated 26.2.2015 in criminal appeal No. 8/10 of 2014 title Bansi Ram vs. Ram Chand.

Brief facts of the case

2. Brief facts of case are that Ram Chand complainant filed complaint under Section 138 of Negotiable Instrument Act 1881 pleaded therein that complainant is proprietor of M/s Ankit Hire Purchase Private Limited Bharari Tehsil Ghumarwin District Bilaspur H.P. It is pleaded that complainant is running the business of financing the vehicles providing loan. It is pleaded that in the month of June 2009 accused approached the complainant for debt and complainant gave a sum of Rs.150000/- (Rupees one lac fifty thousand only) as loan to accused. It is pleaded that accused assured to return the amount on or before March 2010. It is pleaded that accused did not return the loan amount and thereafter complainant approached the accused personally and accused issued cheque bearing No. 5025481 payable in H.P. State Cooperative Bank Branch at Ghumarwin District Bilaspur H.P. Thereafter complainant presented the cheque for encashment before H.P. State Cooperative Bank Branch at Ghumarwin but cheque was returned with memorandum of bank "Insufficient funds". It is pleaded that thereafter complainant served the legal notice upon accused under Section 138 of Negotiable Instrument Act 1881 but despite notice accused did not pay the debt amount. It is pleaded that accused be sent to imprisonment and fine to the tune of Rs.300000/- (Rupees three lacs only) be also imposed upon the accused.

3. Notice of accusation was given to accused by learned trial Court on 1.10.2011 under Section 138 of Negotiable Instrument Act 1881. Accused did not plead guilty and claimed trial.

4. Complainant examined two witnesses i.e. CW1 Ram Chand and CW2 Sukh Dev and accused also examined one defence witness DW1 Labh Singh.

5. Learned trial Court on 23.12.2013 convicted the revisionist under Section 138 of Negotiable Instrument Act 1881 and sentenced the convict to undergo simple imprisonment for three months. Learned trial Court also ordered that convict would pay compensation of Rs.150000/- (Rupees one lac fifty thousand only) to complainant.

6. Feeling aggrieved against the judgment and sentence passed by learned trial Court and affirmed by learned Appellate Court revisionist filed the present revision petition.

7. Court heard learned Advocate appearing on behalf of revisionist and learned Advocate appearing on behalf of non-revisionist and Court also perused the entire record carefully.

8. Following points arise for determination in present criminal revision petition:-

Point No.1

Whether judgments of learned trial Court and learned Appellate Court are perverse and based upon non-appreciation of oral and documentary evidence as alleged in memorandum of grounds of criminal revision petition and whether learned trial Court and learned Appellate Court have committed illegality?

Point No. 2

Final Order.

9. Findings upon Point No. 1 with reasons

9.1 Complainant Ram Chand filed affidavit Ext.CW1/A in examination in chief. There is recital in affidavit Ext.CW1/A that deponent is proprietor of M/s Ankit Hire Purchase Private Limited Bharari Tehsil Ghumarwin District Bilaspur H.P. and deponent is running the business of financing the vehicles loan etc. There is recital in Ext.CW1/A that in the month of June 2009 accused being fast friend of deponent approached the deponent for debt and complainant in good faith advanced Rs.150000/- (Rupees one lac fifty thousand only) as loan to accused without interest. There is recital in Ext.CW1/A that accused assured to return the debt amount on or before March 2010. There is further recital in Ext.CW1/A that accused did not return the debt amount and thereafter deponent approached the accused personally and accused issued cheque No. 5025481 payable in H.P. State Cooperative Bank Limited Branch at Ghumarwin. There is recital in Ext.CW1/A that thereafter cheque was presented for encashment but same was returned with memorandum of bank "Insufficient funds". There is also recital in Ext.CW1/A placed on record that thereafter registered legal demand notice under Section 138 of Negotiable Instrument Act 1881 was issued vide registered letter but despite demand notice accused did not pay the debt amount. CW1 has denied in cross examination that he has filed a false case. CW1 has denied suggestion that he obtained the blank cheque from revisionist.

9.2. CW2 Sukh Dev Manager H.P. State Cooperative Bank Limited Ghumarwin has stated that cheque Ext.C1 was received in bank on 1.6.2010 for encashment. He has stated that cheque was returned on same day on account of insufficient funds. He has stated that cheque was presented by Ram Chand.

9.3 DW1 Labh Singh has stated that he is residing at Bharari since fifteen years and he is mason by profession. He has stated that Bansi Lal accused is known to him because he has worked for construction of his house. He has stated that in his presence accused took debt of Rs.50000/- (Rupees fifty thousand only). He has admitted that in the year 2009 accused was in dire need of money for admission of his son. He has stated that he does not know that in the year 2009 accused took loan of Rs.15000/- (Rupees fifteen thousand only) from complainant for admission of his son. He has stated that he does not know that cheque was issued by accused.

10. Following documentary evidence adduced by complainant. (1) Ext.C1 is cheque to the tune of Rs.150000/- (Rupees one lac fifty thousand only) issued in favour of complainant Ram Chand son of Shri Puran Chand signed by accused. (2) Ext.C2 is postal receipt. (3) Ext.C3 is memorandum issued by H.P. State Cooperative Bank Limited wherein

it is mentioned that cheque was dishonoured due to insufficient funds. (4) Ext.C4 is legal notice issued by complainant to accused under Section 138 of Negotiable Instrument Act 1881.

11. Submission of learned Advocate appearing on behalf of revisionist that learned trial Court did not properly appreciate oral as well as documentary evidence placed on record is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that complaint filed under Section 138 of Negotiable Instrument Act 1881 should contain following ingredients. (1) That there should be legally enforceable debt. (2) That cheque should be presented for encashment before bank within period of six months from the date on which it is drawn or within period of its validity whatever is earlier.(3) That cheque was returned due to insufficiency of funds. (4) That demand notice of fifteen days was given. (5) Failure of accused to pay debt amount despite receipt of demand notice within fifteen days. ***See (2008)4 SCC 54 title Krishna Janardhan Bhat vs. Dattatraya G. Hegde.*** In present case it is proved beyond reasonable doubt that cheque Ext.C1 was issued by revisionist to non-revisionist. It is also proved beyond reasonable doubt that cheque was presented and same was dishonoured on account of insufficient funds as per testimony of CW2 Sukh Dev Manager of H.P. State Cooerpative Bank Limited Ghumarwin (H.P.). It is also proved on record that thereafter demand notice Ext.C4 was given to revisionist and it is also proved on record that despite demand notice the revisionist did not pay the amount due. In present case testimonies of CW1 complainant and CW2 Manager are trustworty reliable and inspire confidence of Court. There is no reason to disbelieve the testimonies of CW1 and CW2. Testimonies of CWs and CW2 are corroborated with documentries evidence placed on record.

12. Submission of learned Advocate appearing on behalf of revisionist that blank cheque was obtained by complainant as security and on this ground revision petition filed by revisionist be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused cheque Ext.C1 placed on record. Cheque Ext.C1 is duly signed by revisionist. At the time of signing the cheque Ext.C1 revisionist was major and was in sound state of mind. Revisionist did not obtain any report from hand writing expert in order to prove that cheque Ext.C1 was not signed by him. It is held that by way of signing cheque Ext.C1 revisionist has admitted liability of antecedent debt. There is no recital in cheque Ext.C1 placed on record that cheque was given for security purpose only. It is proved on record that cheque was issued in connection with discharge of outstanding antecedent debt. It is well settled law that surety or guarantor are also liable under Section 138 of Negotiable Instrument Act 1881 in view of words “Any debt or other liability” mentioned under Section 138 of Negotiable Instrument Act 1881. ***See (2016)3 SCC (Weekly) page 1 title Don Ayengia vs. State of Assam and another.***

13. Submission of learned Advocate appearing on behalf of revisionist that he has issued the cheque to Shri D.K.Sharma Advocate and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Revisionist did not examine Mr.D.K. Sharma Advocate in present case in order to prove that cheque Ext.C1 was issued to Mr.D.K. Sharma Advocate. It is held that plea of revisionist that he had issued cheque Ext.C1 to Mr.D.K.Sharma is rejected on the concept of *ipse dixit* (An assertion made without proof).

14. Submission of learned Advocate appearing on behalf of revisionist that there is material contradiction between the pleadings and oral evidence and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the entire pleadings and Court has also perused oral as well as documentary evidence placed on record. There is no material contradiction in

present case which goes to the root of case. It is well settled law that concept *falsus in uno falsus in omnibus* is not applicable in criminal proceedings. ***See: AIR 1980 S.C.957 title Bhe Ram Vs. State of Haryana. See AIR 1971 S.C. title 2505 Rai Singh Vs. The State of Haryana.***

15. Submission of learned Advocate appearing on behalf of revisionist that testimonies of CWs 1 and 2 are not sufficient for conviction is also rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that conviction can be based on testimony of single witness if testimony of single witness is trustworthy reliable and inspire confidence of Court. ***See: AIR 1973 SC 944 title Jose Vs. The State of Kerla (Full Bench). See AIR 2016 SC 310 (Weekly) title Sudip Kr.Sen alias Biltu vs. State of West Bengal.***

16. Submission of learned Advocate appearing on behalf of revisionist that in view of testimony of DW1 Labh Singh revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. DW1 is not signatory to cheque Ext.C1. It is well settled law that contents of documents can be proved by person who is signatory or marginal witness of document as per Indian Evidence Act 1872.

17. Even as per Section 139 of Negotiable Instrument Act 1881 there is presumption in favour of holder but revisionist did not rebut the presumption as mentioned in Section 139 of Negotiable Instrument Act 1881. ***See AIR 2000 SC 145 title Anil Hada vs. Indian Acrylic Limited.*** Even as per section 118 of Negotiable Instrument Act 1881 there is presumption relating to (a) Consideration. (b) Date. (c) Time of acceptance. (d) Time of transfer. (e) Order of endorsement. (f) As to stamps. (g) Holder is a holder in due course. ***See (2008)7 SCC 655 title Mallavarupu Kasivisweswara Rao vs. Thadi Konda Ramulu Firm.*** Even as per Section 146 of Negotiable Instrument Act 1881 there is presumption relating to fact of dishonour of cheque when bank slip is issued by bank with remarks "Insufficient funds". In present case bank slip Ext.C3 is issued by bank with remarks "Insufficient funds". Even bank slip placed on record is also corroborated by testimony of CW2 i.e. Manager of Bank. Revisionist did not adduce any rebuttal evidence.

18. Submission of learned Advocate appearing on behalf of revisionist that learned trial Court has wrongly imposed the compensation to the tune of Rs.150000/- (Rupees one lac fifty thousand only) without any reason is also rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the judgment passed by learned trial Court. Learned trial Court has discussed the oral as well as documentary evidence in positive cogent and reliable manner with reasons. There is no infirmity in judgment passed by learned Trial Court and learned Appellate Court. In view of above stated facts point No.1 is answered in negative.

Point No. 2(Final Order)

19. In view of findings on point No.1 revision petition is dismissed. File of learned Trial Court and learned Appellate Court along with certified copy of order be sent back forthwith. Revision petition stands disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Narcotics Control Bureau .....Appellant
Versus
Ajmer Kumar and another .....Respondents

Cr. Appeal No. 428/2010
Reserved on: April 12, 2016
Decided on: April 13, 2016

N.D.P.S. Act, 1985- Section 8, 18, 29 and 60- Vehicle was stopped and searched during which 10 Kg. of opium was recovered- accused were tried and acquitted by the trial Court- held, in appeal that incident had taken place near the toll barrier Baddi- no independent witness was associated – confessional statement was not proved satisfactorily- it was necessary to produce the Malkhana Register to prove that the case property was deposited and was taken out at the time of production before the Court – prosecution case was not proved beyond reasonable doubt – trial Court had rightly acquitted the accused- appeal dismissed. (Para-12 to 15)

For the appellant : Mr. Ashwani Pathak, Senior Advocate with Mr. Sandeep K. Sharma, Advocate.
For the respondents : Mr. N.S. Chandel, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted against Judgment dated 15.7.2010 rendered by the learned Special Judge, Fast Track Court, Solan, District Solan, Himachal Pradesh in Case No. 4FTC/7 of 2009, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Sections 8, 18, 29 and 60 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as 'Act' for convenience sake), have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 19.10.2008 at about 2 AM a secret information was received by R.C. Bodh, Intelligence Officer that two persons namely Ajmer Kumar and Balwinder Singh are involved in drug trafficking and they will come from Baddi side towards Pinjore on Baddi Pinjore road on 19.10.2008 between 5 to 7 AM in their silver grey coloured Scorpio vehicle. Number of the vehicle was also given. Information was reduced into writing and put up before the Superintendent, Narcotics Control Bureau, Chandigarh and he directed the Intelligence Officer to constitute a team and lay Naka at Baddi. Search authorisation was also issued. At about 4 AM, complainant alongwith Ganesh Balooni, Intelligence Officer, Shri Rajesh Kumar, Sepoy and Shri Balwinder Singh, Sepoy associated two independent witnesses Mr. Kartar Singh and Jaswinder Singh to witness the whole process. The complainant alongwith the team of Narcotics Control Bureau and independent witnesses placed a Naka at Baddi near toll barrier Baddi on Baddi-Pinjore road at 4.20 AM. At 6.30 AM a grey coloured Scorpio vehicle was seen coming from Baddi side in which two persons were noticed. The NCB team signalled the vehicle to stop. It was stopped at a little distance. The NCB team ran to the vehicle and on reaching there, the complainant showed his identity card to both the persons sitting inside the vehicle and introduced himself, NCB team and witnesses. The persons sitting in the vehicle were told that the NCB

team had an information that a consignment of opium is being transported in the vehicle and they wanted to search the same. On this, the person driving the vehicle took out his pistol and after cocking the same aimed towards the complainant with intention to fire. In the meantime, NCB team snatched the pistol from him. Both the persons tried to run away. The NCB team overpowered the accused. Accused disclosed their identity and also divulged that they were taking delivery from a person named Bagga. Complainant searched the vehicle and found black coloured substance in the coloured polythene under the rear seat of the vehicle. Small substance was taken out by the complainant and was given to Shri Ganesh Balooni, Intelligence Officer, who conducted test with the help of *field drug detection kit* and told that it was opium. It weighed 10 kg. It was taken into possession vide separate seizure memo, which was signed by the accused, witnesses and the complainant. Complainant took out small quantity from different places of the recovered opium and made two representative samples of 25 grams each, which were packed in small polythene pouch and were heat sealed and placed in a separate envelop and on opening side on both the envelopes, white paper slip was pasted. Representative samples marked A1 and A2 and remaining opium was packed in a big transparent polythene, heat sealed and again kept in a cloth bag. Impressions of NCB seal 06 were taken on test memos and *Panchanama* was prepared by the complainant on the spot and seal after use was returned to Ganesh Balooni. Signatures were put on sample parcels and Lot A by the accused persons, witnesses and the complainant. Accused were arrested after explaining grounds of arrest and information of their arrest was given to their family members telephonically. Accused alongwith Lot A, two representative samples A1 and A2 and seized vehicle was produced before ACJM Kasauli on 20.10.2008 from where both the accused were sent to judicial custody. Case property was handed over to Superintendent NCB Chandigarh for safe custody alongwith compliance report of search authorisation. The Superintendent in the capacity of Godown In-charge issued Godown Receipt and deposited the case property given to him in the NCB godown. One sample packet mark A1 was sent alongwith two copies of test memos having facsimile impression of seal NARCOTICS CONTROL BUREAU 06 to the Chemical Examiner CRCL New Delhi through Balbinder Singh Sepoy who deposited the same with Chemical Examiner New Delhi and receipt was issued. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 6 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Learned trial Court acquitted both the accused. Hence, this appeal.

4. Mr. Ashwani Pathak, learned Senior Advocate, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. N.S. Chandel, Advocate, has supported the judgment of acquittal dated 15.7.2010.

6. We have heard the learned counsel for the parties and also gone through the judgment and record carefully.

7. PW-1 Kartar Singh testified that on 19.10.2008, NCB Inspector came to him at 4 AM at Baddi at Taxi Stand. He told him that he had information that some narcotic substance or drugs are likely to be transported from Nalagarh side towards Baddi on that day. He gave notice Ext. PW-1/A in this respect to him. It was signed by him. Thereafter, he proceeded to join some other witness. He accompanied NCB officials to the place of Naka, a little distance from the Taxi Stand. Naka was effected at about 4.30 AM. A Scorpio vehicle, number of which was not known to him, came from Nalagarh side proceeding to Pinjore side. NCB team signalled the vehicle to stop. NCB people disclosed their identity. Person

occupying driver seat suddenly took out a pistol but NCB officials snatched the same from said person. Accused thereafter got down from Scorpio vehicle and tried to escape but were overpowered by the inspector and NCB constables. NCB officials thereafter commenced search of the vehicle and black substance wrapped in polythene was detected having been placed under rear seat of the vehicle under a mat. The NCB inspector took out black substance and gave it for testing to the other inspector. It was found to be opium. Substance was weighed. It weighed 10 kg. Recovery memo Ext. PW-1/B was prepared which was signed by him and other witness, both the accused and the inspector. Thereafter, the NCB team took out two samples of 25 grams each from the recovered substance which were placed in polythene packets and thereafter in paper envelope and both samples were sealed. He did not remember what was the seal mark. Inspector outside the vehicle had taken seal from inspector sitting inside NCB vehicle and after sealing the samples with it, handed over seal back to the inspector sitting inside the NCB vehicle. Case property was produced in the Court while examining PW-1. He identified his signatures on paper mark A. Accused made confessional statements. In his cross-examination, he admitted that he was working as a Driver on daily wages with NCB at Chandigarh. There are many residential houses in the area of Baddi. Scuffle between NCB officials and accused lasted for 5 minutes. Taxi stand is situate at the spot at Baddi from where road goes to Barotiwala. He also admitted that the toll barrier remains open for 24 hours and is handled by officials on duty. He admitted that near barrier there existed a petrol pump which also remained open through day and night and 4-5 workers remained present throughout at petrol pump. Naka had been effected at a distance of 100 meters from the spot where road bifurcates. He admitted that no person from the toll barrier or petrol pump was called to witness the incident. He also admitted that many shops and hotels are situate at Baddi bus stand, and toll barrier and petrol pump are also situate there. NCB officials have conducted personal search of the accused after apprehending them after the scuffle was over. He also admitted that his house is situate 75 kms from Baddi. His village was in Punjab.

8. PW-2 Balbinder Singh Sepoy deposed that he took sample A1 from NCB office Chandigarh to the chemical examiner Central Revenue Control Laboratory, Kusha Road, New Delhi alongwith covering letter Ext. PW-2/A alongwith two duplicate test memos. In his cross-examination, he admitted that his statement was not recorded by NCB officer in this case.

9. PW-3 Ganesh Balooni, Intelligence Officer testified that on 19.10.2008, a specific telephonic information was received by Intelligence Officer R.C. Bodh that one Scorpio will come from Nalagarh side towards Pinjore and number of the vehicle was also known. Thereafter, they took their seizure kit etc. from their office and proceeded towards Baddi. They proceeded to Baddi between 2.20 to 2.30 AM. They reached Baddi at about 4 AM. On reaching Baddi, RC Bodh associated two witnesses namely Kartar Singh and Jaswinder Singh. They were associated near Taxi Stand Baddi. Thereafter at about 4.20-4.30 AM, they placed Naka on Baddi-Pinjore road at a distance of 40-50 metres from Baddi Taxi Stand. The toll barrier from the Naka was about 500 to 600 metres. Thereafter, at about 6.30 AM, a grey coloured Scorpio vehicle came from Nalagarh side towards Pinjore. . The vehicle was stopped. It stopped at a distance of 5 metres from the place of Naka. Thereafter, he and RC Bodh went from driver side and RC Bodh told the person driving that they had got information that some narcotic drugs are being transported through the vehicle and they also disclosed their identity to the person sitting on driver seat. He took out pistol and pointed to fire on RC Bodh but in the meantime, they overpowered him and snatched the pistol. Thereafter both the accused tried to run away from the spot but they were overpowered by the NCB team. Vehicle was searched. Some black coloured substance was found under rear seat under a mat in the vehicle. A small quantity was taken out. It was

found to be opium. It weighed 10 kg. Thereafter, Intelligence Officer R.C. Bodh took small quantities from different places from the contraband and prepared two representative samples of 25 grams each. These were sealed in three different parcels i.e. two parcels of samples and one parcel of the remaining substance. It was sealed with seal of Narcotics Control Bureau 06. The seal with which the parcels were sealed was given to him by the Superintendent and the same was given by him to R.C. Bodh for sealing the parcels. Thereafter seal remained in safe custody. In his cross-examination, he admitted that his statement was not recorded by the IO. He admitted that there was a petrol pump and toll barrier. He did not know if the same remained open for 24 hours. They came to Baddi from Chandigarh via Pinjore.

10. PW-4 Balbinder Kumar deposed that he was working as a Superintendent in NCB Chandigarh. He received information on 19.10.2008 about drug trafficking. Information was supplied to him at 2 AM in the night at Chandigarh in NCB office. He directed R.C. Bodh to constitute a raiding team and to lay Naka by giving written order on the same paper. The written information received by him was Ext. PW-4/A. He issued authorisation to search Ext. PW-3/A. R.C. Bodh gave him compliance report vide Ext. PW-4/C. R.C. Bodh also handed over case property and two samples of opium, for which he issued Godown receipt Ext. PW-4/D. Receipt was issued on 20.10.2008 at 11.50 PM. Thereafter IO gave information of arrest and seizure under Section 57 of the NDPS Act vide letter dated 21.10.2008 vide Ext. PW-4/E. Sample of opium was sent to CRCL New Delhi through C. Balbinder Singh on 21.10.2008 vide letter dated 21.10.2008, Ext. PW-2/A with test memo Ext. PW-2/B. In his cross-examination, he has admitted that there are two criminal cases in progress against him, one of which pertains to Narcotic Drugs & Psychotropic Substances Act and in said case, several persons were accused with him. Other case was regarding embezzlement of Rs.13,81,250/-. He admitted that he had come to the Court being in judicial custody. He had not brought any register pertaining to case property deposited with him. Volunteered that he had come in judicial custody. He also admitted that the writing in circle 'X' in Ext. PW-3/A was not in his hand. He admitted that the godown receipt Ext. PW-4/D did not show that the parcels of contraband were signed by the witnesses and the accused persons. He also admitted that the godown receipt Ext. PW-4/D did not mention the date on which case property was deposited with the NCB.

11. PW-5 V.P. Bahuguna has proved Ext. PW-5/A.

12. PW-6 R.C. Bodh, Intelligence Officer testified that on 19.10.2008, a specific information was received by them that two persons namely Ajmer Kumar and Balbinder were transporting narcotic drugs in a vehicle. He reduced the information into writing vide Ext. PW-4/A. Same was put up before Sr. Superintendent who directed him, in writing, on this report, to constitute a team and lay Naka at Baddi. He also issued search authorisation. Thereafter, they proceeded to Baddi. They reached Baddi at 4 AM. They associated independent witnesses at the spot with them. Notices were issued to them vide Ext. PW-1/A and Ext. PW-6/A. They effected Naka at the joining of said road at 4.20 AM. At about 6.30 AM, they noticed a grey coloured Scorpio coming from Baddi side, in which two persons were sitting. They signalled the vehicle to stop They rushed to the vehicle and disclosed their identity to the person sitting on driver seat and told that they had information that narcotic drug is being transported in the vehicle and they have got search authorisation. On this, the person on the driving seat took out his pistol and aimed at him. However, the pistol was snatched and unloaded. On this, both the accused tried to escape. They were overpowered. The vehicle was searched. During search, black coloured substance wrapped in polythene bag was found on the floor on rear seat covered with a mat. It was found to be opium. Search and sealing proceedings were completed at the spot. They

prepared *Panchanama*. Notice under Section 67 was given to Ajmer Kumar vide Ext. PW-6/B which was signed by accused and him. Similarly notice was given to accused Balbinder Singh vide Ext. PW-6/E which was also signed by the said accused and him. Confessional statements were recorded vide Ext. PW-6/F (Ajmer Kumar) and Ext. PW-1/H (Balbinder Singh). In his cross-examination, he admitted that there were many shops at Baddi. He also admitted that they used court premises during progress of trial earlier when witnesses were being examined. He admitted that a criminal case was going on against their superintendent who was a witness in this case, which is under NDPS Act and 409 IPC In his cross-examination, he admitted that he has not drawn site plan of the place of laying of alleged Naka. He also admitted that in Ext. PW-1/C, it is not mentioned as to where witnesses were contacted to be joined in the raiding party. He did not know as to who has filled Ext. PW-3/A. Volunteered that the Superintendent might have filed it. No time was mentioned in Ext. PW-1/B for the alleged apprehension of the accused and recovery effected thereon.

13. PW-1, Kartar Singh has categorically deposed in his cross-examination that a toll barrier existed towards Pinjore side from Baddi Taxi Stand. Toll barrier remained open 24 hours. It was handled by the officials on duty. He also admitted that near the barrier, there existed a petrol pump. It also remained open throughout day and night. 4-5 workers remained throughout at petrol pump. He also admitted that no person from the toll barrier or the petrol pump was called as witness. PW-6 R.C. Bodh admitted that there are many shops at Baddi. It was neither a secluded nor an isolated place. NCB team could easily associate independent witnesses from the toll barrier or petrol pump. PW-1 Kartar Singh was also working as driver with NCB team. He can not be termed as an independent witness. Evidence placed on record suggests that he must have accompanied the entire team from Chandigarh to Baddi otherwise there was no reason for him to be at Baddi, that too, at odd hours. He belonged to Punjab. His village was 75 kms from the spot where accused were apprehended. PW-1 Kartar Singh has not disclosed the purpose of his visit at Baddi. He did not know the name of the person who was associated with him at the place of Naka. R.C. Bodh (PW-6) did not know who filled up Ext. PW-3/A. Volunteered that the Superintendent might have filled it. He also admitted that there is no facsimile of seal on Ext. PW-4/D. PW-4 Balbinder was the Senior Superintendent. He ordered constitution of raiding team. He also issued authorisation letter for the search of the vehicle. He was also facing trial under NDPS Act and for embezzlement of Rs.13,81,250/-. Moreover, he came to the Court in judicial custody. According to him, IO, R.C. Bodh gave compliance report Ext. PW-4/C alongwith information. R.C. Bodh also handed over case property and two samples of opium, for which he issued Godown receipt Ext. PW-4/D. Receipt was issued on 20.10.2008 at 11.50 PM. In his cross-examination, he admitted that he has not brought any register pertaining to the case property deposited with him. Volunteered that he had come in judicial custody. He also admitted that writing in circle 'X' in Ext. PW-3/A was not in his hand. He also admitted that the godown receipt Ext. PW-4/D did not show that the parcels of contraband were signed by the witnesses and accused persons. More particularly, he also admitted that the godown receipt Ext. PW-4/D did not mention the date on which case property was deposited with NCB. PW-6 R.C. Bodh, in his cross-examination admitted that in *Panchanama*, Ext. PW-1/C, it is not mentioned that where the witnesses were contacted to join the raiding party. Authorisation to search under sub-section (2) of Section 41 of the NDPS Act is Ext. PW-3/A. In his cross-examination, PW-4 Balbinder has admitted that that the writing in circle 'X' in Ext. PW-3/A was not in his hand. Volunteered that same was handwriting of Ganesh Balooni, Intelligence Officer, NCB. There is no date on Ext. PW-4/D when case property was deposited with NCB. This fact has been admitted by PW-4 Balbinder Kumar, in his cross-examination. Prosecution has not examined another witness Jaswinder to whom notice was issued vide Ext. PW-6/A.

14. Learned trial Court has rightly concluded that there was no material on record to prove the time when alleged confessional statements were given by the accused before the NCB regarding involvement in the trade of opium. Malkhana Register was not produced. It was necessary to produce the Malkhana Register to prove that the case property was deposited and was taken out at the time of production of the same before the court. We have gone through the Ext. PW-4/D. It does not mention that the seals were also deposited in the godown /Malkhana of NCB Chandigarh.

15. Prosecution has failed to prove case against the accused under Sections 8, 18, 29 and 60 of the Narcotic Drugs & Psychotropic Substances Act, 1985. Hence, there is no occasion for us to interfere with the well reasoned judgment passed by the learned trial Court.

16. Thus, the appeal is without merits, which is accordingly dismissed. All pending applications, are also disposed of. Bail bonds of the accused are discharged.

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

National Insurance Co. Ltd ...Appellant

Vs

Nisha Verma & ors ...Respondents.

FAO No. 86 of 2012
Decided on:13.4.2016

Motor Vehicles Act, 1988- Section 169- High Court had remanded the case to the Tribunal with a direction to dispose of the same on the point as to whether driver had valid driving licence at the time of accident or not- it was specifically directed that other points which were settled by the learned Tribunal in its award were not to be disturbed- Tribunal not only decided the issue regarding the validity of the driving licence but also proceeded to consider other issues including the issue of quantum of compensation- Tribunal enhanced the compensation from Rs.3.00 lakh to Rs.5,65,000/- and rate of interest from 7.5 % per annum to 8% per annum- held, that Subordinates Courts are bound by the specific direction of the High Court – Tribunal had specifically held that driver had a valid driving licence at the time of accident- therefore, Insurance Company is required to abide by the original award passed by the Tribunal- however, it is directed that Insurance Company will not be liable to pay the amount over and above the award earlier passed by the Tribunal. (Para-4 to 11)

Case referred:
Court on its own motion Vs. Central Bureau of Investigating 2004(72) DRJ 629

For the Appellant	:	Mr. Ashwani Kumar Sharma, Senior Advocate with Mr.Nishant Thakur, Advocate.
For the Respondents		Mr. Anupinder Rohal, Advocate for respondent No.1. Ms. Anjana Khan, Advocate vice counsel for respondents No.2 and 3.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge:

The award impugned reveals judicial obstinacy, indiscipline and rank insubordination on the part of Sh.Shamsher Singh, the then Presiding Officer, Motor Accident Claims Tribunal, Shimla.

2. The undisputed facts are that at an earlier occasion, this court while deciding FAO No. 480 of 2005, preferred by respondent No.1 and another appeal bearing FAO No.305/06, preferred at the behest of the appellant herein had come to the conclusion that the learned Tribunal in its award dated 13.9.2005 had in a slipshod manner decided the question of validity of driving licence and, therefore, the case was remanded to the learned Tribunal below with a direction to re-admit the petition on its record and dispose of the same only on the point as to whether driver of the vehicle Purshotam Singh s/o Hari Singh possessed a valid driving licence at the time when the accident occurred, vide orders passed to this effect on 11.7.2011. It was specifically made clear that the other points which were settled by the learned Tribunal in its award were not to be disturbed nor evidence would be allowed to be adduced on these points.

3. It is apt to reproduce the relevant portion of the order dated 11.7.2011 which reads thus:

> *"In these circumstances, this case is remanded to the learned District Judge, Shimla who shall re-admit the petition on its record and dispose of the same only on the point as to whether driver of the vehicle Purshotam Singh son of Hari Singh possessed a valid driving licence at the time when the accident occurred." Parties will be given an opportunity to lead evidence only on this point and nothing else. The other points which were settled by the learned Tribunal shall not be disturbed nor any evidence shall be allowed to be adduced on them. Both these appeals are remanded. A direction is also issued that the learned Tribunal shall endeavour to dispose of these cases at the earliest not later than 31st December, 2011."*

4. The learned, yet erring Presiding Officer Sh. Shamsher Singh, very glibly ignored the above directions of this court and ventured to pass a fresh award not only deciding the issue regarding validity of the driving licence of Purshotam Singh, but also proceeded to consider *de novo* the other issues including the issue of quantum of compensation payable to the claimant and enhanced the same from Rs.3.00 lakh to Rs.5,65,000/- and he further even enhanced the rate-of-interest from 7.5 % per annum to 8% per annum.

5. The aforesaid act on the part of Sh.Shamer Singh, tantamounts to gross judicial impropriety, gross indiscipline, demeaning the majesty of justice and an act unbecoming of a Judicial Officer and would have in normal course called for severe disciplinary action. But this cannot now be resorted to in view of the concerned Judicial Officer having already retired.

6. Even as a general preposition, there can be no gainsaying that disobedience or disregard of the law laid down by the High Court by the subordinate courts is not only against the very concept of rule of law but also verges on the contempt of court as subordinate courts are, by way of constitutional provision, bound by the decision of the local High Court as is every court of the country including the High Courts, bound by the decisions of the Supreme Court by virtue of provisions of Article 141 of the Constitution. If

the subordinate courts start ignoring the law laid down by their High Courts and start acting contrary thereto, then not only the legal anarchy will set in but the democratic structure of the country, rule of law and contempt of liberty of citizens will be the first casualty. ***(Court on its own motion*** *Vs****. Central Bureau of Investigating 2004(72) DRJ 629).***

7. But here is a case where this court did not lay down any law, rather this court had remanded the case with 'specific directions'. As observed earlier, the Presiding Officer very glibly and deliberately ignored these directions which is apparent and otherwise evident from the fact that he has not even chosen to make a mention or even refer to the order of remand.

8. The act of misdemeanor on the part of learned MACT is apparent and is writ large on the face of award. Such judicial adventurism cannot be permitted and deserves to be deprecated in strongest terms. After all subordinate court is bound by the directions issued by the superior court as system of administration of justice aims at certainty in the law and that can be achieved only if Judges do not ignore the decisions by the courts of superior authority. This is the proper and traditional way to deal with the matters and it is founded and healthy principles of judicial decorum and propriety.

9. The manner in which the learned Presiding Officer has conducted himself in these proceedings clearly amounts to judicial impropriety, rank insubordination and reflects a complete lack of judicial decorum.

10. Adverting to the merits of the case, it would be noticed that the learned Tribunal below, after remand of the case, has held that the respondent No.2 had been in possession of a valid and effective driving licence at the time of accident. In such circumstances, therefore, the appellant/insurance company is required to abide by the original award passed by the learned Tribunal, meaning thereby that the appellant would not be liable to pay any amount of compensation over and above the award passed earlier by the Tribunal on 13.9.2005 that includes the principal amount as also the interest.

11. In view of the aforesaid discussion, appeal is allowed and the appellant/insurance company is liable to pay the amount of compensation strictly in accordance with the award passed by MACT, Shimla on 13.9.2005.

With these observations, appeal is disposed of in the aforesaid terms, leaving the parties to bear their own costs.

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

Pooja Devi wife of Shri Sanjay Sharma ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.MP(M) No. 404 of 2016
Order Reserved on 8.4.2016
Date of Order 13th April 2016

Code of Criminal Procedure, 1973- Section 438- An FIR was registered against the petitioner for the commission of offences punishable under Sections 498-A, 307, 302, 34 Indian Penal Code, 1860- it was contended that accused had been falsely implicated in

present case and his presence is not required- accused took the plea that there was no evidence against him- held, that sufficiency of evidence is not to be seen at the time of granting bail but will be seen at the conclusion of trial- 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 heinous- investigation is at initial stage and in case, bail is granted, investigation will be adversely affected- petition dismissed. (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

For the Petitioner:	Mr. N.S. Chandel, Advocate.
For the Non-petitioner:	Mr. M.L. Chauhan and Mr.Rupinder Singh Additional Advocates General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present anticipatory bail application is filed under Section 438 of the Code of Criminal Procedure 1973 for grant of anticipatory bail relating to FIR No. 41 of 2016 dated 27.2.2016 registered under Sections 498-A, 307, 302, 34 IPC at P.S. Jawali District Kangra (H.P.)

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 the petitioner with alleged crime. It is pleaded that dying declaration recorded by SDM Kangra completely eliminates the participation of petitioner in criminal offence. It is pleaded that petitioner has two small children and investigation of case is over and investigating agency did not require personal custody of petitioner and further pleaded that detention of petitioner would not advance the cause of justice in any manner and also pleaded that petitioner will join the investigation of case whenever and wherever directed by investigating agency. It is pleaded that any condition imposed by Court will be binding upon the petitioner. Prayer for acceptance of anticipatory bail application sought.

3. Per contra police report filed. As per police report deceased Sapna Devi was married about 6½ years ago with co-accused Kali Dass son of Rattan Chand. There is recital in police report that after two years of marriage co-accused Puja Devi wife of Sanjay Kumar who is sister-in-law of deceased generally abused the deceased and also used to give unwarranted oral remarks. There is recital in police report that on 25.2.2016 deceased telephoned in her parental house and informed that accused persons are committing cruelty to deceased in her matrimonail house. There is recital in police report that deceased in hospital informed that Puja Devi co-accused has abused her and also levelled allegations of adultery and told the deceased that she has kept many husbands. There is recital in police report that deceased was referred to CHC Jawali and thereafter deceased was referred to RPGMC Tanda. There is also recital in police report that site plan was prepared and plastic canny of kerosene oil also took into possession. There is also recital in police report that dying declaration of accused under Section 32 of Indian Evidence Act 1872 was recorded by learned SDM Kangra. There is also recital in police report that as per dying declaration

deceased was pushed inside the kitchen by co-accused Ichha Devi, co-accused Rattan Chand, co-accused Puja Devi and co-accused Kali Dass and thereafter accused persons bolted the door from inside and thereafter co-accused Kali Dass, co-accused Ichha Devi, co-accused Puja Devi and co-accused Rattan Chand beaten the deceased and thereafter sprinkled the canny of kerosene oil upon body of deceased and thereafter lit the body of deceased with fire. There is recital in police report that deceased had died within seven years of her marriage due to cruelty committed upon deceased by accused persons in her matrimonial house and due to allegations of adultery by accused persons. There is recital in police report that deceased was burnt alive by pouring kerosene oil. There is also recital in police report that report of viscera still awaited. Prayer for dismissal of anticipatory bail application sought.

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 present anticipatory bail application:-

1. Whether anticipatory bail application filed under Section 438 of Code of Criminal Procedure by petitioner is liable to be accepted as mentioned in memorandum of grounds of bail application before filing of investigation report under Section 173 of Code of Criminal Procedure 1973 in criminal culpable homicide case amounting to murder?
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 as alleged by investigating agency cannot be decided at this stage. Same fact will be decided by learned trial Court after giving due opportunities to both the parties to lead evidence in support of their case. It is well settled law that complicated disputed facts inter se the parties cannot be decided in bail application.

7. Submission of learned Advocate appearing on behalf of petitioner that petitioner is mother of two children and petitioner will join the investigation of case whenever and wherever directed by Court and petitioner is female and on these grounds bail petition 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) Character of 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 title Gurcharan Singh and others Vs. State (Delhi Administration).*** Also see ***AIR 1962 SC 253 title The State Vs. Captain Jagjit Singh.*** In present case there are direct allegations against the petitioner that petitioner pushed the deceased inside the kitchen room and thereafter in furtherance of common intention with co-accused sprinkled kerosene oil upon the body of deceased and thereafter lit the body of deceased with fire and consequently deceased died due to fire burnt injuries in her matrimonial house. Allegations against the petitioner are very heinous and grave in nature relating to commission of culpable homicide amounting to murder. As per police report there are direct allegations against the petitioner relating to commission of criminal offence. Investigation is at the primary stage and final investigation report under Section 173 of Code of Criminal Procedure 1973 has not been filed by investigating agency till today. Court is of

the opinion that it is not expedient in the ends of justice to grant anticipatory bail at this stage of the case. Court is of the opinion that investigation will be adversely effected if petitioner is released on anticipatory bail at this stage in the stage of initial investigation. Court is of the opinion that interest of State and general public will also be adversely effected if petitioner is released on anticipatory bail at the initial stage of investigation.

8. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that allegations against the petitioner are very heinous and grave in nature qua commission of culpable homicide amounting to murder and if anticipatory bail is granted to petitioner then petitioner will threat the prosecution witnesses and on this ground anticipatory bail application be declined is accepted for the reasons hereinafter mentioned. Primafacie there are direct allegations against the petitioner relating to culpable homicide amounting to murder. Court is of the opinion that investigation is at the initial stage and it is not expedient in the ends of justice to relase the petitioner on anticipatory bail till the final investigation report is not filed under Section 173 of Code of Criminal Procedure 1973 in the competent Court of law. Point No. 1 is answered in negative.

Point No.2 (Final order)

9. In view of findings on point No.1 anticipatory bail application filed by petitioner under Section 438 Cr.P.C. is rejected. Observations made in this order will not effect merits of case in any manner and will strictly confine for disposal of anticipatory bail application filed under Section 438 of Code of Criminal Procedure 1973. Anticipatory bail petition filed under Section 438 of Code of Criminal Procedure stands disposed of. All pending application(s) if any also disposed of.

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

Rajeshwar Sabarwal son of Shri O.P. Sabarwal ....Petitioner

Versus

State of H.P. ....Non-petitioner

Cr.Revision No. 170 of 2015
Order Reserved on 1st April 2016
Date of Order 13th April 2016

Code of Criminal Procedure, 1973- Section 397 read with Section 401- Trial Court framed charge for the commission of offence punishable under Section 420 Indian Penal Code against the accused- held, in revision that at the time of framing of charge meticulous sifting of evidence is not required- Magistrate is under legal obligation to consider the police report and the documents sent with police report under Section 173 of Cr.P.C.- it was duly mentioned in the statements recorded by the police that accused was Managing Director of the company - he had put stickers of army on his vehicles- he was not retired army official- accused had represented that he had retired from army as Colonel to deceive the people – accused had taken boxes of apples and mangoes by representing himself as army official and had not paid money- thus, the cheating on the part of the accused was prima facie proved - revision dismissed. (Para-7 to 14)

Cases referred:

Mohammad Akbar Dar and others vs. State of J&K and others, AIR 1981 SC 1548

ash Pal Mital vs. The State of Punjab, AIR 1977 SC 2433
Dayal Singh and others vs. State of Uttaranchal, AIR 2012 SC 3046
S.A. Venkataraman vs. Union of India (Constitutional Bench of five Judges), AIR 1954 SC 375
The State of Bombay vs. S.L. Apte and another, AIR 1961 SC 578
Sangeetaben Mahendrabhai Patel vs. State of Gujarat and another, (2012)7 SCC 621
State of NCT of Delhi vs. Sanjay, AIR 2015 SC 75
G.Sagar Suri and another vs. State of U.P. and others, AIR 2000 SC 754
Sunil Kumar vs. M/s Escorts Yamaha Motors Ltd and others, 2000 Cri.L.J. 174
S.Jayaswami and another vs. State of Orissa and another, 2005 Cri.L.J.2896
Vir Prakash Sharma vs. Anil Kumar Agarwal and another, (2007)7 SCC 373
V.Y.Jose and another vs. State of Gujarat and another, (2009)3 SCC 78

For the Petitioner:	Mr. R.K. Bawa Sr. Advocate with Mr.Jeevesh Sharma Advocate.
For the Non-petitioner:	Mr. Shrawan Dogra Advocate General with Mr. M.L. Chauhan and Mr.Rupinder Singh Thakur Additional Advocates General with Mr.R.K.Thakur, Deputy Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge

Present criminal revision petition is filed under Sections 397 read with Section 401 of Code of Criminal Procedure against order dated 21.3.2015 passed by learned Additional Chief Judicial Magistrate Kasauli District Solan H.P. in case No. 53/2 of 2014 title State of H.P. vs. Rajeshwar Sabarwal registered under Section 420 of Indian Penal Code 1860.

Brief facts of the case

2. There is recital in final police report filed under Section 173 of Code of Criminal Procedure 1973 that w.e.f. 16.01.2011 to 01.03.2012 there was business transaction between the complainant Chuni Lal Chauhan and accused relating to business of apples and mangoes. There is recital in police report that accused Rajeshwar Sabarwal had purchased 276853 boxes of apples and mangoes from complainant Chuni Lal Chauhan. There is also recital in police report that total cost of 276853 boxes was Rs.467315977/- (Rupees Forty six crore seventy three lacs fifteen thousand nine hundred and seventy seven only). There is further recital in police report that accused Rajeshwar Sabarwal had paid an amount to the tune of Rs.254399480/- (Rs. Twenty five crore forty three lacs ninty nine thousand four hundred and eighty only). There is recital in police report that accused Rajeshwar Sabarwal did not pay an amount to the tune of Rs.212916497/- (Rupees twenty one crore twenty nine lacs sixteen thousand four hundred and ninty seven only) to complainant Chuni Lal Chauhan. There is further recital in police report that accused Rajeshwar Sabarwal told that he was retired from army from the post of Colonel and is running the business in the name of Tara Business Group. There is recital in police report that accused also told that accused used to supply apples to army and on 06.05.2011 complainant Chuni Lal Chauhan was invited in the function of Punjab University Chandigarh and complainant was honoured with best apple supplier to defence authorities. There is recital in police report that during investigation it was observed that accused Rajeshwar Sabarwal was not retired as Colonel from army. There is also recital in police

report that accused Rajeshwar Sabarwal with dishonest intention of cheating informed the complainant that accused was retired from army from the post of Colonel. There is further recital in police report that accused Rajeshwar Sabarwal was not Colonel in the army at any point of time. There is recital in police report that accused Rajeshwar Sabarwal also did not supply apples and mangoes to the army authorities. There is also recital in police report that accused has committed cheating with complainant under Section 420 IPC to the tune of Rs.212916497/-(Rupees twenty one crore twenty nine lacs sixteen thousand four hundred and ninty seven only).

3. Learned trial Court vide order dated 21.3.2011 held that there exists primafacie material to frame charge against accused under Section 420 IPC. Learned trial Court framed charge against accused under Section 420 IPC.

4. Feeling aggrieved against the charge framed by learned trial Court revisionist filed the present revision petition.

5. Court heard learned Senior Advocate appearing on behalf of revisionist and heard learned Advocate General appearing on behalf of non-revisionist and also perused the entire record carefully.

6. Following points arise for determination in present revision petition:-

1. Whether revision petition filed by the revisionist is liable to be accepted as mentioned in memorandum of grounds of revision petition?
2. Final Order.

Findings on Point No.1 with reasons.

7. Submission of learned Advocate appearing on behalf of revisionist that as per forensic science report original cheques bearing Nos. 396001, 396002, 396003 were not signed by revisionist and on this ground primafacie case against the revisionist is not made out under Section 420 IPC is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that at the time of framing charge meticulous consideration of evidence is not required. ***See AIR 1981 SC 1548 title Mohammad Akbar Dar and others vs. State of J&K and others. See AIR 1977 SC 2433 title Yash Pal Mital vs. The State of Punjab.*** It is well settled law that opinion of expert under Section 45 of Indian Evidence Act 1872 is only advisory in nature. It is well settled law that facts of cheating as defined under Section 420 IPC can be proved by way of oral evidence also. It is well settled law that when there is conflict between the oral evidence and expert evidence then testimony of eye version given by eye witness get preference. ***See AIR 2012 SC 3046 title Dayal Singh and others vs. State of Uttaranchal.*** It is the case of prosecution that accused had given three cheques of ` Rs.90 lacs each to the complainant through his employee namely Sunil Kumar @ Manu. Court has carefully perused the testimony of Sunil Kumar @ Manu recorded by investigating officer during investigation process. Sunil Kumar @ Manu has specifically stated in his statement recorded under Section 161 Cr.P.C. that he joined Tara Business Group Private Limited in the month of September 2001. Sunil Kumar @ Manu has stated in his statement recorded under Section 161 Cr.P.C. that accused Rajeshwar Sabarwal was the owner of Tara Business Group Private Limited Company. Sunil Kumar @ Manu has also stated in positive manner that his elder brother Naresh Kumar was also employed in the company. Sunil Kumar @ Manu has stated that accused was MD of company and he used to look after the security work. Sunil @ Manu has stated in his statement recorded under Section 161 Cr.P.C. that accused Rajeshwar Sabarwal was owner of two vehicles i.e. Swift and Etioes. Sunil Kumar has further stated that there were stickers of army upon both vehicles. Sunil Kumar @ Manu has stated that on 11.3.2012 accused had handed over to him one envelope and directed him to hand over the envelope to

complainant Chuni Lal Chauhan at his hotel at Parwanoo. Sunil Kumar @ Manu has further stated in his statement recorded under Section 161 Cr.P.C. that on the same day he came to hotel of complainant Chuni Lal Chauhan at Parwanoo and handed over the envelope to complainant Chuni Lal Chauhan on behalf of accused. Sunil Kumar @ Manu has further stated in his statement recorded under Section 161 Cr.P.C. that complainant Chuni Lal Chauhan opened the envelope and in the envelope there were cash of Rs.140000/- (Rupees one lac forty thousand only) and there were three cheques of Rs.90 lacs each. Sunil Kumar @ Manu has further stated in his statement recorded under Section 161 Cr.P.C. that accused Rajeshwar Sabarwal was not retired as Colonel from army. Sunil Kumar @ Manu has further stated that accused informed the people that he was retired from army from the post of Colonel just to cheat the people. Sunil Kumar @ Manu has further stated that after registration of criminal case under Section 420 IPC accused removed the stickers of Colonel from vehicles and also sold both vehicles. Court is of the opinion that above stated statement of Sunil Kumar @ Manu eye witness is sufficient to frame charge against revisionist under Section 420 IPC. Court is of the opinion that for the purpose of framing charge Courts are legally competent to peruse police report and documents sent along with report under Section 173 of Code of Criminal Procedure 1973 as per Section 239 and Chapter XIX of Code of Criminal Procedure 1973. Punishment under Section 420 IPC is seven years and fine. Criminal offence under Section 420 IPC is warrant case.

8. Submission of learned Advocate appearing on behalf of revisionist that complainant Chuni Lal Chauhan has already initiated criminal proceedings under Section 138 of Negotiable Instrument Act 1881 relating to some cheques and parallel criminal proceedings under Section 420 IPC cannot be initiated against the revisionist under Section 420 IPC as subject matter of complaint filed under Section 138 of Negotiable Instrument Act and subject matter of criminal case filed under Section 420 IPC are similar and on this ground revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that if criminal offences are distinct then concept of double jeoparady would not apply relating to same fact. ***See AIR 1954 SC 375 title S.A. Venkataraman vs. Union of India (Constitutional Bench of five Judges).*** It is well settled law that concept of double jeoparady as mentioned under Article 20(2) of Constitution of India is based on the concept of "*Nemo debet bis vaxari*". (Man must not be put twice in peril for the same offence). It was held in case reported in ***AIR 1954 SC 375 title S.A. Venkataraman vs. Union of India (Constitutional Bench of five Judges)*** that to attract concept of double jeoparady prosecution and punishment must co-exist. It was held in case reported in ***AIR 1961 SC 578 title The State of Bombay vs. S.L. Apte and another*** that if two offences are distinct then notwithstanding the fact that allegations of facts in two criminal complaints were substantially similar then concept of double jeoparady could not be invoked. It was held in case reported in ***(2012)7 SCC 621 title Sangeetaben Mahendrabhai Patel vs. State of Gujarat and another*** that ingredients of offence punishable under Section 138 of Negotiable Instrument Act are entirely different from offence punishable under Section 420 IPC. It was held that under Section 420 IPC there is no legal presumption of antecedent debt but under Section 138 of Negotiable Instrument Act there is presumption of antecedent debt. It was held that under Section 420 IPC *mensrea* is relevant. It was held in case reported in ***AIR 2015 SC 75 title State of NCT of Delhi vs. Sanjay*** that offence punishable under Section 138 of Negotiable Instrument Act and offence punishable under Section 420 IPC are distinct offences and it was further held that both proceedings under Section 138 of Negotiable Instrument Act and proceedings under Section 420 IPC would continue relating to similar facts in view of the fact that offence under Section 138 of Negotiable Instrument Act and offence under Section 420 IPC are distinct criminal offences.

9. Submission of learned Advocate appearing on behalf of revisionist that learned trial Court has framed the charge against the revisionist under Section 420 IPC without any iota of evidence on record is rejected being devoid of any force for the reasons hereinafter mentioned. Offence under Section 420 IPC is a warrant case. As per Section 239 of Code of Criminal Procedure 1873 Chapter XIX Magistrate is under legal obligation to consider the police report and documents sent with police report under Section 173 of Cr.P.C. Court has perused the police report carefully and Court has also perused the documents annexed with police report carefully. Investigating Officer has sent the police report under Section 173 Cr.P.C. along with oral statements of thirty witnesses namely (1) Chuni Lal Chauhan, (2) Lekh Ram, (3) Rajesh Bhardwaj, (4) Anwaroo, (5) Rajan Gupta, (6) Jai Singh, (7) Rajesh Punia, (8) Mandeep Singh, (9) Nishant Chauhan, (10) Rakesh Kumar, (11) Ravi Kiran, (12) Rakesh Dutta, (13) Ajay Kumar, (14) Sunil Kumar @ Manu, (15) Naresh Kumar, (16) Sayad Ajmat Tula (17) Vijay Laxmi, (18) Manisha Sharma, (19) Bihari Lal Chauhan, (20) Kuldeep Singh, (21) Vijender Dutt Gautam, (22) Hem Raj, (23) Balwant Singh, (24) Amit Angreesh, (25) ASI Ved Parkash, (26) ASI Kundan Singh, (27) Shiv Kumar, (28) Nishchint Singh Negi, (29) Padam Chand Additional S.P. Solan, (30) Susheel Kumar Sharma. Court has also perused documents annexed with police report i.e. (1) Final report under Section 173 Cr.P.C. comprised of sixteen pages. (2) Original FIR. (3) Complaint under Section 156(3) Cr.P.C. (4) Bill of apples and mangoes. (5) Bills of Laxmi Fruit company. (7) Billty booked from Haryana Roadways Transport Chandigarh. (8) Billty booked from Sher-e-Punjab Roadways Transport Chandigarh. (9) Billty booked from Sher-e-Punjab Roadways Transport Chandigarh. (10) Recovery memo of invitation card, five photographs and one momento. (11) Recovery memo of gate pass and arrival and dispatch ledger register HPMC Parwanoo from 2010 to March 2011 along with letter No. 2399-3 dated 30.11.2013. (12) Recovery memo of letter issued by accused Rajeshwar Sabarwal to Manager PNB Branch Kasumpti. (13) Original cheque dated 24.3.2014. (14) Bank account of accused Rajeshwar Sabarwal. After perusal of police report filed under Section 173 Cr.P.C. carefully and after perusal of documents annexed with police report carefully Court is of the opinon that there are grounds for presuming that accused has committed an offence punishable under Section 420 IPC because there are grounds that accused cheated the complainant by way of pretending that accused was retired as Colonel from army and thereafter accused obtained supply of 276853 boxes of apples and mangoes in consideration of Rs.467315977/- (Rupees Forty six crore seventy three lacs fifteen thousand nine hundred and seventy seven only). It is prima face proved on record that accused did not return Rs.212916497/- (Rupees twenty one crore twenty nine lacs sixteen thousand four hundred and nety seven only) value of supply of apples and mangoes. It is prima facie proved on record that accused Rajeshwar Sabarwal was not Colonel in army at any point of time. It is prima facie proved on record that accused cheated the complainant and dishonestly induced the complainant to deliver 276853 boxes of apples and mangoes in consideration amount of Rs.467315977/- (Rupees Forty six crore seventy three lacs fifteen thousand nine hundred and seventy seven only). Prima face dishonest intention on part of accused is proved from the very beginning in present case to cheat and dishonestly induce delivery of movable property.

10. Submission of learned Advocate appearing on behalf of revisionist that connection of revisionist is not proved in criminal offence under Section 420 IPC in view of handwriting expert report placed on record and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. After perusal of investigation report under Section 173 Cr.P.C. and after perusal of entire documents placed with police report it is held that prima facie connection of accused is proved relating to offence under Section 420 IPC as per statement of Sunil Kumar @ Manu.

11. Submission of learned Advocate appearing on behalf of revisionist that learned trial Court has exercised jurisdiction with material irregularity and illegality is also rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that after perusal of investigation report filed under Section 173 Cr.P.C. and after perusal of evidence annexed with report it is held that order of learned trial Court is not illegal and it is held that learned trial Court has not committed any material illegality.

12. Submission of learned Advocate appearing on behalf of revisionist that revisionist has also filed complaint under Section 156(3) of Cr.P.C. for misplacing the cheques of petitioner and on this ground revision petition be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. Court is of the opinion that complicated disputed facts are involved in present case and Court is of the opinion that complicated disputed facts inter se the parties cannot be decided at this stage. It is held that complicated disputed facts inter se the parties shall be decided by learned trial Court after giving due opportunities to both the parties to prove their case in Court of law by way of adducing oral and documentary evidence. It is held that it is not expedient in the ends of justice to give any finding relating to complicated disputed facts inter se the parties at this stage of case without giving opportunity to parties to prove asserted disputed facts.

13. Submission of learned Advocate appearing on behalf of revisionist that in view of ruling given by Hon'ble Apex Court ***AIR 2000 SC 754 title G.Sagar Suri and another vs. State of U.P. and others*** and in view of rulings reported in ***2000 Cri.L.J. 174 title Sunil Kumar vs. M/s Escorts Yamaha Motors Ltd and others, 2005 Cri.L.J.2896 title S.Jayaswami and another vs. State of Orissa and another, (2007)7 SCC 373 title Vir Prakash Sharma vs. Anil Kumar Agarwal and another, (2009)3 SCC 78 title V.Y.Jose and another vs. State of Gujarat and another*** present revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the above said rulings. All these rulings were given by Division Bench. It is well settled law that when there is conflict between ruling given by Division Bench and Larger Bench then ruling given by Larger Bench always prevails. In view of the ruling given by Constitutional Bench comprised of five Judges i.e. ***AIR 1954 SC 375 title S.A. Venkataraman vs. Union of India*** it is held that criminal offence under Section 420 IPC and criminal offence under Section 138 of Negotiable Instrument Act are distinct criminal offences. It is held that as offence under Section 138 of Negotiable Instrument Act and offence under Section 420 IPC are distinct criminal offences then benefit of double jeoparady cannot be granted to revisionist notwithstanding the fact that allegations of both criminal complaints are substantially similar. It is held that ingredients of offence under Section 420 IPC and 138 of Negotiable Instrument Act are not similar. In view of above stated facts point No.1 is answered in negative.

Point No. 2 (Final Order)

14. In view of findings on point No. 1 revision petition filed by revisionist is dismissed. Order of learned trial Court is affirmed. Observations made in this order will not effect the merits of case in any manner. 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 ***27.4.2016.*** Criminal revision petition is disposed of. All pending miscellaneous application(s) if any also stands disposed of.

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

Cr. Appeal No. 275/2011 and Cr. Appeal No.404/2011
Judgment reserved on: 28th March, 2016
Date of judgment: April 13, 2016

(1) Cr. Appeal No. 275/2011

Sanjeev Kumar s/o Sh. Mangal Singh ....Appellant
Versus
State of H.P. ...Respondent

For appellant Mr. P. P. Chauhan, Advocate
For respondent Mr. V. S. Chauhan, Addl. A.G. with Mr. Vikram Thakur, Dy. A.G.

(2) Cr.Appeal No.404/2011

Kulwant Singh s/o Sh. Pohu Lal ....Appellant
Versus
State of H.P. & Ors. ...Respondents

For appellant Mr. Ramakant Sharma, Sr. Advocate with Mr. Basant Thakur, Advocate
For respondents Mr. V. S. Chauhan, Addl. A.G. with Mr. Vikram Thakur, Dy. A.G. for respondent No.1, Mr. P. P. Chauhan, Advocate for respondent No.2 & Mr. Anoop Chitkara, Advocate for respondents No.3 to 6

Indian Penal Code, 1860- Section 302, 201 and 120-B- **Indian Arms Act, 1959**- Section 25- Accused murdered 'K' at Androla bridge- accused 'S' was found in possession of fire arm with which 'K' was murdered – accused were tried and convicted by the trial Court- held, in appeal that case was based upon circumstantial evidence- many of the prosecution witnesses have not supported the prosecution version- ballistics expert stated that no opinion regarding firing of used cartridge from country made pistol could be given- disclosure statement is corroborative piece of evidence and is not sufficient by itself to convict the accused- chain of circumstances was not complete- accused 'S' was wrongly convicted by the trial Court- appeal accepted and accused 'S' acquitted. (Para-12 to 27)

Cases referred:

Bakshish Singh vs. State of Punjab, AIR 1971 Apex Court 2016
Babboo & Others vs. State of Madhya Pradesh, AIR 1979 Apex Court 1042
Parkash Chand vs. State of Rajasthan, 2013 Cr. Law Journal 2040
Musheer Khan @ Badshah Khan and Another vs. State of Madhya Pradesh, 2010 Apex Court of India 762
hivaji @ Dadya Shankar Alhat vs. State of Maharashtra, AIR 2009 Apex Court of India 56
Kusuma Ankamarao vs. State of Andhra Pradesh, AIR 2008 Apex Court of India 2819
Vijayan vs. State of Kerala, AIR 1999 Apex Court 1086 t
John Pandian vs. State, JT 2010 (13) Apex Court 284
Anjlus Dungdung vs. State of Jharkhand, 2005 (9) SCC 765

The following judgment of the Court was delivered:

P. S. Rana, J.

Cr. Appeal No.275 of 2011 title Sanjeev Kumar vs. State of H.P. and Cr. Appeal No.404 of 2011 title Kulwant Singh vs. State of H.P. & Others filed against the same judgment and sentence passed by learned Trial Court in Sessions Trial No.9-NL/7 of 2010 title State of H.P. vs. Sanjeev Kumar and others decided on 28.07.2011. As both the appeals have been filed against the same judgment and sentence hence both the appeals are consolidated and disposed of together in order to avoid conflicting judgments.

Brief facts of the case:

2. It is alleged by the prosecution that in the month of May 2009 all the accused persons constituted criminal conspiracy to kill deceased Kirpal Singh. It is further alleged by the prosecution that in the intervening night of 19th/20th May 2009 at about 11.30 PM in pursuance of criminal conspiracy hatched by accused persons deceased Kirpal Singh was murdered at place Androla bridge by accused persons. It is further alleged by the prosecution that co-accused Sanjeev Kumar @ Sanju in connivance with PW Dhruv Kumar got his duty card punched for the period 18.05.2009 to 21.05.2009 without being present in the factory premises known as Ravira Home Finishing Company Panipat in order to cause disappearance of evidence. It is further alleged by the prosecution that co-accused Sanjeev Kumar @ Sanju was found in possession of fire arm and live cartridge and shot dead deceased Kirpal Singh with the help of fire arm on the intervening night of 19th/20th May 2009. It is further alleged by the prosecution that on 20.05.2009 a telephonic information was received in the police station that dead body was lying over Androla bridge and thereafter entry was recorded in daily diary and thereafter police officials went to the spot and statement under Section 154 Cr.PC of PW-1 Kulwant Singh recorded. It is further alleged by the prosecution that FIR was registered and inquest reports prepared at the spot. It is further alleged by the prosecution that photographs took and thereafter dead body was sent for post mortem and thereafter after post mortem dead body was handed over to father of the deceased. It is further alleged by the prosecution that during investigation motorcycle Hero Honda No.HP-12-B-0323 alongwith documents, driving licence, identity card of deceased Kirpal Singh were taken into possession from the spot vide seizure memo. It is further alleged by the prosecution that during investigation blood stained soil and controlled sample of soil lifted from the spot and took into possession vide seizure memo in the presence of witnesses. It is further alleged by the prosecution that during investigation blood stained lying over parapet also took into possession. It is further alleged by the prosecution that as per post mortem report cause of death of deceased was hemorrhagic shock due to injury to major blood vessel. It is further alleged by the prosecution that as per opinion of PW-25 Dr. Puneet Sharma injuries observed over the dead body of deceased could be caused with close range of fire with country made pistol. It is further alleged by the prosecution that co-accused Sanjeev Kumar @ Sanju also made disclosure statement disclosing that he had concealed country made pistol. It is further alleged by the prosecution that as per disclosure statement country made pistol alongwith used cartridge and live cartridge were recovered and taken into possession vide seizure memo. It is further alleged by the prosecution that sketch of country made pistol and photographs of the place of recovery also took into possession. It is further alleged by the prosecution that statement of witness Dhruv Kumar also recorded under Section 164 Cr.PC. It is further alleged by the prosecution that co-accused Jaspal Singh made a disclosure statement that he alongwith other co-accused hatched conspiracy to kill deceased Kirpal Singh. It is further alleged by the prosecution that co-accused Vikram Singh made a disclosure statement disclosing that payment of Rs.20,000/- (Rupees twenty thousand) made by co-accused Sodhi Singh to co-accused

Sanjeev Kumar @ Sanju as part payment to kill deceased Kirpal Singh. It is further alleged by the prosecution that motorcycle Hero Honda No.PB-10AZ-1004 also took into possession. It is further alleged by the prosecution that during investigation co-accused Jaspal Singh produced his clothes T-shirt and lower and same took into possession vide seizure memo. It is further alleged by the prosecution that co-accused Vijender Singh @ Vicky produced his clothes shirt and pant and same took into possession vide seizure memo. It is further alleged by the prosecution that co-accused Jasbeer Singh produced his clothes shirt T-shirt and pant and same took into possession vide seizure memo. It is further alleged by the prosecution that during investigation co-accused Sanjeev Kumar @ Sanju produced his clothes T-shirt and pant and same took into possession vide seizure memo in the presence of witnesses. It is further alleged by the prosecution that during investigation motorcycle No.HP-12-A-3318 took into possession from courtyard of Mangal Singh vide seizure memo alongwith documents i.e. copy of RC. It is further alleged by the prosecution that during investigation Smt. Kaushalya Devi produced mobile phone alongwith Sim card No.09958347400 and same took into possession vide seizure memo. It is further alleged by the prosecution that during investigation copies of jamabandi relating to Khasra No.106 and Khasra No.35 also took into possession. It is further alleged by the prosecution that Aksh Sajra prepared by Patwari Ram Dayal and same also took into possession. It is further alleged by the prosecution that case property was deposited in malkhana and thereafter same was sent to State Forensic Science Laboratory. It is further alleged by the prosecution that dead body was lying over Androla bridge alongwith motorcycle. It is further alleged by the prosecution that during investigation spot map also prepared.

3. Learned Trial Court framed charge against co-accused Sanjeev Kumar @ Sanju under Sections 120-B, 302 & 201 IPC and under Arms Act on dated 08.06.2010. Learned Trial Court also framed charge against co-accused Vikram Singh, Sodhi Singh, Jasbeer Singh, Vijender Singh, Jaspal Singh & Shashi @ Kali @ Sonu under Sections 120-B and 302 IPC. Accused persons did not plead guilty and claimed trial.

4. Prosecution examined forty oral witnesses and accused persons examined two defence witnesses. Prosecution also adduced documentaries evidence. Learned Trial Court convicted co-accused Sanjeev Kumar @ Sanju under Sections 302 & 201 IPC read with Section 25 of Arms Act and learned Trial Court acquitted co-accused Vikram Singh, Jasbeer Singh, Vijender Singh, Jaspal Singh, Sodhi Singh and Shashi @ Kali @ Sonu.

5. Feeling aggrieved against the judgment and sentence passed by learned Trial Court convict Sanjeev Kumar filed Criminal Appeal No.275/2011 title Sanjeev Kumar vs. State of H.P. and father of deceased Kulwant Singh filed Cr. Appeal No.404 of 2011 title Kulwant Singh vs. State of H.P. & Others.

6. We have heard learned Advocate(s) appearing on behalf of appellant(s) in both the appeals and learned Additional Advocate General appearing on behalf of State and learned other Advocates in both appeals. We have also perused the entire record carefully.

7. Following points arise for determination in both criminal appeals:

1) Whether conviction and sentence of convict are based upon non appreciation of evidence properly and whether judgment and sentence passed by learned Trial Court are perverse as mentioned in memorandum of grounds of Cr. Appeal No.275 of 2011?

2) Whether acquittal of other co-accused is based upon non appreciation of evidence properly by learned Trial Court and is

perverse as mentioned in memorandum of grounds of Cr. Appeal No.404 of 2011?

3) Final order.

8. **Findings upon Point No.1 with reasons.**

8.1 PW-1 Kulwant Singh has stated that he has three sons and deceased Kirpal Singh was his eldest son. He has stated that deceased was working in factory. He has stated that deceased Kirpal Singh used to go for his duty at 2.00 PM upon his motorcycle and used to come back during mid night. He has stated that his deceased son Kirpal Singh had gone to factory for his duty at 2.00 PM on motorcycle. He has stated that at about 11.50 PM he received a telephone call but no conversation took place. He has stated that deceased Kirpal Singh did not return during night. He has stated that in the morning Devi Ram told him that deceased was lying over Androla bridge. He has stated that thereafter he immediately went to the spot and found that his son Kirpal Singh was lying dead over Androla bridge. He has stated that he also saw injuries over the body of deceased. He has stated that motorcycle of the deceased was also lying on other side of the road. He has stated that thereafter police officials came at the spot and his statement under Section 154 Cr.PC Ext.PW1/A was recorded. He has stated that inquest reports Ext.PW1/B and Ext.PW1/C also prepared and dead body was sent for post mortem. He has stated that photographs of the spot also took into possession and he has stated that after post mortem dead body was handed over to him vide memorandum Ext.PW1/D. He has denied suggestion that deceased had disclosed him that some officer in the factory had inimical relations towards him. He has admitted that writing was found written with blood as 'NI' over Androla bridge. He has denied suggestion that deceased had affair with a girl named Nisha working in the same factory. He has admitted that deceased was having Mobile Phone No.9805336714. He has admitted that deceased was having shift duties. He has denied suggestion that factory manager was having enmity with deceased on account of Nisha. He has denied suggestion that he suspected involvement of Ram Lal, Surjit Singh, Harmesh Singh, Amrik Singh, Balwinder Singh and Nisha working in the factory. He has denied suggestion that accused persons have been falsely implicated in the present case. He has denied suggestion that co-accused Sanjeev Kumar @ Sanju and Vikram Singh were not present at Nalagarh on the date of incident as they were present at Panipat and Delhi. He has stated that there was land dispute with the family of Surjit Singh, Amrik Singh and Ram Lal. He has stated that land dispute was compromised in the year 2008. He has stated that he registered the case on the basis of suspicion against accused persons. He has admitted that when his statement was recorded under Section 154 Cr.PC Ext.PW1/A he did not mention name of any accused.

8.2 PW-2 Pawan Kumar has stated that he is Pradhan of Gram Panchayat Karsol since 2006 and he was associated by the police officials in the investigation of the present case. He has stated that on dated 20.05.2009 he went to the spot and found dead body of deceased Kirpal Singh lying on Androla bridge which was blood stained and motorcycle was lying at some distance. He has stated that there was injury on the body of deceased. He has stated that police officials prepared inquest reports Ext.PW1/B and Ext.PW1/C and he had signed the same. He has stated that Kulwant Singh father of deceased also signed upon inquest reports. He has stated that one ATM card and one test pen were found which took into possession vide memorandum Ext.PW2/A. He has stated that there was land dispute with co-accused Sodhi Singh which was settled by the panchayat amicably. He has stated that compromise was executed as per his intervention.

8.3 PW-3 Harinder Singh has stated that he was associated by the police officials during investigation of the present case. He has stated that on 20.05.2009 motorcycle

No.HP-12-B-0323 which was lying on the road took into possession alongwith insurance, driving licence, key, identity card, registration of the motorcycle vide memorandum Ext.PW3/A. He has stated that dead body of deceased Kirpal Singh was also lying with blood stained and injuries at some distance over Androla bridge.

8.4 PW-4 Randeep Singh has stated that he was associated by the police officials during investigation of the present case on 20.05.2009. He has stated that dead body of deceased Kirpal Singh was lying on Androla bridge which was blood stained and motorcycle was lying at a distance on the road. He has stated that blood was also lying on the ground which was lifted by the police officials and placed into a small bottle. He has stated that sample soil was also lifted from the spot. He has stated that police also took into possession one Purse from the pant of deceased containing three currency notes each to the denomination of Rs.100/-, one ATM card, one mobile phone and one slip over which Mobile No.9805336714 was written and one test pen found from the pocket of the deceased also took into possession vide memo Ext.PW2/A. He has stated that police also took into possession motorcycle No.HP-12-B-0323 alongwith RC, insurance, driving licence, identity card and key of the motorcycle vide memo Ext.PW3/A. He has stated that police also took into possession blood stained lying at the spot. He has stated that police also lifted blood with words 'NI' found written near dead body. He has stated that small glass bottles Ext.P1 & P2 are the same which were lifted from the spot. He has stated that small glass bottles Ext.P3 & P4 are the same which were taken into possession. He has admitted that words NI were written with blood on parapet near head of the dead body which was lifted from the spot.

8.5 PW-5 Krishan Pal has stated that he is running a Courtyard used for taking liquor outside the liquor vend for the last four years at Panjehra. He has stated that he does not know who came to take drinks in his courtyard on 19.05.2009. He has denied suggestion that on 19.05.2009 co-accused Sanjeev Kumar @ Sanju who was known to him visited his courtyard alongwith other four persons who came on motorcycle. He has denied suggestion that he had disclosed to the Investigating Officer that co-accused Sanjeev Kumar @ Sanju alongwith four boys in the age group of 20 to 25 years visited his courtyard and enjoyed drinks for sufficient time. He has denied suggestion that he has resiled from his earlier statement in order to save the accused persons.

8.6 PW-6 Nand Lal has stated that he is driver by profession for the last fifteen years. He has stated that he alongwith Kuldeep were coming to his house over motorcycle from Gullarwala at mid night. He has stated that other motorcycle came from opposite direction and two persons were traveling upon it. He has stated that he could not identify the persons. He has stated that he could not state age of the motorcyclists as well as colour of their clothes. Witness was declared hostile. He has denied suggestion that he has resiled from his earlier statement in order to save the accused persons.

8.7 PW-7 Jagir @ Chhibar has stated that he is electrician by profession. He has stated that he was coming back to his house from the place of work at about 6.00 PM. He has stated that nothing happened in his presence. Witness was declared hostile. He has denied suggestion that when he was coming on motorcycle from Panjehra then accused persons were standing at Androla bridge and they caught hold him and slapped him. He has denied suggestion that co-accused Sanjeev Kumar @ Sanju was carrying country made pistol. He has stated that accused persons are his neighbours and are residing in the adjoining village. He has denied suggestion that he has resiled from his earlier statement in order to save the accused persons.

8.8 PW-8 Raj Kumar has stated that he is running a Chemist shop at Manpura for the last two years. He has stated that deceased Kirpal Singh was son of his father's sister. He has stated that deceased used to work in Indian Herbal factory and he used to visit his shop frequently. He has stated that thereafter deceased left his job and joined Promed Pharmacy at Khera. He has stated that on 16.05.2009 deceased Kirpal Singh came to his shop and stayed in his house. He has stated that in the year 2007 during Diwali festival co-accused Sanjeev Kumar @ Sanju and Vikram Singh alongwith some boys from Punjab picked up a quarrel/altercation with him at village Baruna and after altercation his maternal uncle Chanan Singh alongwith family members including deceased Kirpal Singh visited the house of co-accused Sanjeev Kumar @ Sanju for settlement. He has stated that he registered criminal case against the assailants. He has admitted that criminal case relating to FIR No.261/2006 was compromised.

8.9 PW-9 Dilbara Singh has stated that he was working in Torant Pharmaceutical Bhud from September 2007 to June 2010. He has stated that deceased Kirpal Singh was known to him and he was working in Promed Pharmaceutical. He has stated that on 19.05.2009 deceased was coming from the factory after his duty at 11.30 PM upon motorcycle. He has stated that Androla bridge falls on the way to house of deceased. He has stated that when he reached at Androla bridge at about 12.30 AM (mid night) he saw that a person was lying on the bridge. He has stated that he did not stop at the spot because of mid night. He has stated that in the morning he came to know that deceased Kirpal Singh was lying on the bridge and he was murdered. He has stated that he did not inform any one when he saw a person was lying on the bridge smeared with blood.

8.10 PW-10 Kuldeep Singh has stated that during night period he alongwith his friend Nand Lal were coming to Baruna on motorcycle. He has stated that at Baruna during mid night a motorcycle crossed over. He has stated that two persons were travelling upon the motorcycle. He has stated that he dropped Nand Lal at Baruna and thereafter returned on motorcycle to his house. He has stated that he could not find out the description of the motorcycle and its riders. Witness was declared hostile. He has denied suggestion that he has resiled from his earlier statement in order to save the accused persons.

8.11 PW-11 Constable Ram Piara has stated that in the month of May 2009 he was posted in Police Station Nalagarh. He has stated that on dated 06.07.2009 co-accused Sanjeev Kumar @ Sanju disclosed during investigation that on 20.05.2009 after using country made pistol for committing crime he had concealed the same near his house in a broken shed in the fields and he could trace the same. He has stated that disclosure statement Ext.PW11/A of co-accused was also recorded which he signed as marginal witness. He has stated that Avtar Singh, Amar Singh and co-accused Sanjeev Kumar also signed disclosure statement. He has stated that thereafter co-accused Sanjeev Kumar led the police party alongwith the witnesses to the place in the fields near his house and he has stated that country made pistol was recovered. He has stated that thereafter sketch of country made pistol Ext.PW11/B was drawn and thereafter same was taken into possession and sealed in cloth parcel with seal impression 'A'. He has stated that spot map also prepared and photographs also obtained. He has stated that country made pistol is Ext.P6 and used cartridge is Ext.P7 and live cartridge is Ext.P8. He has denied suggestion that co-accused Sanjeev Kumar did not make any disclosure statement. He has denied suggestion that he had signed in the police station.

8.12 PW-12 Maninder Singh has stated that he was associated in the investigation. He has stated that he handed over motorcycle No.PB-10AZ-1004 to the police officials alongwith RC and key. He has stated that motorcycle was purchased by him and was not purchased by his brother Jasbeer Singh. Witness was declared hostile. He has

denied suggestion that his brother Jasbeer Singh had purchased the motorcycle through affidavit. He has denied suggestion that on 19.05.2009 motorcycle was driven by his brother during night. He has denied suggestion that his brother Jasbeer Singh took the motorcycle on 19.05.2009 and thereafter returned to his house during mid night. He has stated that he did not hand over motorcycle to his brother Jasbeer Singh. He has stated that on 19.05.2009 he travelled upon motorcycle to the place of his working during night duty.

8.13 PW-13 Kuldeep Singh has stated that on 06.07.2009 he visited Police Station Nalagarh. He has stated that none of the accused had put off their clothes in his presence. He has stated that clothes were already in possession of the police officials. He has stated that he had simply signed the seizure memo. He has denied suggestion that co-accused Jaspal Singh @ Rinku had given his clothes in his presence. He has denied suggestion that co-accused Vijender Singh @ Vicky had given his clothes in his presence. He has denied suggestion that co-accused Jasbeer Singh @ Jassi had given his clothes in his presence. He has denied suggestion that co-accused Sanjeev Kumar @ Sanju had given his clothes in his presence. He has denied suggestion that he has resiled from his earlier statement in order to save the accused persons.

8.14 PW-14 Avtar Singh has stated that he is numberdar of village Karsoli. He has stated that on 06.07.2009 he alongwith Amar Singh came to Police Station Nalagarh. He has stated that in his presence co-accused Sanjeev Kumar has given disclosure statement that he had concealed country made pistol in a shed near his house and he could get it recovered. He has stated that disclosure statement Ext.PW11/A was recorded and he signed as marginal witness. He has stated that thereafter co-accused Sanjeev Kumar led the police officials towards the house and thereafter co-accused brought country made pistol from the broken shed alongwith two cartridges and same were taken into possession vide seizure memo Ext.PW11/C. He has stated that accused persons and police officials signed seizure memo. He has stated that country made pistol is Ext.P6 and used cartridge is Ext.P7 and live cartridge is Ext.P8 and same were taken into possession. He has denied suggestion that in the year 1978 he was prosecuted under Section 182 IPC for perjury. He has denied suggestion that he is a stock witness of the police. He has denied suggestion that co-accused Sanjeev Kumar did not give any disclosure statement. He has denied suggestion that country made pistol was already lying in police station when his signatures were obtained. He has denied suggestion that he has deposed against the accused because he has inimical relation with the father of co-accused Sanjeev Kumar.

8.15 PW-15 Madan Lal has stated that his in-laws are in District Bilaspur. He has stated that on 19.05.2009 he was coming from his in-laws house in his jeep at about 11.00 PM. He has stated that he crossed Androla bridge and saw two motorcycles parked on the road side at Androla bridge and five boys were standing there. He has stated that one of them was known to him as Vicky. He has stated that other boys though were known to him but their names were not known to him. He has stated that he did not stop his vehicle over Androla bridge. He has stated that he crossed Androla bridge and saw these persons through head light of his vehicle. He has stated that he identified all the accused persons in Court. He has stated that all the accused persons were present at Androla bridge on 19.05.2009. He has denied suggestion that he did not see accused persons during mid night on 19.05.2009 at Androla bridge. He has stated that he crossed Androla bridge in normal speed without stopping the vehicle. He has stated that he did not stop due to odd hours and due to the reason that he had no concern with the accused persons standing on the road. He has stated that there was no street light over bridge and he has stated that he did not talk to any accused while crossing Androla bridge. He has denied suggestion that he did not

see accused persons over Androla bridge. He has denied suggestion that he is deposing falsely at the instance of police officials.

8.16 PW-16 Santokh Singh has stated that he visited Police Station Nalagarh. He has stated that co-accused Jaswinder Singh @ Jassu Vicky and Sanju were in police station. He has stated that co-accused Jaspal Singh disclosed that co-accused Sanjeev Kumar, Vicky and Sodhi Singh were involved in the murder of deceased Kirpal Singh. He has stated that co-accused Jaspal Singh disclosed that accused persons were roaming at Panjehra and thereafter took liquor at the liquor shop and thereafter went to Devli Boar and again took liquor and thereafter brought liquor from liquor shop to Himachal border and again took liquor. He has stated that all the accused went to the house of co-accused Sanjeev Kumar and thereafter co-accused Sanjeev Kumar came from his house alongwith some people. He has stated that during night co-accused Sanjeev Kumar committed murder of deceased Kirpal Singh at the instance of co-accused Sodhi Singh for Rs.50,000/- (Rupees fifty thousand) out of which Rs.20,000/- (Rupees twenty thousand) were already paid and remaining were to be paid later on. Statement of co-accused Jaspal Singh recorded under Section 27 of Indian Evidence Act Ext.PW16/A. He has stated that he accompanied the police with co-accused Jaspal Singh and PW Moninder to Gullarwala stream wherein it was disclosed by co-accused that Rs.20,000/- (Rupees twenty thousand) were paid to co-accused Sanjeev Kumar. He has stated that disclosure statement of co-accused is Ext.PW16/B. He has stated that he signed memorandum Ext.PW16/C. He has stated that motorcycle Hero Honda No.HP-12-A-3318 was also taken into possession vide seizure memo Ext.PW16/E. He has stated that another motorcycle No.PB-10-AZ-1004 was also taken into possession vide seizure memo Ext.PW12/A. He has stated that mobile phone alongwith Sim card No.09958347400 also took into possession vide seizure memo Ext.PW16/F which he signed. He has denied suggestion that accused persons did not give disclosure statement. He has denied suggestion that neither motorcycle nor any mobile phone recovered in his presence. He has denied suggestion that he is deposing falsely in Court because he is relative of deceased.

8.17 PW-17 Phuman Singh has stated that deceased was son of his brother who was working in Promed company. He has stated that on 19.05.2009 deceased had gone to his duty at 3.00 PM and he was supposed to return during mid night at about 12'O' clock. He has stated that on 19.05.2009 at about 11.50 PM telephone call came to his brother twice but no one responded the call. He has stated that thereafter his sister-in-law came to him and asked him to make call on mobile phone of deceased Kirpal Singh. He has stated that thereafter he made call on mobile phone of deceased Kirpal Singh but same was not responded despite ringing. He has stated that on the next morning his paternal uncle Devi Ram informed him that deceased Kirpal Singh was lying over Androla bridge. He has stated that when they went to the spot they found that deceased was lying with blood stained having shot over his chest. He has stated that motorcycle was lying nearby the deceased. He has stated that there was land dispute with the family of co-accused Sodhi Singh. He has stated that family of co-accused Sodhi Singh has enmity with them. He has stated that enmity still remains with the family of co-accused Sodhi Singh. He has denied suggestion that there was no enmity of the family of co-accused Sodhi Singh with the family of deceased Kirpal Singh. He has denied suggestion that he did not make any call to the mobile phone of deceased Kirpal Singh. He has denied suggestion that he has falsely implicated the accused persons in connivance with the police officials.

8.18 PW-18 Amrinder Singh has stated that he is running a mobile repair shop in village Soban Majra and he identified co-accused Sanjeev Kumar present in Court. He has stated that co-accused Sanjeev Kumar belongs to his village. He has stated that on

19.05.2009 he was present in his shop. He has stated that at about noon co-accused Sodhi Singh came to his shop for payment of recharge. He has stated that after sometime deceased Kirpal Singh came to his shop over his motorcycle and stopped over for some time in the shop and thereafter left. He has stated that deceased Kirpal Singh was not having helmet while driving his motorcycle. He has stated that co-accused Sanjeev Kumar and Jaspal also crossed the road in front of his shop. He has stated that on 19.05.2009 he closed his shop at 9.30 PM. He has stated that at bus stand co-accused Shashi was also found. He has stated that next day he came to know that deceased Kirpal Singh had died. He has stated that on 02.07.2009 he was with Santokh Singh in Police Station Nalagarh when co-accused Jaspal made a disclosure statement. He has stated that all accused persons consumed liquor at Panjehra and thereafter went to Deoli and again consumed liquor and when the liquor finished co-accused Sanjeev Kumar went to the shop of liquor to bring more liquor and thereafter all accused persons went to the house of co-accused Sanjeev Kumar and thereafter co-accused Sanjeev Kumar brought pistol and came to Deoli bridge and when deceased Kirpal Singh was returning from his duty he was shot dead by co-accused Sanjeev Kumar. He has stated that statement of co-accused Jaspal Singh Ext.PW16/A was recorded. He has stated that motorcycle Hero Honda No.PB-10AZ-1004 alongwith RC was also taken into possession vide seizure memo Ext.PW12/A. He has denied suggestion that co-accused Sodhi Singh did not recharge his mobile phone. He has denied suggestion that no recharge payment given to him. He has denied suggestion that he had an altercation with co-accused Sanjeev Kumar in marriage. Voluntarily stated that some altercation took place in marriage. He has denied suggestion that co-accused Jaspal Singh did not make disclosure statement Ext.PW16/A. He has denied suggestion that he is deposing falsely at the instance of police officials. He has denied suggestion that his signatures were obtained in police station subsequently.

8.19 PW-19 Chanan Singh has stated that deceased Kirpal Singh was from his village. He has stated that he came to police station on 13.09.2009 when co-accused Vikram Singh disclosed to the police that co-accused Sodhi Singh had agreed to pay Rs.50000/- (Rupees fifty thousands) for the murder of deceased Kirpal Singh. He has stated that Rs.20000/- were given and statement of co-accused Vikram Singh to this effect Ext.PW16/B was recorded. He has stated that in pursuance of disclosure statement Ext.PW16/B co-accused Vikram Singh alongwith police officials identified the place where money was delivered in river Gullarwala. He has stated that Sim card No.09958347400 was produced by the mother of co-accused Vikram Singh which was taken into possession vide seizure memo Ext.PW16/F. He has stated that T-shirt Ext.P11 and lower Ext.P12 are the same which were produced by co-accused Jaspal Singh. He has stated that Shirt Ext.P14 and pants Ext.P15 are the same which were taken into possession vide seizure memo Ext.PW13/B. He has stated that T-shirt Ext.P17 and pants Ext.P18 are the same which were taken into possession vide seizure memo Ext.PW13/C. He has stated that T-shirt Ext.P20 and pants Ext.P21 are the same which were taken into possession vide seizure memo Ext.PW13/D. He has stated that he cannot say as to which clothes were produced by which accused because all the clothes were mixed together. He has admitted that his sister is married to the maternal uncle of deceased Kirpal Singh. He has denied suggestion that co-accused Vikram Singh did not make any disclosure statement. He has denied suggestion that he is deposing falsely on account of enmity with accused.

8.20 PW-20 Dhruv Kumar has stated that he is working as operator in the company since 1999. He has stated that co-accused Sanjeev Kumar @ Sanju was also working in the same company. He has stated that he did not mark any punching regarding presence of co-accused Sanjeev Kumar @ Sanju in the factory whenever co-accused Sanjeev Kumar @ Sanju remained absent. Witness was declared hostile. He has stated that his

statement was recorded under Section 164 Cr.PC before Judicial Magistrate Ist Class Nalagarh Ext.PW20/A. He has stated that his statement Ext.PW20/A is correct which was duly signed by him before Judicial Magistrate. He has admitted that he was brought before Judicial Magistrate for recording his statement under Section 164 Cr.PC. He has stated that he was forced to make statement Ext.PW20/A. He has stated that threats were given to him that he would be implicated in the case. He has stated that he remained under constant fear of the police officials as the police officials remained outside Court throughout the time when his statement was recorded. He has stated that co-accused Sanjeev Kumar remained present in the factory w.e.f. 18.05.2009 to 21.05.2009 and prepared progress report which was verified in the factory.

8.21 PW-21 Ashok Sharma has stated that he is working in Ravira Home Finishing Company since 2002 as personal manager. He has stated that company deals in home finishing items. He has stated that presence in the factory is marked by computerised time machine with the help of I.D. card. He has stated that I.D. card is shown to the machine and if it is accepted then presence is marked. He has stated that in the month of July 2009 some relation of co-accused Sanjeev Kumar requested him telephonically to send the record of presence of co-accused Sanjeev Kumar for the month of May 2009 and he obtained computerised record and sent the same through fax as co-accused Sanjeev Kumar was working in factory. He has stated that presence of the person can be accepted by the machine if I.D. card of some other employee is shown to the machine. He has voluntarily stated that security verifies the identity of the person whose presence is marked by manual checking. He has stated that presence taken by the machine of all employees is checked up daily. He has stated that he cannot say that co-accused Sanjeev Kumar remained absent from factory w.e.f. 09.05.2009 to 15.09.2009 and thereafter from 18.05.2009 to 20.05.2009. Witness was declared hostile. He has denied suggestion that he has resiled from his earlier statement in order to save the company from stigma. He has stated that I. D. card of each employee is having photographs and security guard verifies their identity cards. He has stated that physical verification is also conducted relating to presence of employees.

8.22 PW-22 Ajay Kumar has stated that he is working as security guard for the last three years in Ravira Home Finishing Company Panipat. He has stated that on the gate employee is allowed to enter by checking his photo identity card. He has stated that no other person is allowed to enter inside the factory if the name of employee does not match with the check list and I. D. card. He has stated that guard used to stand nearby the punching machine. He has stated that presence is marked by the punching machine after showing the identity card. He has stated that co-accused Sanjeev Kumar is working in factory. He has denied suggestion that any person can mark the presence of others by showing the I.D. card of others to the punching machine. He has denied suggestion that w.e.f. 18.05.2009 to 20.05.2009 he did not see co-accused Sanjeev Kumar in the company. He has denied suggestion that he has resiled from his earlier statement in order to save co-accused Sanjeev Kumar being co-worker in the company. He has stated that moment presence is marked by the machine after due verification of the person with identity card report is submitted to the authority before 11.00 AM.

8.23 PW-23 Sukhdev Singh has stated that in the year 2009 he remained posted as supervisor in Promed factory at Khera. He has stated that deceased Kirpal Singh was also working in the factory. He has stated that duty period of deceased Kirpal Singh was from 3.00 PM to 11.00 PM. He has stated that on 19.05.2009 deceased Kirpal Singh was present on his duty. He has stated that he used to come to the factory over his motorcycle. He has stated that attendance report of Promed factory w.e.f. 15.05.2009 to 20.05.2009 is Ext.PW23/A.s He has stated that at Sl. No.24 deceased Kirpal Singh has been shown to be

present on 19.05.2009. He has stated that he has not brought original record of Ext.PW23/A and he does not remember name of the manager of the factory. He has stated that he does not know whether any girl named Nisha was also working in the factory.

8.24 PW-24 Pawan Singh has stated that in the year 2009 he was working with Fiem Industry Bhatian as Store Manager. He has stated that his duty hours were from 9.00 AM to 5.30 PM. He has stated that due to heavy rush of work he used to sit late during night. He has stated that on 19.05.2009 he left his company during mid night at about 12 'O' clock over his motorcycle No.HP-12B-0521. He has stated that when he reached Androla bridge he saw one boy lying over left side and motorcycle was also lying at some distance. He has stated that he did not stop as some motorcycle was coming behind him. He has stated that people used to come and go over motorcycle during night as a routine being industrial area.

8.25 PW-25 Dr. Puneet Sharma has stated that he remained posted as Medical Officer Nalagarh in the year 2009. He has stated that on 20.05.2009 police filed post mortem application Ext.PW25/A. He has stated that he conducted post mortem of deceased aged 25 year. He has stated that death of deceased occurred due to deep injury in left shoulder due to some weapon. He has stated that deceased was averagely built adult male of height around 5 feet 09 inches. He has stated that clotted blood was present over anterior abdominal wall. He has stated that entry wound was present through and through left side upper part of rib cage and anterior axillary line 1 cm x 1 cm with blackish charred margin exit wound. He has stated that cause of death was hemorrhagic shock due to injury to major blood vessel. He has stated that probable time between injury and death was few minutes to few hours. He has stated that probable time between death and post mortem was 12 hours to 24 hours. He has stated that he had issued post mortem report Ext.PW25/B with his signatures

8.26 PW-26 Harjinder Singh has stated that he is working as motorcycle mechanic at Baruna for the last five years. He has stated that his elder brother deceased Kirpal Singh was working in Promed factory at Khera. He has stated that on 19.05.2009 deceased Kirpal Singh had gone on duty and in the evening he had gone to Ropar for purchasing and returned to his house in mid night. He has stated that his mother and father and paternal uncle Phuman Singh were present in the house and told that deceased did not return home from his working place. He has stated that his maternal uncle made a call to the deceased but the same was not responded. He has stated that on the next morning his paternal uncle Devi Ram informed that dead body of deceased Kirpal Singh was lying over Androla bridge and motorcycle was also lying there. He has stated that thereafter they went to the spot and found dead body of deceased Kirpal Singh having a shot over his chest. He has stated that photographs mark A1, A2, A3 and A4 belong to his deceased brother. He has stated that co-accused Sanjeev Kumar is also known to him. He has stated that he has enmity with the family of co-accused Sodhi Singh relating to land. He has denied suggestion that there was no enmity with co-accused Sodhi Singh. He has denied suggestion that he is deposing falsely at the instance of police officials and on account of the fact that deceased was his brother.

8.27 PW-27 Constable Des Raj has stated that in the year 2009 he remained posted in Police Post Jogon. He has stated that on 20.05.2009 he alongwith police party visited spot and took photographs Ext.PW27/A-1 to Ext.PW27/A-14. He has stated that thereafter he took photographs Ext.PW27/A-15 to Ext.PW27/A-41 at Gullarwala. He has stated that photographs took with the help of digital camera. He has denied suggestion that photographs Ext.PW27/A-15 to Ext.PW27/A-41 were not taken at the spot.

8.28 PW-28 HC Neelam Kumar has stated that in the year 2008 he remained posted in Police Post Jogon. He has stated that copy of complaint under Section 107/150 Cr.PC is Ext.PW28/A. He has stated that complainant is Devi Ram and Harmesh Kumar, Jeet Ram and Ram Lal are accused. He has stated that statements of witnesses and copy of MLC are Ext.PW28/A-1, A-2, A-3, A-4, A-5 and A-6. He has stated that proceedings under Sections 107/150 were initiated. He has stated that he does not know that matter was compromised between parties.

8.29 PW-29 Ram Dayal has stated that in the year 2009 he remained posted as patwari in Patwar circle Kashmirpur and he was associated during investigation. He has stated that he prepared copy of jamabandi for the year 1998-99 of khasra No.106 Mauja Androla Ext.PW29/A. He has stated that he also prepared copy of jamabandi for the year 1999-2000 of khasra No.35 Mauja Rahia Ext.PW29/B and alsoprepared Aksh Sajra Ext.PW29/C and same are true as per original record.

8.30 PW-30 HHC Kamal Chand has stated that he was discharging the duty of MC at Police Post Jogon and he has brought the diary of police post dated 20.05.2009. He has stated that Rapat No.17 dated 20.05.2009 is true and correct as per original record. He has stated that on 27.05.2009 he handed over the case property vide RC to MHC Mansu Ram with the direction to deposit in State Forensic Science Laboratory and thereafter he deposited the same and brought receipt and handed over the same to MHC. He has stated that no interference was caused in the case property during the period case property remained in his possession. He has denied suggestion that no case property was handed over to him with the direction to deposit in State Forensic Science Laboratory.

8.31 PW-31 MHC Mansu Ram has stated that case property was deposited in malkhana. He has stated that all the sealed parcels alongwith impression of seal were sent to State Forensic Science Laboratory vide RC through C. Kamal Chand. He has stated that some parcels of case property were sent to State Forensic Science Laboratory through C. Devinder Singh. He has stated that parcels remained intact during his custody. He has denied suggestion that no sealed exhibits were deposited by S.I.Om Parkash. He has denied suggestion that exhibits were not duly sealed.

8.32 PW-32 Devinder Kumar has stated that in the year 2009 he remained posted in Police Station Nalagarh. He has stated that on 21.07.2009 MHC Mansu Ram handed over to him five sealed parcels to be handed over in State Forensic Science Laboratory. He has stated that after depositing the parcels in the office of State Forensic Science Laboratory he brought the receipt on RC. He has stated that parcels remained intact in his possession. He has denied suggestion that parcels were not handed over to him. He has denied suggestion that he did not deposit the parcels in State Forensic Science Laboratory.

8.33 PW-33 C. Mohan Singh has stated that entry in daily diary were incorporated in the computer with certificate and FIR Ext.PW33/C was also registered. He has stated that computer was in working condition. He has admitted that whenever any entry incorporated in the computer the certificate is appended.

8.34 PW-34 SI Amar Singh has stated that on 19.05.2009 he remained posted in Police Station Nalagarh. He has stated that on 20.05.2009 FIR Ext.PW33/C was registered on the basis of statement recorded under Section 154 Cr.PC Ext.PW1/A of Kulwant Singh.

8.35 PW-35 Sanjeev Lakhanpal has stated that he remained posted as SDPO Nalagarh. He has stated that on 13.06.2009 he received a letter addressed to Dy.SP Nalagarh Ext.PW35/A and thereafter he handed over the same to I.O. Om Parkash. He has stated that when he received a letter Ext.PW35/A at that time investigation was in progress

in the present case. He has stated that he did not conduct any inquiry relating to the source of letter. He has stated that he did not hand over the letter through any seizure memo to the investigating officer.

8.36 PW-36 Randeep Thakur has stated that he has brought record of case FIR No.113/2009. He has stated that District Magistrate Solan has given sanction against co-accused Sanjeev Kumar @ Sanju under Arms Act Ext.PW36/A. He has stated that he identified the signatures of then District Magistrate Solan. He has stated that Dr. Amandeep Garg is presently working as Deputy Commissioner Mandi.

8.37 PW-37 Bhajan Singh has stated that he was posted as Patwari in Patwar Circle Karsoli. He has stated that demarcation was given by Kanungo in his presence. He has stated that land in Khasra No.365 was found in possession of Devi Ram and exchange took place between parties qua Khasra No.365 and 366 vide mutation No.1689 dated 28.02.2008. He has stated that demarcation report was signed by parties and Kanungo and he also signed.

8.38 PW-38 ASI Yash Pal has stated that he conducted partly investigation and recorded statement of Bhajan Singh Patwari and thereafter handed over the file to Inspector SHO Ramesh Chand who prepared supplementary challan.

8.39 PW-39 SI Ram Asra has stated that he remained posted in Police Station Nalagarh and he partly investigated the case. He has stated that on dated 10.09.2009 he arrested co-accused Vikram Singh.

8.40 PW-40 Inspector Om Parkash has stated that he remained posted as SHO in Police Station Nalagarh and conducted investigation. He has stated that on 20.05.2009 he received a telephonic information that dead body was lying over Androla bridge. He has stated that he proceeded to the spot alongwith police officials and took photographs of dead body and also took motorcycle into possession. He has stated that he prepared inquest reports and recorded statement of Kulwant Singh father of deceased under Section 154 Cr.PC Ext.PW1/A and sent the same to police station for registration of FIR. He has stated that he prepared spot map and dead body was sent for post mortem. He has stated that mobile of deceased, ATM card and purse containing three notes to the denomination of Rs.100/- took into possession vide seizure memo. He has stated that motorcycle alongwith documents, driving licence, identity card also took into possession. He has stated that he also took blood stained soil and controlled sample of soil. He has stated that words NI were written with blood nearby dead body of deceased. He has stated that anonymous letter Ext.PW35/A was received. He has stated that he made inquiry on the basis of anonymous letter and found that on 19.05.2009 co-accused Sanjeev Kumar @ Sanju, Vikram @ Vicky, Jaswinder @ Jassi, Vijender @ Vicky and Jaspal @ Rinku were found roaming around the liquor shop at Panjehra. He has stated that he interrogated all the persons and arrested the accused persons. He has stated that during investigation it emerged that co-accused Sodhi Singh had agreed to give Rs.50,000/- (Rupees fifty thousand) to co-accused Sanjeev Kumar @ Sanju for the murder of deceased Kirpal Singh as there was land dispute between family of deceased Kirpal Singh and co-accused Sodhi Singh. He has stated that Rs.20,000/- (Rupees twenty thousand) were paid by co-accused Sodhi Singh to co-accused Sanjeev Kumar @ Sanju as part payment to kill deceased. He has stated that on 19.05.2009 when deceased came upon his motorcycle over Androla bridge where all the accused persons were present then deceased was stopped and thereafter co-accused Sanjeev Kumar @ Sanju had given fire shot with country made pistol upon body of deceased over his chest and thereafter deceased fell down from the motorcycle. He has stated that thereafter accused persons tried to drag dead body of deceased from the bridge with the intention to throw the dead body into

river but due to flash light of the moving vehicles dead body of the deceased was left upon the bridge. He has stated that co-accused Jaspal has made a disclosure statement. He has stated that co-accused Sanjeev Kumar @ Sanju also made a disclosure statement relating to concealment of country made pistol. He has stated that in pursuance of disclosure statement country made pistol was recovered. He has stated that country made pistol Ext.P6, used cartridge Ext.P7 and live cartridge Ext.P8 were recovered as per disclosure statements given by accused. He has stated that T-shirts, lowers and pants of accused persons were taken into possession. He has stated that on 13.09.2009 co-accused Vikram Singh had given disclosure statement that he could disclose the place where payment of Rs.20,000/- (Rupees twenty thousand) given to co-accused Sanjeev Kumar @ Sanju by co-accused Sodhi Singh to kill deceased. He has stated that after receiving report from SFSL final report was prepared. He has admitted that there is no eye witness of the incident. He has stated that deceased was not last seen with any of the accused. He has stated that he did not lift any finger print or foot print from the spot. He has stated that nothing was visible to lift the prints. He has stated that complainant did not mention name of any accused when the statement of complainant was recorded under Section 154 Cr.PC. He has denied suggestion that he did not conduct fair investigation. He has denied suggestion that accused persons did not give any disclosure statement. He has denied suggestion that none of the accused were roaming in and around the place of incident on the date of death. He has denied suggestion that recovery of country made pistol was fabricated recovery. He has stated that he did not obtain call details of mobile of accused. He has denied suggestion that PW Dhruv Kumar was threatened to implicate him in false case. He has denied suggestion that he had recorded statements of prosecution witnesses as per his own suitability. He has denied suggestion that accused persons have been falsely implicated in the present case. He has denied suggestion that co-accused Sodhi Singh did not agree to pay Rs.50,000/- (Rupees fifty thousand) to co-accused Sanjeev Kumar @ Sanju to kill deceased. He has denied suggestion that statements of accused persons were recorded after torturing them.

9. Statements of accused persons under Section 313 Cr.PC. were recorded. Accused persons have stated that they are innocent and have been falsely implicated in the present case.

10. Following defence witnesses examined:

10.1 DW-1 Jarnail Singh has stated that he is numberdar for village Karsoli, Bhatoli Tapria and he is in possession of identity card issued by Tehsildar Nalagarh and copy is Ext.DW1/A. He has stated that there is no numberdar in the village in the name of Avar Singh s/o Rattan Singh. He has stated that Avtar Singh is wrongly proclaiming himself as numberdar of the village. He has stated that there are 2-3 numberdars in the village namely Milkhy and father of Avtar Singh. He has denied suggestion that Avar Singh s/o Rattan Singh is also numberdar. He has denied suggestion that he is not residing in the village for the last two years. He has denied suggestion that co-accused Sanjeev Kumar @ Sanju is son of his real brother. He has denied suggestion that he is deposing falsely because he is relative of co-accused Sanjeev Kumar @ Sanju.

10.2 DW-2 Mangal Singh has stated that he had dispute with Chanan Singh and compromise took place. He has stated that altercation took place on the issue of reversing vehicle when the vehicle parked by Chanan Singh was not removed. He has stated that matter was reported to the police and compromise mark D was executed. He has stated that co-accused Sanjeev Kumar @ Sanju is his son and altercation took place with Mandeep s/o Jaimal Singh, Raj Kumar s/o Gudev and Harjeet Singh s/o Chanan Singh. He has stated that he was on duty when the incident took place. He has denied suggestion that he was creating nuisance under the influence of liquor. He has denied suggestion that in the year

2007 his son Sanjeev Kumar had an altercation with Raj Kumar. He has admitted that matter was compromised after registration of FIR against his son Sanjeev Kumar. He has denied suggestion that there was inimical relation towards complainant even after compromise.

11. Following documentaries evidence produced by the prosecution: (1) Ext.PW-1/A is statement of PW-1 Kulwant Singh recorded under Section 154 Cr.PC. (2) Ext.PW1/B and Ext.PW1/C are inquest reports. (3) Ext.PW1/D is memo qua handing over of dead body of deceased to his relative. (4) Ext.PW2/A is memo relating to articles recovered from dead body of deceased. (5) Ext.PW2/B is complaint filed by Devi Ram before Gram Panchayat Karsoli against Ram Lal, Jeet and Harmesh and report filed by Pradhan Gram Panchayat Karsoli to police station against quarrel between two parties at the spot. (6) Ext.PW2/C is family compromise. (7) Ext.PW3/A is seizure memo of motorcycle Hero Honda No.HP-12-B-0323 alongwith documents, driving licence and identity card. (8) Ext.PW4/A is seizure memo of blood clotted soil and sample of controlled soil. (9) Ext.PW4/B is seizure memo of writing NI with blood from parapet of Androla bridge. (10) Ext.PX is death certificate of Kuldeep Kumar. (11) Ext.PW11/A is disclosure statement recorded under Section 27 of Indian Evidence Act of co-accused Sanjeev Kumar @ Sanju relating to recovery of 12 bore country made pistol. (12) Ext.PW11/B is sketch of country made pistol alongwith one live cartridge. (13) Ext.PW11/C is seizure memo of 12 bore country made pistol alongwith used cartridge and live cartridge. (14) Ext.PW12/A is recovery of motorcycle Hero Honda No.PB-10AZ-1004 alongwith RC and key. (15) Ext.PW13/A is recovery of clothes of co-accused Jaspal Singh worn at the time of incident. (16) Ext.PW13/B is recovery of clothes of co-accused Vijender Singh @ Vicky worn at the time of incident. (17) Ext.PW13/C is recovery of clothes of co-accused Jasveer Singh @ Jassi worn at the time of incident. (18) Ext.PW13/D is recovery of clothes of co-accused Sanjeev Kumar @ Sanju worn at the time of incident. (19) Ext.PW16/A is disclosure statement recorded under Section 27 of Indian Evidence Act of co-accused Jaspal Singh. (20) Ext.PW16/B is disclosure statement recorded under Section 27 of Indian Evidence Act of co-accused Vikram Singh relating to payment of Rs.20000/- (Rupees twenty thousands) by co-accused Sodhi Singh to co-accused Sanjeev Kumar @ Sanju to kill deceased. (21) Ext.PW16/C is disclosure statement recorded under Section 27 of Indian Evidence Act of co-accused Vikram Singh wherein co-accused Sodhi Singh given Rs.20000/- (Rupees twenty thousands) to co-accused Sanjeev Kumar @ Sanju to kill deceased. (22) Ext.PW16/D is statement of co-accused Jaspal Singh relating to location of incident. (23) Ext.PW16/E is recovery of motorcycle Hero Honda No.HP-12-A-3318. (24) Ext.PW16/F is seizure memo of Mobile C117 alongwith sim card. (25) Ext.PW17/A is recovery of RC of motorcycle Hero Honda No.HP-12-A-3318. (26) Ext.PW17/B is driving licence of Bhoop Chand Sharma relating to motorcycle Hero Honda No.HP-12-A-3318. (27) Ext.PW20/A is statement of PW Dhruv Kumar recorded before Judicial Magistrate Ist Class Nalagarh under Section 164 Cr.PC. relating to punching of attendance card of co-accused Sanjeev Kumar @ Sanju from 18.05.2009 to 20.05.2009 in the absence of co-accused Sanjeev Kumar @ Sanju in the factory. (28) Ext.PW23/A is copy of attendance register. (29) Ext.PW25/A is application filed by I.O. for post mortem of deceased. (30) Ext.PW25/B is post mortem report of deceased. As per mortem report deceased aged 25 years had died due to hemorrhagic shock due to injury to major blood vessel. (31) Ext.PW25/C, Ext.PW25/D, Ext.PW25/E and Ext.PW25/F are State Forensic Science Laboratory reports. (32) Ext.PW25/G is ballistics expert report. As per ballistics expert report no opinion regarding firing of exhibit E/1b used cartridge Ext.P7 from country made pistol Ext.P6 could be given because metal base of used cartridge Ext.P7 on which firing pin and breech face marks developed were missing. (33) Ext.PW27/A-1 to Ext.PW27/A-41 are photographs. (34) Ext.PW28/A is complaint filed under Section 107/150 Cr.PC by Devi Ram against Hermesh Kumar, Jeet Ram and Ram Lal. (35) Ext.PW28/A-1 is rapat No.4. (36)

Ext.PW28/A-2 is statement of Devi Ram. (37) Ext.PW28/A-3 is statement of Kulwant Singh. (38) Ext.PW28/A-4 is statement of Phuman Singh. (39) Ext.PW28/A-5 is MLC of Kulwant Singh. (40) Ext.PW28/A-6 is MLC of Devi Ram. (41) Ext.PW29/A is copy of jamabandi for the year 1998-1999 qua khasra No.106 Mauja Androla Upperla. (42) Ext.PW29/B is copy of jamabandi for the year 1999-2000 qua khasra No.35 Mauja Raiya. (43) Ext.PW29/C is nakal aksh sajra kisatbar. (44) Ext.PW30/A is copy of rapat No.17 dated 20.05.2009. (45) Ext.PW30/B is road certificate. (46) Ext.PW31/A, Ext.PW31/B, Ext.PW31/C and Ext.PW31/D are extracts of malkhana register. (47) Ext.PW33/A is certificate relating to report No.6A dated 20.05.2009 taken through computer. (48) Ext.PW33/C is FIR No.133 dated 20.05.2009 registered under Section 302 IPC. (49) Ext.PW35/A is letter written to Dy.SP Nalagarh. (50) Ext.PW35/B is outer cover of letter written to Dy.SP Nalagarh. (51) Ext.PW36/A is permission given by District Magistrate Solan (H.P.) to prosecute co-accused Sanjeev Kumar @ Sanju under Arms Act. (52) Ext.PW40/B, Ext.PW40/C, Ext.PW40/D & Ext.PW40/E are site plans. (53) Ext.PW40/F-1, F-2, F-3, F-4 & F-5 are specimens of seal taken upon plain clothes. (54) Ext.PW40/G is site plan. (55) Ext.PW40/H is letter written to Halqua patwari by Addl. SHO Nalagarh. (56) Ext.PW40/J is site plan. (57) Ext.PW40/K-1, K-2, K-3, K-4, K-5, K-6, K-7, K-8 & K-9 are statements of witnesses relating to contradiction purpose. (58) Ext.DW1/A is identity card of Jernail Singh.

Findings in Cr. Appeal No.275 of 2011 title Sanjeev Kumar vs. State of H.P.

12. Submission of learned Advocate appearing on behalf of appellant Sanjeev Kumar that chain of circumstances against appellant/co-accused Sanjeev Kumar is not completed is accepted for the reasons hereinafter mentioned. Present case is not based upon eye witnesses but entirely based upon circumstantial evidence. PW-5 Krishan Pal did not support the prosecution case when he appeared in witness box. PW-5 has specifically stated that he is running a courtyard used for consuming liquor outside liquor shop for the last four years at Panjehra. PW-5 has stated in positive manner that he does not know who came to take drinks in his courtyard on 20.05.2009. He has stated that he does not remember all the visitors. PW-5 did not state that all the accused persons came to his courtyard and consumed liquor. Hence it is held that testimony of PW-5 has broken the chain of circumstantial evidence.

13. We have also perused the testimony of PW-6 Nand Lal. PW-6 Nand Lal has specifically stated when he appeared in witness box that he could not identify the persons travelling upon motorcycle who crossed during night. He has stated that he could not state age of the motorcyclists as well as colour of their clothes. Witness was declared hostile. We are of the opinion that testimony of PW-6 has also broken the chain of circumstantial evidence in the present case. Similarly, we have also perused the testimony of PW-7 Jagir @ Chhibar. PW-7 Jagir has specifically stated when he appeared in witness box that nothing had happened in his presence. PW-7 did not support the prosecution case as alleged by the prosecution. Witness was declared hostile. We are of the opinion that testimony of PW-7 has also broken the chain of circumstantial evidence in the present case. Similarly we have also perused the testimony of PW-10 Kuldeep Singh. PW-10 has specifically stated in positive manner that he could not trace out description of motorcycle riders who crossed during mid night. Witness was declared hostile. We are of the opinion that testimony of PW-10 has also broken the chain of circumstantial evidence in the present case.

14. We have also perused the testimony of PW-12 Maninder Singh. PW-12 also did not support the prosecution case as alleged by the prosecution and witness was declared hostile. We are of the opinion that testimony of PW-12 has also broken the chain of circumstantial evidence in the present case. PW-12 has stated that motorcycle No.PB-10AZ-1004 was used by him on night duty on 19.05.2009 and was not used by co-accused

Jasbeer Singh. Similarly we have also perused the testimony of PW-13 Kuldeep Singh. PW-13 also did not support the prosecution case as alleged by the prosecution and witness was declared hostile. We are of the opinion that testimony of PW-13 has also broken the chain of circumstantial evidence in the present case. PW-13 has stated in positive manner that clothes were not given by accused persons in his presence. Similarly we have also perused the testimony of PW-20 Dhruv Kumar. PW-20 also did not support the prosecution case as alleged by the prosecution and witness was declared hostile. We are of the opinion that testimony of PW-20 has also broken the chain of circumstantial evidence in the present case. PW-20 has stated that he was forced to give statement under Section 164 Cr.PC by way of threats. He has stated that he had made statement under Section 164 Cr.PC as directed by police officials. PW-20 has stated that he was threatened by police officials that he would be implicated in present case as accused in case he would not give statement under Section 164 Cr.PC as directed by police officials. Prosecution did not examine Judicial Magistrate in the present case who recorded statement of PW-20 under Section 164 of Code of Criminal Procedure. Similarly we have also perused the testimony of PW-21 Ashok Sharma. PW-21 also did not support the prosecution case as alleged by the prosecution and witness was declared hostile. We are of the opinion that testimony of PW-21 has also broken the chain of circumstantial evidence in the present case. PW-21 has denied suggestion that co-accused Sanjeev Kumar was not present in factory w.e.f. 18.05.2009 to 20.05.2009. Similarly we have also perused the testimony of PW-22 Ajay Kumar. PW-22 also did not support the prosecution case as alleged by the prosecution. We are of the opinion that testimony of PW-22 has also broken the chain of circumstantial evidence in the present case. PW-22 was security guard in company. He has stated that he could not state that co-accused Sanjeev Kumar was absent from duty w.e.f. 18.05.2009 to 20.05.2009. As per duty chart co-accused Sanjeev Kumar was present in factory on 19.05.2009 and 20.05.2009.

15. We have also carefully perused the ballistic expert report Ext.PW25/G placed on record. Ballistic expert has specifically mentioned in his report Ext.PW25/G that no opinion regarding firing of exhibit E/1b (Used cartridge) from country made pistol could be given because metal base of used cartridge on which firing pin and breech face marks developed were missing. In the present case ballistic expert has not given any definite opinion that deceased had sustained injuries upon his body due to used cartridge Ext.P7 produced by prosecution in Court. In view of the above stated facts it is held that chain of circumstantial evidence is broken in the present case as per report of Ballistics expert relating to used cartridge Ext.P7 placed on record. In the present case no finger prints and foot prints of appellant took into possession in order to connect the appellant with the commission of offence with country made pistol Ex.P6 beyond reasonable doubt as required under criminal law.

16. We are of the opinion that chain of circumstantial evidence is broken in the present case when view is given by ballistic expert that no opinion regarding firing of exhibit E/1b (Used cartridge) Ext.P7 from country made pistol Ext.P6 could be given because metal base of used cartridge on which firing pin and breech face marks developed were missing. We are of the opinion that in view of the opinion given by ballistic expert Ext.PW25/G cited supra chain of circumstantial evidence is broken in the present case and disclosure statements of accused persons are not sufficient for conviction because disclosure statements are not substantive evidence. It is well settled law that disclosure statements are only corroborative in nature and are not conclusive circumstances. Disclosure statement merely raises strong suspicion. See AIR 1971 Apex Court 2016 title **Bakshish Singh vs. State of Punjab**. See AIR 1979 Apex Court 1042 title **Babboo & Others vs. State of Madhya Pradesh.**

17. We are of the opinion that statement given by PW Dhruv Kumar under Section 164 of Code of Criminal Procedure can be used for contradiction and corroborative purpose only and we are of the opinion that if witness resiled from his earlier statement then perjury case can be instituted against the witnesses in accordance with law. In view of the opinion of ballistic expert Ext.PW25/G placed on record chain of circumstantial evidence is broken in present case.

18. Even prosecution did not recover Rs.20,000/- (Rupees twenty thousand) from co-accused as part payment of killing deceased. Hence chain of circumstantial evidence is broken in present case. It is held that in view of opinion of ballistic expert that no opinion regarding firing of exhibit E/1b (Used cartridge) from country made pistol could be given because metal base of used cartridge on which firing pin and breech face marks developed were missing. Conviction given by learned Trial Court could not be sustained.

19. It was held in case reported in 2013 Cr. Law Journal 2040 title **Parkash Chand vs. State of Rajasthan** Apex Court that there are five golden principles in case of circumstantial evidence. (i) Circumstances from which the conclusion of guilt is to be drawn should be fully established and the accused must be and not merely may be guilty (ii) Facts so established should be consistent only with guilt of the accused (iii) Circumstances should be of a conclusive nature. (iv) Chain of evidence should be completed. (v) Innocence of accused should be ruled out. It is well settled law that circumstantial evidence is combination of all facts creating a net through which accused could not escape. See AIR 2010 Apex Court of India 762 title **Musheer Khan @ Badshah Khan and Another vs. State of Madhya Pradesh**. Also See AIR 2009 Apex Court of India 56 title **Shivaji @ Dadya Shankar Alhat vs. State of Maharashtra.**

20. It is well settled law that last seen theory comes into play where time gap between point of time when accused and deceased were last seen together and when deceased found dead is so small that possibility of any person other than the accused being author of crime becomes impossible. See AIR 2008 Apex Court of India 2819 title **Kusuma Ankamarao vs. State of Andhra Pradesh.** In the present case dead body of deceased was found upon the bridge which was approachable to the public easily and even vehicles were passing from the bridge where the dead body was lying. Place of dead body was accessible to the general public and even in the present case as per ballistic expert report Ext.PW25/G doubt is created relating to injuries sustained by the deceased from used cartridge Ext.P7 placed on record. Hence it is held that prosecution did not prove circumstantial evidence against the appellant beyond reasonable doubt and conclusive in nature. Hence point No.1 framed in Cr. Appeal No.275 of 2011 title Sanjeev Kumar vs. State of H.P. is answered in affirmative in favour of appellant Sanjeev Kumar @ Sanju.

Findings in Cr. Appeal No.404 of 2011 title Kulwant Singh vs. State of H.P.

21. Oral and documentaries evidence in Cr. Appeal No.275/2011 will be read as oral and documentaries evidence in Cr. Appeal No.404/2011 because both appeals have been filed against same judgment and sentence passed by learned trial Court and oral and documentaries evidence is not repeated again in order to avoid repetition.

22. Submission of learned Advocate appearing on behalf of appellant that other co-accused should be convicted in view of the testimonies of PW-1 to PW-8 is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that chain of circumstantial evidence is not proved against other co-accused as mentioned in findings in Cr. Appeal No.275/2011. Reasons are not repeated again in order to avoid repetition. Reasons mentioned in Cr. Appeal No.275/2011 be also read as reasons mentioned in Cr. Appeal No.404/2011.

23. Submission of learned Advocate appearing on behalf of appellant that in view of disclosure statements Ext.PW16/A, Ext.PW16/B & Ext.PW16/C co-accused No.2 to 7 be punished is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that in the present case chain is not completed and it is held that in the present case ballistics expert has given opinion Ext.PW-25/G that no opinion regarding firing of exhibit E/1b (Used cartridge) Ext.P7 from country made pistol Ext.P6 could be given because metal base of used cartridge Ext.P7 on which firing pin and breech face marks developed were missing. Hence it is held that chain against accused persons is broken as per opinion of ballistic expert. It is the case of prosecution that only one shot injury was given to the deceased from 12 bore country made pistol Ext.P6 with used cartridge Ext.P7.

24. Submission of learned Advocate appearing on behalf of appellant that as per testimony of PW-20 Dhruv Kumar and as per statement recorded under Section 164 of Code of Criminal Procedure Ext.PW20/A it is proved on record that murder of deceased was pre-planned and it is proved on record that co-accused Sodhi Singh had given part payment to co-accused Sanjeev Kumar @ Sanju to kill deceased Kirpal Singh and on this ground appeal filed by the appellant be accepted and other co-accused be also convicted is also rejected being devoid of any force for the reasons hereinafter mentioned. We have perused the testimony of PW-20 Dhruv Kumar carefully. PW-20 has specifically stated when he appeared in witness box that he was kept in police station for three days. He has stated in positive manner that he was forced to make statement Ext.PW20/A by way of threats that he would be implicated in present case. He has stated that he remained under constant fear of the police officials as the police officials were present outside Court throughout the time when his statement was recorded by Judicial Magistrate. In view of above stated facts it is not expedient in the ends of justice to allow Criminal Appeal No.404 of 2011 title Kulwant Singh vs. State of H.P. & Others.

25. Submission of learned Advocate appearing on behalf of appellant that criminal conspiracy to kill deceased under Section 120-B of IPC between all the accused is proved beyond reasonable doubt is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that to bring home the charge of criminal conspiracy it is necessary to establish that there was an agreement between the parties for doing an unlawful act. See AIR 1999 Apex Court 1086 title **Vijayan vs. State of Kerala**. Also see JT 2010 (13) Apex Court 284 title **John Pandian vs. State**. In the present case criminal conspiracy is not proved beyond reasonable doubt as required under criminal law. Consideration amount of Rs.20,000/- (Rupees twenty thousand) as part payment to kill deceased not produced in Court.

26. Submission of learned Advocate appearing on behalf of appellant that as per testimonies of PW-15, PW-16 and PW-18 all the accused persons were present at the spot on the intervening night and on this ground appeal filed by the appellant be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that dead body of deceased was found upon Androla bridge which was accessible to the general public at large and it is also proved on record that many vehicles also crossed from the bridge where dead body of deceased was found. It is not proved on record that used cartridge Ext.P7 was used for murder of deceased from country made pistol Ext.P6 as per ballistic expert opinion Ext.PW25/G. Hence it is held that chain of circumstantial evidence is broken in the present case against accused persons.

27. Submission of learned Advocate appearing on behalf of appellant that learned Trial Court has not properly appreciated oral as well as documentaries evidence placed on record qua co-accused No.2 to 7 is also rejected being devoid of any force for the reasons hereinafter mentioned. It is held that in the present case PW-6 Nand Lal, PW-7

Jagir, PW-10 Kuldeep Singh, PW-12 Maninder Singh, PW-13 Kuldeep Singh, PW-20 Dhruv Kumar, PW-21 Ashok Sharma and PW-22 Ajay Kumar did not support the prosecution case as alleged by the prosecution and they have been declared hostile by the prosecution. It is held that as per testimonies of above stated witnesses chain of circumstantial evidence against accused persons is broken in the present case. It is well settled criminal law that prosecution must stand or fall on its own legs and it cannot derive any strength from weakness of defence. It is well settled law that moral conviction however strong or genuine cannot amount to legal conviction sustainable in law. See 2005 (9) SCC 765 title **Anjlus Dungdung vs. State of Jharkhand.** In view of above stated facts point No.2 is decided against appellant Kulwant Singh.

Point No.3 (Final order).

28. In view of my findings on points No.1 & 2 above Cr. Appeal No.275 of 2011 title Sanjeev Kumar vs. State of H.P. is allowed and appellant Sanjeev Kumar is acquitted qua offences punishable under Sections 302, 201 IPC read with Section 25 of Arms Act by way of giving him benefit of doubt. Cr. Appeal No.404 of 2011 title Kulwant Singh vs. State of H.P. & Others is dismissed. Certified copy of judgment will be placed in Cr. Appeal No.404 of 2011 title Kulwant Singh vs. State of H.P. & Others. Files of learned Trial Court alongwith certified copy of judgment be sent back forthwith. Learned Registrar (Judicial) will issue release warrant in favour of Sanjeev Kumar s/o Sh. Mangal Singh forthwith in accordance with law if Sanjeev Kumar is not required in any other case. Both Criminal Appeals i.e. Cr. Appeal No.275 of 2011 title Sanjeev Kumar vs. State of H.P. and Cr. Appeal No.404 of 2011 title Kulwant Singh vs. State of H.P. & Others are disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh .....Appellant.

Versus

Chaman Lal .....Respondent.

Cr. Appeal No. 429 of 2010.
Reserved on: April 12, 2016.
Decided on: April 13, 2016.

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police party- search of the accused was conducted during which 1.45 kg. of charas was recovered- accused was tried and acquitted by the trial Court- PW-7 had given a different version regarding the place of visit and the place where accused was apprehended- there was discrepancy in the number of seals put on the parcel at the spot and the number of seals actually found on the parcel in the Court- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these

circumstances prosecution case was not proved beyond reasonable doubt- trial Court had rightly acquitted the accused. (Para-12 to 22)

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondent: Mr. Naveen K. Bhardwaj, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 6.5.2010, rendered by the learned Special Judge (FTC), Kullu, H.P., in Sessions trial No. 60/2009, whereby the respondent-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 acquitted.

2. The case of the prosecution, in a nut shell, is that PW-7 SI Onkar Singh, HC Balbir Sharma, PW- 1 HC Mukesh Kumar, PW-2 Sanjay Kumar and driver Aad Nath of the vehicle bearing registration No. HP-34-0049 were going towards Jari (Bradha) for investigation into the case FIR No. 107 of 2009 dated 12.3.2009. When the police party reached near Bagyanda Mour, the accused was found carrying a backpack Ext. P-5 on his left shoulder. He tried to run on seeing the police party. The vehicle was stopped and accused was apprehended. He disclosed his identity. The bag was checked and it was found to be containing jean pants Ext. P-6. The charas Ext. P-3 was found concealed inside both the legs of the pant. It was wrapped in cello tape. It weighed 1 kg and 45 grams. The charas was sealed in a parcel of cloth with six impressions of seal "O". Seal impression Ext. PW-1/A was taken separately on a piece of cloth. NCB-I form Ext. PW-3/B was filled in triplicate at the spot and seal impression was taken on the form. Charas was seized vide seizure memo Ext. PW-1/B. Backpack Ext. P-5 and jean pants Ext. P-6 were sealed in a separate parcel with six impressions of seal "H". Rukka Ext. PW-7/A was prepared and it was sent to the Police Station for registration of FIR. FIR Ext. PW-6/A was registered in the Police Station. The case property was produced before PW-6 Insp. Sanjeev Chauhan who resealed the parcels with six impressions of seal "W". He also filled in column Nos. 9 to 11 of NCB-I form. He obtained the seal impressions on separate pieces of cloth. The case property alongwith seal impressions "O", "W" and NCB-I form was handed over to PW-3 HC Manoj Kumari who made an entry in the register of malkhana Ext. PW-3/A and deposited the case property in the malkhana. She made entry in the register of malkhana at Sr. No. 218 Ext. PW-3/C. HHC Tek Singh deposited the parcel and other documents at FSL Junga and handed over receipt to MHC. 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 8 witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Naveen K. Bhardwaj, Advocate for the accused has supported the judgment of the learned trial Court dated 6.5.2010.

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

6. PW- 1 HC Mukesh Kumar testified that he was posted in SIU for the last 8-10 months. He along with SI Onkar Singh, HC Balbir Sharma and Const. Sanjay Kumar were going in a government vehicle bearing registration No. HP-34-0049 for investigation into the FIR No. 107 of 2009 dated 12.3.2009. When the investigation was completed, they were returning towards Kullu. One person was present at Bagyanda Mour at about 3:30 PM. He was having a backpack on his shoulder which was black coloured. He started running on seeing the police. He was apprehended. He disclosed his identity. SI Onkar Chand checked the backpack and it was found to be containing pancake like charas. The charas was kept inside the pants which was in the pack. It weighed 1 kg 45 grams. It was wrapped in a piece of cloth along with cello tape. The cloth parcel was sealed with six impressions of seal "O". Seal impression Ext. PW-1/A was taken separately on a piece of cloth. It was signed by him and HC Balbir. NCB-I form was filled in triplicate. Charas was seized vide seizure memo Ext. PW-1/B. Site plan was prepared. Rukka was prepared. It was handed over to Const. Sanjay Kumar. The case property was produced while recording the statement of this witness in the Court. In his cross-examination, he testified that they saw the accused when they were travelling in the vehicle from a distance of about 70-80 meters. They stopped the vehicle near the accused and accused started running away. They got suspicious. The accused ran towards Jari. They were coming from Jari towards Kullu at that time. All the police officials ran after the accused. They ran towards Jari. The accused had covered 40-50 paces before he was apprehended. SI Onkar caught the accused and thereafter all of them caught the accused. He was carrying bag. The bag was checked by SI Onkar Singh. The charas was weighed by the I.O. It was weighed in one lot. He also admitted that the parcel was stitched with the help of sewing machine on two sides. He admitted that portion of Ext. P-1 was torn and thereafter re-stitched and sealed with seal of FSL. The contents of NCB-I form were filled at the spot by the I.O. The accused was arrested at about 5:00 PM.

7. PW-2 Sanjay Kumar deposed the manner in which the accused was apprehended and the contraband was recovered. The rukka Mark-B was handed over to him. He carried it to the Police Station Kullu and handed over to SHO Sanjeev Chauhan. In his cross-examination, he testified that the accused ran towards Bhunter for about 5-7 paces. He also admitted that many vehicles crossed Bagyanda Mour in the presence of the police party. He did not remember whether any vehicle was stopped or any occupant was asked to become a witness. He did not remember whether driver, conductor or passengers of the bus in which he came to Kullu were associated as witnesses or not. He did not remember as to whether I.O. had sent any person to associate any person of the village.

8. PW-3 HC Manoj Kumari deposed that Sanjeev Chauhan handed over to her one sealed parcel which was sealed with six impressions of seal impressions "O" and was resealed with four impressions of seal "W" alongwith sample seals, NCB0I form in triplicate, photo copy of seizure memo on 21.10.2009 at 9:20 PM. She made entry in the malkhana register at Sr. No. 219. She deposited the case property in the malkhana. She handed over the case property to HHC Tek Singh on 22.10.2009 with direction to deposit the same at FSL, Junga vide RC No. 172/2009.

9. PW-4 HHC Tek Singh deposed that MHC Manoj Kumari handed over one parcel sealed with six impressions of seal "O" and four impressions of seal "W", sample seals and other documents on 22.10.2009. He deposited the same at FSL, Junga on 23.10.2009.

10. PW-6 SHO Sanjeev Chauhan deposed that SI Onkar Singh returned to the Police Station at about 9:00 PM on the same day. He handed over the case property to him. He resealed the same with four impressions of seal "W". He filled in column nos. 9 to 11 of NCB-I form. He handed over the case property alongwith the sample seals, NCB-I form and other documents to MHC Manoj Kumari.

11. PW-7 SI Onkar Singh testified the manner in which the accused was apprehended. The charas was recovered. He filled in NCB-I form Ext. PW-3/B. It was handed over to witness Mukesh Kumar. Memo Ext. PW-1/B was made regarding recovery of charas. Rukka Ext. PW-7/A was prepared which was sent to Police Station through Const. Sanjay Kumar. Statements of the witnesses were recorded. The case property was produced before PW-6 SHO Sanjeev Chauhan who resealed the same. In his cross-examination, he deposed that he had made efforts to associate independent witnesses but it was lonely and deserted place, therefore, no witness could be associated. There was no building at the spot. No vehicle crossed the road at the spot. The driver and conductor of the bus in which Sanjay Kumar left the spot were not associated as witnesses because investigation was already complete and rukka had been prepared.

12. PW- 1 HC Mukesh Kumar deposed that accused ran towards Jari side, however, PW-2 Const. Sanjay Kumar deposed that accused ran towards Bhuntar. PW-2 Const. Sanjay Kumar has categorically admitted in his cross-examination that many vehicles crossed Bagyanda Mour in the presence of the police party. He did not remember whether any vehicle was stopped or any occupant was asked to become a witness. He did not remember whether driver, conductor or passengers of the bus in which he came to Kullu were associated as witnesses or not. He did not remember as to whether I.O. had sent any person to associate any person of the village. PW-7 SI Onkar Singh has admitted in his cross-examination that he had made efforts to associate independent witnesses but it was lonely and deserted place, therefore, no witness could be associated. No vehicle crossed the road at the spot. The driver and conductor of the bus in which Sanjay Kumar left the spot were not associated as witnesses because investigation was already complete and rukka had been prepared. It has come in the statement of PW-2 Sanjay Kumar that many vehicles crossed Bagyanda Mour in the presence of the police party. PW-2 Constable Sanjay Kumar has admitted that there is a building of Malana Project at a distance of 5 meters from Bagyanda Mour. The police could easily associate the occupants of the building of Malana Project as well as vehicle as independent witnesses.

13. The case of the prosecution, precisely, is that the police party was coming back from Jari after carrying out investigation in FIR No. 107 of 2009 dated 12.3.2009. The accused was found at Bagyanda Mour. However, PW-7 SI Onkar Singh, in his examination-in-chief, has deposed that they had gone to Bagyanda for investigation in case FIR No. 107 of 2009 dated 12.3.2009. This witness has given altogether a different version regarding the place of visit and the place where the accused was apprehended.

14. PW- 1 HC Mukesh Kumar testified that vehicle was stopped near the accused. The accused started running away. However, PW-2 Sanjay Kumar has given a different version. According to him, the vehicle was stopped at some distance towards Jari. PW- 1 HC Mukesh Kumar testified that accused ran and covered 40-50 paces when he was apprehended, however, PW-2 Const. Sanjay Kumar deposed that the accused had covered only 5-7 paces when he was apprehended.

15. According to the evidence adduced by the prosecution, there is mention of six seals of Seal "O" and four seals of seal "W" in the report Ext. PW-7/E. However, when

the case property was produced before the Court, it was having six impressions of seal "O", six impressions of seals of FSL and three seal impressions of seal "W".

16. The case property was produced while recording the statement of PW-1 HC Mukesh Kumar. 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)."

17. 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 re-deposited 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 re-deposited 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.

18. Sub-rule (2) Rule 22.18 of Punjab Police Rules, reads as under:

> "(2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.

Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so."

19. Rule 27.18 of Punjab Police Rules, reads as under:

"27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).

Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its

closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

20. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

21. In Punjab Police Rules, also applicable to the State of Himachal Pradesh, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

22. In the instant case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

23. Thus, the prosecution has failed to prove the case against the accused under Sections 20 of the ND & PS Act that the charas was recovered from the conscious and exclusive possession of the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 6.5.2010.

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

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

State of Himachal Pradesh ..... Appellant
Versus
Hakim Singh and another ..... Respondents

Cr. Appeal No. 325/2010
Reserved on: April 8, 2016
Decided on: April 13, 2016

Indian Penal Code, 1860- Section 302- One V had taken room in Hotel for the night stay - accused stayed with V- room was found locked in the morning- Manager opened the lock and found dead body of V- matter was reported to police- FIR was registered- accused were tried and acquitted by the trial Court- held, in appeal that register regarding entry of visitors was not proved - Medical Officer admitted that deceased had died due to asphyxia after consuming phosphide poison- Phosphide poison emits pungent smell and because of pungent smell of the poison any person would resist the attempt of administering poison to him- no marks of injuries were found on the person of the accused- accused were not properly identified in the court- all these circumstances leading to the guilt of the accused were not established- trial Court had taken a reasonable view- appeal dismissed.

(Para-16 to 23)

Cases referred:
Dandu Jaggaraju v. State of A.P. (2011) 14 SCC 674
Rumi Bora Dutta v. State of Assam (2013) 7 SCC 417
Rishipal v. State of Uttarakhand (2013) 12 SCC 551

For the appellant : Mr. Ramesh Thakur, Deputy Advocate General, Advocate.
For the respondents : Mr. Virender Singh Rathore, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 31.8.2009 rendered by the learned Additional Sessions Judge (I),Kangra at Dharamshala, HP in Sessions Case No. 42-D/2005, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Section 302/34 IPC, have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 18.7.2003, one Vikramjit Singh had taken room No. 9 in Hotel *Yatri Sadan* situate at Chamunda for the night stay. Both the accused alongwith with Vikramjit Singh stayed in room No. 9 but on the next day i.e. on 19.7.2003, the room was found locked. After waiting for some time, the Manager of the Hotel namely Rajesh Kumar opened the lock of that room by using duplicate key and found dead body of Vikramjit Singh alias Vicky lying in room No. 9. Rajinder Singh, father of

the deceased on receipt of information from the police, about the death of his son came to Dharamshala and lodged report with the police stating that on 16.7.2003, his son Vikramjit Singh alongwith the accused had come to pay obeisance to Chintpurni, Jawalaji and Chamunda on the motorcycle and had told his wife that he would return to his place by the evening of 19.7.2003 but on 19.7.2003, he received telephonic call from the police about his death. Rajinder Singh told that he suspected that the accused had administered poison to his son. On the basis of his statement Ext. PW-1/A, FIR Ext. PW-5/A was registered against accused persons. The key Ext. P4 of the lock was recovered by the police in pursuance of the disclosure statement Ext. PW-10/A made by accused Hakim Singh and was taken into possession vide memo Ext. PW-14/B. Post mortem report is Ext. PW-13/A. Cause of death was opined to be asphyxia due to Phosphide poison. Police took into possession the case property. IO prepared site plan Ext. PW-12/A. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 14 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Trial Court acquitted both the accused as noticed above. Hence, this appeal.

4. Mr. Ramesh Thakur, Deputy Advocate General has vehemently argued that the prosecution has proved its case against the accused persons.

5. Mr. Virender Singh Rathore, Advocate has supported the judgment of acquittal dated 31.8.2009.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Rajinder Singh deposed that he had two sons and elder one was Vikramjit Singh @ Vicky. He had opened a jewellery shop in village Lambajatpura. From there his son had telephonically informed his wife on 16.7.2003 about his going to pay obeisance at Chintpurni, Jawalaji and Chamunda. He had told her that he was going with accused Hakim Singh to these places. From then till 19.7.2003, he had no contact with them. His son had met his nephew (*Bhanja*) Bhagwant Singh at place Maina Thana in Moga. At that time, accused Hakim Singh was also with him. He had asked his son as to where he was going and he had told him that he was going to pay obeisance to Chintpurni, Jawalaji and Chamunda temples. His son had gone on pilgrimage on motor cycle. After receiving telephonic message from police, Dharamshala about the poisoning case of his son, he came to Dharamshala. He came to know that his son and accused were accompanied by one lady Rajbinder Kaur. He came to know that all three had come to this place on one motor cycle. He had also come to know that on the night of 18.7.2003, all these had stayed in a hotel at Chamunda in room No. 9. Police have recorded his statement Ext. PW-1/A. He had handed over the bill book of the handwriting of his son to the police i.e. Ext. P1 to Ext. P10. In his cross-examination he deposed that he has disclosed in his statement that his son has told his mother that he was going to Chintpurni, Jawalaji and Chamunda to pay obeisance. (Confronted with his statement Ext. PW-1/A, wherein it is not so recorded, paying obeisance to the Goddesses has been mentioned). He has not disclosed in his statement Ext. PW-1/A that both the accused persons had killed his son by administering poison to him. He admitted that his supplementary statement was recorded after eight days. He has also admitted in his cross-examination that he has not seen his son and accused going on motor cycle. He admitted the suggestion that he did not know about where his son stayed between 16.7.2003 to 18.7.2003.

8. PW-4 Rajesh Kumar is a material witness. He was working as a Manager in Hotel *Yatri Sadan*. He used to make entry of the visitors in the register and accounts also used to be settled by him. On 18.7.2003, six rooms stood booked in the hotel. One Vikramjit Singh came to the hotel on motor cycle on 18.7.2003 at about 8.30 PM during night and parked his motor cycle in the parking. He asked for a room. He conveyed to him that room was available. He gave him the room and after inspecting the room he went away and came after about 15 minutes to the hotel with two other persons. The other two persons who came with him were present in the Court. He told Vikramjit Singh to hire another room but he told him that the persons with him were his sister and brother-in-law and that they will stay in one room. Entry of Room No. 9 was made in the name of Vikramjit Singh son of Rajinder Singh resident of Moga. Entry of accused persons was not made in the register since they told that they were sister and brother-in-law of Vikramjit Singh. They had placed order for supply of three cups of tea and one biscuit packet, which was served to them. Key of the room was given to Vikramjit Singh. After taking tea all of them had locked the room and had gone away towards temple. They had not taken dinner in his hotel. Last booking of the room on that night was done by him at 12.30 AM. He got up at 7.30 AM on the next day and went towards room No. 9 and found it locked. He was under the impression that the occupants of that room might have gone out for a stroll. Upto 8.30 AM, the room was still locked. He went to the room No. 9 at 9 AM as he had told the occupants to vacate the room by that time. When no one turned up till 9 AM he opened the lock with duplicate key which was with him. He went inside and found one person sleeping with entire body covered. He pulled the bed sheet and found froth in the mouth of the person. He was Vikramjit Singh. Accused persons were not in the room. He got frightened and locked the room. He went straightway to Pathiar to the house of maternal uncle of Abhisek Sood. The register in which entry was made and key of the room had been taken from the hotel. He had suspicion that key of room No. 9 and the entry register had been taken away by the accused persons. Police came to the spot and took key of room No. 9 from him and opened the lock and sealed the lock. It was taken into possession vide Ext. PW-4/A. Police had brought the accused before him for identification. He identified the accused who came to the hotel with Vikramjit Singh on 18.7.2003. He has also accompanied the accused and police to the place of recovery of the key. Key was got recovered by the accused Hakim Singh. He has also admitted that the identification parade of the accused has not been conducted by the police in his presence in the jail through a Magistrate. He has also admitted that the number of persons staying in the room together is entered in the register. He admitted that the relationship of those persons is also recorded in the register. Even entry is made as to how many of them are adults and how many are children. Purpose of visit is also recorded. He has also admitted that being the Manager of the Hotel, entry register of visitors used to be in his safe custody and it was his duty to make proper entry of the visitors alongwith their addresses in the register. He also admitted that it could be stated after perusal of the register who was staying in a particular room on a particular date. He has also admitted that neither the register nor the extract of the register dated 18.7.2003 was shown to him. He had obtained advance of Rs.100/- from Vikramjit Singh. He had not issued any receipt for the same. No record was shown to him in the court. He has gone to room No. 9 at 7.30 AM and found the room locked on 19.7.2003. (confronted with his statement mark Y, where it is not recorded so.) He has not disclosed in his statement mark Y to the police that he had gone to check room No. 9 at 8.30 AM and still found it locked. He had disclosed to the police that he had entered the room and found a person sleeping therein, covered with bed sheet. (Confronted with his statement mark Y, wherein it is not so recorded). He had disclosed in the statement to the police that police visited the hotel and took duplicate key from him and opened the lock of the room No. 9 and then went inside room, (Confronted with his statement Mark Y, wherein it is not so recorded). Key was recovered on 26.7.2003.

9. PW-7 Gopal Dass Constable, deposed that Ext. P9 was in Punjabi, which is now Ext. PW-7/A and he read it over. Contents of this note are as follows: "*I am myself responsible for my death. I am dying myself for the sake of my darling Sukh Deep*".

10. PW-9 Rajesh Kumar deposed that from the room of deceased, one bottle of Corex in open condition, one photo and vomiting was found on the ground. The vomiting found on the floor was collected in a plastic bottle. Some vomiting was also found on the bed sheet and that portion of the bed sheet was cut and the vomiting found on this piece was poured into plastic bottle. One suicide note was also found in the room. All the articles were taken into possession vide memo Ext. PW-9/A. He admitted in his cross-examination that no bottle of any type and piece of bed sheet has been shown to him in the court. He admitted the suggestion that without these articles he could not say as to which were those articles taken into possession by the police.

11. PW-10 Ashwani Kumar deposed that he was working as a Helper in *Yatri Sadan* Chamunda. He was paid a salary of Rs.1500/- per month. On 18.7.2003, he was on duty in the hotel. Rajesh Kumar was the manager of the hotel. One Vikramjit Singh came on a bike in the hotel at 8.30 PM and parked his bike in the parking of the hotel. He came to the cabin of the manager and demanded room. On that date six rooms had already been occupied. Room No. 9 was given to Vicky. He was accompanied by one gentleman and a lady and he had introduced them as his sister and brother-in-law. He took them to room No. 9 and opened the lock and handed over the room to them. He also served water in the room. He had told them to vacate the room on next date by or before 9 AM. On the next day, at about 9.30 AM all the rooms except room No. 9 had been vacated but room No. 9 was still locked. They waited for half an hour for vacation of room No. 9 but nobody came. On this the manager had opened the room lock with duplicate key. Rajesh Kumar opened the door and saw inside. He got frightened and told about dead body inside the room. He could not say whether the accused persons were present in that room or not because 5 years have elapsed since the occurrence. Froth was coming from the mouth of the deceased. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that the empty bottle of Corex was also found on the spot. Accused Hakim Singh had given statement Ext. PW-10/A to the police in his presence on 26.7.2003. According to the statement, accused has told that on the night of 18.7.2003 he and his wife Rajbinder Kaur had stayed in room No. 9 with deceased Vikramjit Singh at Chamunda and during that night Vikramjit Singh had died after consuming poisonous medicine. He and his wife got frightened and ran away after locking the room. Key was thrown by the accused on the side of road. He admitted in his cross-examination by the learned defence counsel that the register of the hotel was not shown to him.

12. PW-11 HC Sushil Kumar deposed that on 19.7.2003 he had received a telephonic message informing that some person had died in *Yatri Sadan* Chamunda in room No. 9. He and constable Gopal Dass had gone to *Yatri Sadan* for verification of the fact. Rajesh Patial Manager of *Yatri Sadan* was present below *Yatri Sadan*. They went to Room No.9. It was locked. Rajesh Patial told that one key of the room was with the person who had stayed in the room and duplicate key was with him. He also told that in all, three persons were staying in that room. Out of them two were male and third was a lady. Room was unlocked with duplicate key. Inside the room, dead body of Vikarmjit Singh was found on the double bed. One Corex bottle was also found on the bed. There was also some vomiting found on the floor. The bottle and vomiting found on the bed were preserved separately and then sealed. In his cross-examination, He admitted that he had inspected the register of entry of visitors in the hotel *Yatri Sadan*, when he reached there. He also admitted that the register has not been shown to him in the court. He also admitted it to be correct that visitor

register of *Yatri Sadan* was not taken into possession by him. He also admitted that extract of register of hotel *Yatri Sadan* dated 18.7.2003 and 19.7.2003 was neither taken into possession nor same was seen by him in the Court.

13. PW-12 SI Gulzari Lal deposed that the accused persons were arrested by him on 24.7.2003. During the police remand, accused Hakim Singh had given disclosure statement Ext. PW-1/A in the presence of Sanjay Ghai and Ashwani Kumar which was recorded as per his version. According to the statement, accused Hakim Singh told that he had thrown the key at a particular place after locking the door of the room. He got the key recovered and spot identified. He prepared site plan Ext. PW-12/B of the place from where key was recovered. Lock of the room No. 9 was taken into possession by him from Rajesh Kumar, Manager of the Hotel *Yatri Sadan*. He took the specimen handwriting of accused Hakim Singh S-7 to S-20 and also took specimen handwriting of Rajbinder Kaur S-1 to S-6 and documents Ext. P-1 to Ext. P-8 and Ext. P-10 were produced before him by father of the deceased. Ext. P-10 is the letter written by accused Rajbinder Kaur to the accused Hakim Singh. Case property was taken into possession. Statement of Rajesh Kumar Mark Y (Ext. PW-12/E) in the case was recorded by him correctly as per his version on 20.7.2003. In his cross-examination by the defence counsel, he admitted that the test identification parade of the accused was not got conducted by him through any Magistrate. He also admitted that the register of the visitors maintained in the hotel was not taken into possession by him in this case. He also admitted that in the register maintained in Hotel *Yatri Sadan*, entry of all the travellers is made and their names, addresses and with whom they were staying is made in the same. Even purpose of their visit is entered in the register. He further admitted that such register is kept in the safe custody of the manager. He has not taken into possession the receipts of cash in this case. He has also admitted that in Ext. PW-1/A, it is nowhere stated that the accused was having illicit relations with accused Rajbinder Kaur.

14. PW-13 Dr. Dinesh Sharma had conducted post mortem examination. Post-mortem report is Ext. PW-13/A. According to his opinion, deceased died due to asphyxia after consumption of phosphide poison. In his cross-examination, he admitted that there was no mark of any injury on the body. There were no signs of any struggle or any kind of violence. The Phsphide poison emits a very offensive and pungent odour and because of odour of the Phosphide poison any person would resist the attempt of being administered to him. He admitted that in that situation there would be struggle. He further admitted that administration of poison was possible if victim was weak, feeble and unable to resist.

15. PW-14 Dr. Meenakshi Mahajan, Assistant Director, SFSL Junga deposed that she examined Q1, the questioned document Ext. PW-7/A with specimen handwriting marked as S1 to S20, Ext. PW-14/A-1 to Ext. PW-14/A-20 and admitted handwriting marked A1 to A14, Ext. P-1 to Ext. P-10 and Ext. P-24. Her opinion was that the person who has written S1 to S6 and A13 did not write red enclosed writings similarly stamped as mark Q1 and it was not possible to express any definite opinion regarding authorship of red enclosed writings stamp and marked as Q1 as per her opinion Ext. PW-14/B.

16. Case of the prosecution, is that accused had booked room No. 9 with accused persons at Chamunda on 18.7.2003. They ordered tea. Tea was served. Thereafter, room was locked. Manager had told the occupants to vacate the room at 9 AM. He visited the room, which was found locked. He opened the door with duplicate key. He entered the room and noticed dead body. Thereafter, police was informed. Prosecution has not proved the register in which entries of the visitors were made. PW-4 Rajesh Kumar deposed that accused have taken away the register and key. However, no FIR was registered to this effect. It has come on record that the register used to be in safe custody of the Manager. In his cross-examination, PW-4 Rajesh Kumar admitted that the number of persons staying in a

room together is entered in the register. According to him, relationship of those persons is also recorded in the register. Place of residence, purpose of visit is also entered in the same. He also admitted that it could only be told from the perusal of the register as to who had stayed in the hotel on a particular date in a particular room. He admitted in his cross-examination that neither the register of the Hotel nor the extract of the entry of the register of hotel dated 18.7.2003 has been shown to him. He took Rs.100/- from Vikramjit Singh but he has not issued any receipt. PW-11 Sushil Kumar, in his cross-examination had admitted that he had inspected the register of visitors in hotel *Yatri Sadan* when he reached there. He admitted the suggestion that the register had not been shown to him in the Court. He also admitted that register of visitors had not been taken into possession by him. He further admitted that neither the register of visitors of Hotel *Yatri Sadan* had been taken into possession nor the extract of the register dated 18.7.2003 had been shown to him in the Court. PW-12 Guljari Lal, Addl. SHO has specifically admitted that the register of visitors was not taken into possession. He also admitted in the cross-examination that in the register maintained in hotel, entry of travellers is made, their names, addresses and with whom they are staying, is also entered. Even purpose of visit is entered in the register. Register is also kept in the safe custody of the Manager of the Hotel. It was essential for the police to take into possession the visitor register to prove that accused had stayed in room No. 9 at Chamunda with the deceased. Version of PW-4 Rajesh Kumar that the register was taken away by the accused, is belied from the statement of PW-11 Sushil Kumar, who has admitted, as noticed above, that he had inspected the register of entry of visitors in Hotel *Yatri Sadan* Chamunda when he reached there. According to PW-13 Dr. Dinesh Sharma, deceased died due to consumption of poison. Post-mortem report is Ext. PW-13/A. In his cross-examination, he admitted that the Phosphide poison has a very offensive and pungent odour and any person would resist attempt of administering Phosphide poison. He has noticed no mark of injury over the body. There were no signs of struggle or violence on the body of the deceased. Nobody has seen any one administering poison to the deceased. Police have recovered Corex bottle and no poison was recovered. There is also no tangible evidence led by the prosecution that the deceased has travelled with the accused. Duplicate key was not seized on 19.7.2003 but taken into possession only on 26.7.2003. Accused though arrested by the police on 24.7.2003 but disclosure statement was recorded on 26.7.2003. Prosecution has also not shown that the key Ext. P12 is in fact the key of lock P-14. The key Ext. P-12 was not applied to lock Ext. P14 to prove that the said key was in fact the key of this lock. Identification of the accused by the witness is also doubtful. PW-10 Ashwani Kumar in his examination-in-chief admitted that he could not say whether accused persons, present in the Court were the persons who stayed in room No.9 or not because 5 years have elapsed since the date of occurrence. He could easily remember the accused persons had they stayed in room No. 9. Prosecution has tried to show that PW-4 Rajesh Kumar has identified the accused. However, fact of the matter is that the accused was shown to PW-4, Rajesh Kumar in the custody of the Police. Police has not even lifted finger prints from the room. Thus, the prosecution has failed to connect the accused with the commission of alleged offence.

17. Entire case of the prosecution is based on circumstantial evidence. Prosecution has not attributed any motive to the accused. It is settled law now that in order to prove the case based on circumstantial evidence, entire chain must be complete and it should exclusively point towards the guilt of the accused.

18. Their lordships of the Hon'ble Supreme Court in **Dandu Jaggaraju v. State of A.P.** 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 and it is this circumstance which often forms the fulcrum of the prosecution story. Their lordships have held as under:

> 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.

19. Their lordships of the Hon'ble Supreme Court in **Rumi Bora Dutta v. State of Assam** reported in (2013) 7 SCC 417 have held that when a case is totally hinges on the circumstantial evidence, it is the duty of the Court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the probabilities which are likely to allow the presumption of innocence of the accused. Their lordships have held as under:

> [10] It is seemly to state here that the whole case of the prosecution rests on the circumstantial evidence. The learned trial Judge as well as the High Court has referred to certain circumstances. When a case is totally hinges on the circumstantial evidence, it is the duty of the Court to see that the circumstances which lead towards the guilt of the accused have been fully established and they must lead to a singular conclusion that the accused is guilty of the offence and rule out the probabilities which are likely to allow the presumption of innocence of the accused.
>
> [13] In C. Chenga Reddy and others v. State of A.P., 1996 10 SCC 193 it has been held that 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.

20. Their lordships of the Hon'ble Supreme Court in **Rishipal v. State of Uttarakhand** reported in (2013) 12 SCC 551 have held 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. Their lordships have held as under:

> 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. 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.

21. Thus, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. No motive has been contributed to the accused.

22. Accordingly, we find no occasion to interfere with the well reasoned judgment passed by the learned trial Court. The appeal is thus dismissed. All pending applications, are also disposed of. Bail bonds of the accused persons are discharged.

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

State of Himachal Pradesh .....Appellant

Versus

Jagbir Singh and others .....Respondents

Cr. Appeal No. 567/2010
Reserved on: April 8, 2016
Decided on: April 13, 2016

Indian Penal Code, 1860- Section 498-A and 306- Deceased was married to accused J- S and R are her parents in law- accused started maltreating the deceased after 5-6 months of marriage- deceased told her mother that accused was asking her to construct two rooms but the parents of the deceased were unable to fulfill the demand- she telephonically informed her mother that accused had beaten her on account of the demand and she had consumed poison- mother of the deceased went to CHC and found her daughter dead – accused were tried and acquitted by the trial Court- held, in appeal that it was duly proved on record that accused J and deceased were residing in different portions of the house- ration cards of accused and his father were separate and deceased never made any complaint of harassment to Panchayat- father of the deceased was not cited as witness- no marks of external injuries were noticed by Medical Officer- accused J used to visit in-laws on every important festival- no satisfactory evidence of cruelty was proved on record- trial Court had rightly acquitted the accused- appeal dismissed. (Para-14 to 16)

For the appellant : Mr. Ramesh Thakur, Deputy Advocate General, Advocate.
For the respondents : None.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 9.9.2010 rendered by learned Additional Sessions Judge, Fast Track Court, Kangra at Dharamshala in S.T. No. 31/2010, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Section 498-A/34 and 306/34 IPC, have been acquitted.

2. Case of the prosecution, in a nutshell, is that deceased Parveeen alias Lado was married to accused Jagbir, whereas Sarain Singh and Raj Kumari are the parents-in-law of the deceased. Accused after 5-6 months of marriage started maltreating the deceased by giving her taunting and beatings. Deceased had told her mother that accused persons had been asking her to construct two rooms at their house. The parents of deceased being poor, were unable to satisfy the aforesaid demand. Consequently, accused persons had been taunting and beating the deceased. Once, accused Jagbir and deceased had come to the parental house of deceased and the deceased had told her mother that accused had been asking her to construct two rooms, otherwise she could leave after taking her articles. Mother of deceased made the accused Jagbir understand that being poor persons they could not construct room in the near future. After 3-4 days, accused Jagbir went back, whereas deceased Parveen stayed with her mother. Thereafter, the deceased told her mother that her husband was asking not to come to his house if she could not construct the room. On 15.8.2009, at about 8.45 PM, Parveen telephoned her mother Savitri Devi that accused

person had abused and beaten her on account of aforesaid demand and due to this reason, she had consumed poisonous substance. Thereafter parents of Parveen went to the village of accused and they came to know that Parveen had been shifted to CHC, Gangath for medical treatment. They also reached CHC Gangath at 10.30 PM and found their daughter dead. Police was informed. Statement of the complainant was recorded under Section 154 CrPC. Bottle of poison, alongwith viscera was taken to Police Station, Nurpur. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 14 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Trial Court acquitted all the accused as noticed above. Hence, this appeal.

4. Mr. Ramesh Thakur, Deputy Advocate General has vehemently argued that the prosecution has proved its case against the accused persons.

5. We have heard the learned counsel for the appellant and also gone through the record carefully.

6. PW-1 Savitri Devi testified that four years ago, Parveen Kumari was married to accused Jagbir Singh at village Chaloh. Relations of the husband-wife were good for 5-6 months and thereafter, Jagibir and his parents started harassing their daughter. They were asking her daughter that two rooms be got constructed at Chaloh. This fact was told by Parveen to them whenever she used to come to their house. She told her daughter that they were unable to fulfill the demand due to their poverty. On the occasion of Rakhi, in the year 2009, her daughter and her husband came to their house. Accused remained in the house for two days. At that time also her daughter complained against the accused for not meeting the demand of constructing the house. They also threatened her daughter to oust her if the demand of construction of the house was not fulfilled. She tried to make Jagbir Singh understand the problem that she was unable to construct the house due to poverty. About two months back Parveen visited her house with accused. Jagbir, after leaving Parveen in her house, went back. On Rakhi occasion, both of them came again to her house. Accused stayed for two days and on third day he went alone. On return, accused Jagbir telephoned Parveen Kumari to come back otherwise she should take away the *Stridhan* articles. Her daughter went to her matrimonial house. On 15.8.2009, at about 8.45 PM, her daughter rang up her and told that the accused were beating her. She also told that she had consumed poisonous substance due to harassment. She alongwith her husband and villagers went to Chaloh and came to know that Parveen was taken to Gangath. When they reached Gangath, Parveen Kumari had expired. She reported the matter to the police. Her statement Ext. PW-1/A was recorded by the police. In her cross-examination, she admitted that on the occasion of festivals and some other important engagements, accused and her daughter use to come to their house. They had also gone to the house of their daughter at Chaloh. Her younger daughters also used to visit house of Parveen Kumari. After Rakhi, she went to the house of accused. She admitted that the house of accused Sarain Singh was in two parts, one was of slate portion having two rooms and a veranda, while the other house had lintel and two rooms. She further admitted that her daughter used to live in Pakka portion of house in one room and other part of house was occupied by accused Sarain Singh. Sarain Singh had two sons, younger was a driver and Sarain Singh himself was a retired Army personnel. He had agricultural land. She had not complained to the police or Panchayat about the harassment to her daughter by accused persons. She admitted that accused never asked for constructing house. She also admitted that between March 2009 to 15.8.2009, her daughter visited her house also. She stayed for nearly one month when she came on the occasion of Rakhi. She admitted that Jagbir used to ask Parveen to come back. Volunteered that he used to threaten her.

7. PW-2 Madan Lal, deposed that on 15.8.2009, at about 8.30/9 AM, Jagbir came to his house and he was accompanied by his son. After some time, his wife Parveen Kumari also came. She told that she had consumed some poisonous substance. Accused at this stage said that she was pretending. In the meanwhile, Parveen fell unconscious. He called the police and police advised him to carry Parveen to the hospital. She was taken to the hospital. In his cross-examination, he admitted that there was difference of about 5 minutes between the coming of deceased and accused to his house. When deceased fell down, accused Jagbir massaged the feet of deceased. Accused also accompanied the deceased when she was taken to the hospital. Jagbir came to know about taking of some poisonous substance at his house. He was a Ward member. Jagbir Singh got married 4/5 years back. Parveen used to live with accused at the place of his work and also at Chaloh. Accused had two houses one was slate portioned and other was with lintel. Jagbir and his wife used to reside in the Pakka structure. He admitted that the ration cards of Sarain Singh and Jagbir were separate. Parveen never made any complaint to the Panchayat about the harassment.

8. PW-3 Chaman Lal deposed that he was called by the police at about 4.30 AM at the house of accused. A plastic bottle was found in the nearby field. Bottle was put in a cloth parcel. He identified Ext. P1. It was taken into possession vide Ext. PW-3/A. In his cross-examination, he admitted that Jagbir used to work in a factory. His wife used to live with him. Sarain had two houses. He admitted that Jagbir and his wife had come two days prior to the incident to the village. He also admitted that Sarain and Jagbir used to live separately. They had separate ration cards. Deceased or her family members have never complained against harassment to him.

9. PW-4 Rajesh Kumar is the brother of deceased. He deposed that accused used to harass his sister and demand was made to construct two rooms. They showed their inability to construct two rooms due to poverty. Two months back, Parveen Kumari visited their house. She told that accused were insisting for construction of house otherwise she should take her belongings and stay in a rented house. At that time also she told about beatings and harassment by the accused. After some time, accused Jagbir and his sister visited them. At that time also she repeated the same thing. Both of them stayed for 4/5 days and then accused Jagbir Singh went away leaving his sister. After some time, he rang up his sister to come back or take her belongings. He also asked to hand over minor son to him or give rent of room where her belongings were kept. Thereafter, Parveen Kumari went back. On 15.8.2009, at about 8.45 PM, his sister telephoned them. Call was received by his mother. She told that she was beaten up by accused and she had consumed some poisonous substance. They went to Chaloh and then to CHC Gangath. They reached at about 10.30 PM, by which time, Parveen Kumari had already died. In his cross-examination, he admitted that his brother-in-law worked at Bilaspur. His sister was also staying with him. She stayed there for about 2/3 months. From Bilaspur, accused came for work to Baijnath. His sister also used to live with accused at Baijnath. He also visited his sister at Bilaspur.

10. PW-5 Ajay Kumar deposed that on 15.8.2009 at about 9.30 PM, after taking meals, he was about to sleep. Parveen Kumari came to him and asked for his mobile. He handed over his mobile to her and she talked to her parents. She said that she had taken the medicine and asked her mother to take care of her son. She had also told that accused persons present in the Court had made her life difficult. In his cross-examination, he admitted that there was no demand of dowry in his presence. In his presence there were talks regarding construction of the house.

11. PW-8 Satish Kumar deposed that for 5-6 months after the marriage, the relations between accused and deceased were cordial. Father of the girl used to tell that accused persons were asking him to construct a room for them. Whenever there used to be a quarrel between girl and accused, father of girl used to make the girl understand. About 1-2 months prior to her death, Parveen had come to her parents. Her husband was with her. They stayed with parents of girl for 2-4 days. Then the girl had stayed back, whereas accused had gone away. In his cross- examination, he admitted that in his presence accused persons never demanded dowry. He was Ward Member of Panchayat. Girl or her parents have not moved any application before him.

12. PW-12 Dr. P.K. Aluwalia, has conducted post mortem examination. He issued post-mortem report Ext. PW-12/B. According to his opinion, cause of death was due to respiratory passage chocking with froth. In his opinion, death in the case was due to consumption of Organo Chloro poison leading to respiratory failure. He gave his final opinion vide Ext. PW-12/C. Post-mortem report is Ext. PW-12/B. He has noticed no fresh external injury on the body.

13. PW-14 ASI Gurdev deposed that Ext. PW-9/A was lodged in PP Gangath. He reached Gangath Hospital with other police officials. FIR was lodged at the instance of mother of deceased. He filled inquest papers, Ext. PW-8/A He also prepared spot map Ext. PW-14/C. In his cross-examination, he admitted that accused Jagbir Singh used to reside in a separate house with his family.

14. What emerges from the statements enumerated herein above, is that the relations between the accused and deceased were normal for 5-6 months. Case of the prosecution is that the accused used to insist the deceased to tell her parents to get two rooms constructed. However, in the statement of PW-1 Savitri Devi, it has come that she had also gone to the house of the accused and accused used to come to their house with deceased. She also admitted that her daughter used to live in Pakka portion of the house. Other members occupied slate portion. Sarain Singh had two sons. It has come on record that deceased had told that the accused Jagbir Singh remained at Bilaspur as well as Baijnath. PW-2 Madan Lal has admitted in his cross-examination that accused Sarain Singh had two houses one was slate portion and other having lintel portion. Jagbir Singh and his wife used to reside in Pakka portion of house. Ration cards of Jagbir Singh and Sarain Singh were separate. Parveen never made complaint of harassment to Panchayat. Similarly, PW-3 Chaman Lal deposed that Jagbir Singh and his wife had come two days before this incident to the village. Sarain Singh and Jagbir used to live separately. They had separate ration cards. PW-4 Rajesh Kumar admitted in his cross-examination that he visited his sister at Bilaspur. He also admitted that his sister remained at Bilaspur for 2-3 months. Thereafter, Jagbir Singh came to Baijnath. PW-5 Ajay Kumar has stated in his cross-examination that there was no demand of dowry by accused persons. He also admitted that Parveen had not stated in his presence that accused persons had been torturing her. PW-8, Satish Kumar, Ward Member of Panchayat, also admitted that in his presence accused persons never tortured the girl. Father of deceased used to tell that accused were asking to construct room for them. However, fact of the matter is that father of deceased has not been cited as a witness. According to the prosecution version, deceased was beaten up and thereafter she consumed poison and rang up her parents. We have noticed that as per PW-12, Dr. P.K. Aluwalia, he has not noticed any marks of external injury on the body of the deceased. Even PW-14 ASI Gurdev has admitted that the accused Jagbir Singh used to reside in a separate house from his family. Since accused Jagbir Singh was residing in Pakka house with his wife and remaining members lived in Kachha house, thus, there were two houses owned by accused and as such there was no occasion for them to ask the deceased to get

two rooms constructed for them by the deceased's family. Neither the deceased nor the family of the deceased lodged any complaint with the authorities about the demand made by the accused. No external injury has been noticed on the body of the deceased by PW-12 Dr. P.K. Ahluwalia.

15. Accused Jagbir used to visit in-laws on every important festival. There is neither any cogent nor convincing evidence against the accused to establish that they had maltreated or subjected deceased to cruelty and criminal cruelty was of such nature which was likely to derive the deceased to commit suicide. There is also no tangible evidence that accused Parveen Kumari had been abetted by accused persons to commit suicide. Independent witnesses examined by the prosecution have categorically stated that the deceased never made any complaint about the cruel behaviour of the accused regarding alleged demand of construction of two from, as noticed herein above.

16. Thus, the prosecution has failed to prove its case against the accused beyond all reasonable doubt. No motive has been contributed to the accused.

17. Accordingly, we find no occasion to interfere with the well reasoned judgment passed by the learned trial Court. The appeal is thus dismissed. All pending applications, are also disposed of. Bail bonds of the accused persons are discharged.

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

State of Himachal Pradesh ...Appellant

Versus

Krishan Kumar ...Respondent

Criminal Appeal No. 330 of 2010
Judgment Reserved on : 12.04.2016
Date of Decision : April 13/2016

Indian Penal Code, 1860- Section 409, 420, 467, 468, 471- Accused had misappropriated the wheat supplied to him by the Department for further supply to the Depot Holders- he had failed to perform the duty to keep the accounts of receipt, demand and supply of the wheat and had misappropriated the wheat which was to be supplied to Depot Holders through him- accused had deposited lesser amount in comparison to the amount supposed to be deposited by him for supplying wheat- prosecution had failed to prove the quantity of entrustment of wheat, supply of the same by the accused and deficiency in the stock- original record was also not produced before the Court- written complaint made by Accounts, stock verification report and stock register were also not produced in the Court- evidence of the prosecution does not prove that the accused has caused wrongful gain or loss – accused was rightly acquitted by the trial Court- appeal dismissed. (Para-12 to 18)

Cases referred:

Tulsi Ram and others Versus State of U.P. AIR 1963 Supreme Court 666

B.K. Roy Choudhary v. The State of (CBI), AIR 1997 Cril. L.J. 4204

Jiwan Dass v. State of Haryanaya with Mittar Pal Yadev v. State of Haryana AIR 1999 SC 1301

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondent : Mr. Lovneesh Kanwar, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

The present appeal has been filed by the State of Himachal Pradesh against the Judgment dated 17.12.2009, passed by learned Additional Chief Judicial Magistrate, Chamba, in Criminal Case No. 428-1/05/2000T/188-11/05/2000, acquitting the respondent-accused in FIR No. 35/87, dated 16.06.1987 under Sections 409 and 420 of the Indian Penal Code in Police Station, Bharmaur, District Chamba, H.P.

2. Shri. M.A. Khan, learned Additional Advocate General has vigorously contended that the findings of acquittal, recorded by the learned trial court are not based on proper appreciation of the evidence on record.

3. On the other hand, learned counsel appearing for the accused has with considerable force contended that the findings of acquittal, recorded by the court below are based on proper appreciation of evidence on record. We have heard the learned counsel for the parties and have gone through the record carefully.

4. This Court with the able assistance of the learned counsel on either side, has evaluated the entire evidence on record.

5. In the present case, the FIR under Sections 409, 420, 467, 468, 471 of Indian Penal Code was registered on a complaint Ex. PW-1/A forwarded by the PW-1 Rattan Chand against the accused Krishan Kumar alleging the mis-appropriation of the wheat supplied to him by the Department for further supply to the Depot Holders. It had been alleged that it was the duty of the accused to keep the accounts of receipt, demand and supply of the wheat and the accused had failed to perform his duty, rather, he had mis-appropriated the wheat which was to be supplied to Depot Holders through him. It had also been alleged that the accused has deposited lesser amount in comparison to the amount deserved to be deposited by him on account of supply of wheat. The prosecution, in support of its case, has examined as many as 19 witnesses.

6. PW-1 Rattan Chand in his statement has deposed that Accounts Section had made a complaint that lesser amount has been received from the accused on the basis of he lodged FIR. However, he has stated that he has not remembered the complete detail of the mis-appropriation. He has further stated that he has no knowledge about the period of supply of wheat. He has also stated that godown were under his supervision but he had not checked the godown. He has admitted that the Accounts Section had made a written complaint but the said complaint and Stock Register has not been shown to him in the Court. Therefore, the statement of PW-1 cannot be made basis for convicting the respondent-accused.

7. PW-2 Pratap Chand has been examined with respect to the production of receipts of carriage of wheat through truck of Chamba Truck Union, Exs. P-2 to P-51 taken into possession vide Seizure Memo.PW-1/A. This witness has admitted that Exs.PW-1 to PW-51 did not have endorsement that the wheat had been sent by the Food and Supply Department, Chamba, due to which the said receipts cannot be said to be definitely related to the accusation of respondent-accused.

8. PW-3 Madan Lal is witness to the seizure memo Ex. 2/A. However, he has also admitted that Seizure Memo is only Photostat. PW-4 Surinder Kumar had produced the record relating to requirement and demand of the wheat. However, he had admitted in cross-examination that application and demand to wheat had not been placed before him and he has no knowledge that with whom and in whose possession these documents were. PW-5 Madan Lal was also witness to PW-2/A and he has also admitted that the Seizure Memos PW-2/A and PW-5/A are only photocopies. PW-6 Mahinder had taken over charge from the accused on the instructions of District Food and Supply, Chamba. He had alleged that on sport, there was shortage of 1 Qtl. 51 Kgs. 500 Grams wheat regarding which a physical verification was conducted by the District Food Inspector Krishan Dev, PW-10 but at the same time, he has also stated that the accused had handed over charge of the godown without any material and list. However, he had admitted in cross-examination that in Stock Register, balance of nine bags and 10 Qts. 51 Kgs. and 500 Grams has been shown. He has further admitted that Mark X-6, copy of Stock Register is only Photostat copy. PW-7 Rakesh Kant was the Inspector, who had handed over charge to the respondent-accused in June, 1984. Therefore, the statements of these witnesses and the documents produced through them are not sufficient to held the respondent-accused guilty.

9. PW-8 Rishi Ram and PW-9 Ram Kishan are the contractors who had allegedly transported wheat during 1984 to 1987. In cross-examination, PW-8 has stated that he had further assigned carriage of wheat to the other persons who are using their horses for carrying wheat to godown and the receipts also brought by those persons. PW-9 has also admitted in cross-examination that he had sublet the work of supply of wheat to another contractor whose name not remembered by him. As per him, contractor used to bring kachi receipts from the accused. He has further stated in cross-examination that he did not remember that for how many days the work of carriage of wheat was done. The statements as a whole made by these witnessed do not prove the guilt of the accused.

10. PW-10 Shri Krishan Dev has made detailed statement with respect to the allegations against the accused. In examination-in-chief, he has stated that there should be 30 Qtl.07 Kgs. wheat in the godown as per Stock Register which was not there at the time of checking, however, in the cross-examination, he has stated that he had not stated to the police that the accused had done embezzlement. He has further stated that he did not know that who had done the embezzlement. As per him, he had submitted verification report to District Food and Supply Officer, Chamba which had not been shown to him in the Court. Hence, statement of PW-10 also does not support the case of the prosecution.

11. PW-11 Vijay Kumar has only produced appointment letter of the accused. PW-12 Shri Ramesh Chand had produced two receipts dated 03.06.1986 and 08.03.1986 vide seizure Memo. Ex.PW-5/A. However, in cross examination he has admitted that Ex.PW-51/A does not bear receipt number. PW-13 Mast Ram had recorded FIR and made endorsement Ex.PW-13/A in this regard. PW-14 Lajam Singh had partially investigated the case and has taken the documents in possession vide Ex. PW-4/A. PW-15 Gulab Singh has also taken into possession the documents vide Ex. PW-5/A and had recorded statements of witnesses Partap Chand, Ramesh Chand, Madan Lal and Des Raj, Ex. PW-15/A to Ex.PW-15/D. Thereafter, he has handed over the file to SI Hans Raj who has not been examined by the prosecution. PW-16 Jaram Singh, SI has also recorded statements of Ami Chand, Rikhi Ram and Ram Krishan. PW-17 Sukhdev DSP has taken into possession file vide Ex. PW-17/A receipts vide Ex. PW-17/B, appointment letter PW-11/A and posting order Ex. PW-11/B. He has also recorded statements of Vijay Kumar, Vijay Singh, Rakesh Kant, Satya Parkash, Mahinder Chand, Kuldeep Chand, Pratap Chand and Krishan Dev. The challan

was put in the court by PW-18 Om Parkash. PW-19 Devi Ram had arrested the accused and produced in the Court.

12. From the perusal of the entire statements made by the prosecution witnesses in the Court, it is evident that the prosecution has failed to prove the guilt of the accused and to establish the offences under Sections 409 and 420 of the Indian Penal Code beyond reasonable doubt. It is settled principle of law that no one can be punished on the basis of suspicion and the prosecution has to prove its case on the basis of cogent, reliable and conclusive evidence for which the prosecution has failed in the present case. As evident from the evidence led by the prosecution, the prosecution has failed to prove quantity of entrustment of wheat, supply of the same by the accused and deficiency in the stock, if any. The originals of relevant record had also not been produced before the Court below. The written complaint made by the Accounts Section, verification report submitted by the PW10 Krishan Dev and Stock Register had also not been produced in the Court. In view of the statements of other witnesses, the statement of Investigating Officer and other police officials are not sufficient to hold the respondent-accused guilty.

13. Their Lordships of Hon'ble Supreme Court in **Tulsi Ram and others Versus State of U.P. AIR 1963 Supreme Court 666** has held that 'wrongful loss is the loss by unlawful means of property to which a person is entitled while wrongful gain to a person means a gain to him by unlawful means of property to which the person gaining is not legally entitled'. Their Lordships have held as under:-

> 14. "..... .... Learned counsel points out and rightly, that for a person to be convicted under Section 420, Indian Penal Code it has to be established not only that he has cheated some one but also that by doing so he has dishonestly induced the person who was cheated to deliver any property etc.. A person can be said to have done a thing dishonestly if he does so with the intention of causing wrongful gain to one person of wrongful loss to another person. Wrongful loss is the loss by unlawful means of property to which a person is entitled while wrongful gain to a person means a gain to him by unlawful means of property to which the person gaining is not legally entitled. ....".

14. The evidence led and relied upon by the prosecution does not prove that the respondent-accused has caused wrongful gain or loss dishonestly as required to punish the respondent-accused under Section 420 of Indian Penal Code.

15. Learned Single Judge of Delhi High Court in **B.K. Roy Choudhary v. The State of (CBI), AIR 1997 Cril. L.J. 4204** has held that in the absence of proof of entrustment, there can be no question of accused being found guilty of the offence. Learned Single Judge has held as under:-

> 3(3) "..... .... In a case under S. 409, IPC, the factum of entrustment and the factum of misappropriated of the entrusted articles is absolutely necessary. In the absence of these two essential ingredients, no charge can be framed under S. 409 I.P.C. (see Janeshwar Das Aggarwal v. State of Uttar Pradesh, reported as AIR 1981 SC 1646). In the absence of proof of entrustment, there can be no question of accused being found guilty of the offence (see Roshan Lal Raina v. State of Jammu & Kashmir, reported as AIR 1983 SC 631 (1983 Cri LJ 975)".

16. Their Lordships of the Hon'ble Supreme Court in **Jiwan Dass v. State of Haryanaya with Mittar Pal Yadev v. State of Haryana AIR 1999 SC 1301** have held that in a prosecution for offence of criminal breach of trust if there is absence of legal and

independent evidence with regard to the entrustment, then, it would be improper either to put a question with regard to the entrustment to the accused and if put an answer is obtained, partially admitting entrustment, the same does not establish the case of the entrustment. Their Lordships have held as under:-

> 10. "In our considered opinion the gravamen of the charge being misappropriation of 4300 litres of diesel oil which was found to be in shortage while measuring the diesel that had been brought and the said diesel having been delivered to Mittar Pal Yadav, who had signed the relevant documents in token thereof, the entrustment to or dominion over the diesel by Jiwan Dass has not been established and as such the prosecution has not been able to establish the charge under Section 409, I.P.C. beyond reasonable doubt as against accused Jiwan Dass in respect of the shortage of diesel to the tune of 4300 liters. It is no doubt that Jiwan Dass appears to have given in writing on 2.03.1982 that he would be completing the quantity of 10,000 litres of oil but that writing neither can be held to be a confession or admission of the guilt on the part of the accused Jiwan Dass, nor that can form the basis of convicting the accused-Jiwan Dass for an offence under Section 409, I.P.C. In a prosecution for offence of criminal breach of trust if there is absence of legal and independent evidence with regard to the entrustment, then it would be improper either to put a question with regard to the entrustment to the accused and if put an answer is obtained, partially admitting entrustment, the same does not establish the case of the entrustment.

17. In the present case for want of proper evidence, as required, the prosecution has failed to prove entrustment as well as misappropriation as required in criminal jurisprudence to punish a person under Section 409 IPC.

18. The accused has been acquitted by the court below and there is nothing on record from which it can be said that the Court below has not correctly appreciated the evidence on record and the acquittal of the accused has resulted in travesty of justice. Therefore, no interference is warranted in the instant case.

In view of the aforesaid discussion, appeal being devoid of merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be immediately sent back.

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

State of Himachal Pradesh .....Appellant.

Versus

Raj Kumar .....Respondent.

Cr. Appeal No. 327 of 2010
Reserved on: April 08, 2016.
Decided on: April 13, 2016.

Indian Penal Code, 1860- Section 302- Accused had murdered S- he was tried and acquitted by the trial Court- prosecution witnesses have not supported the prosecution version- Medical Officer deposed that deceased died due to hanging- chain of circumstances

was not established- held, that in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. (Para-12 to 19)

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, (2013) 12 SCC 551

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondent: Ms. Archna Dutt, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 31.12.2009, rendered by the learned Sessions Judge, Kangra at Dharamshala, H.P. in Sessions Case No. 14-P/VII-2009, whereby the respondent-accused (hereinafter referred to as accused), who was charged with and tried for offence punishable under Section 302 IPC has been acquitted.

2. The case of the prosecution, in a nut shell, is that on 26.12.2008 at 11:00 PM at village Khurd-Patt (Bhawarna), the accused committed the murder of Sunita Devi. The charge was framed against the accused under Section 302 IPC on 19.5.2009, to which he pleaded not guilty and claimed trial. The prosecution, in order to prove its case has examined as many as 11 witnesses. The statement of the accused was also recorded under Section 313 Cr.P.C. The accused has produced DW-1 Dr. Suresh Sankhyan in defence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, Addl. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved the case against the accused under Section 302 IPC. On the other hand, Ms. Archna Dutt, Advocate has supported the judgment of the learned trial Court dated 31.12.2009.

5. We have heard learned counsel appearing for the State and gone through the judgment and records of the case carefully.

6. PW-1 Vikas alias Vicky testified that his brother was working in a private concern at Jallandhar for the last 7-8 years. He was also doing private job at Jallandhar and his mother was also residing with them. The accused is his Uncle. Accused was married and he has three kids from his first wife who was residing in her parents' house for the last 4-5 years with one kid. The other two children are residing with accused. The accused had kept another lady as his wife who was having one male child, aged about one and a half years. On 22.12.2008, he along with his mother came to his native village in order to see the bride. On 25.12.2008, he along with his mother and grandfather visited village Khaniyara to see the girl. They returned to their house on that very day. Thereafter, they again visited village Khaniyara since they could not see the girl on the earlier occasion. They returned from village Khaniyara at about 9:30 PM. After taking meals, he and his mother and his grand parents were sitting in the room. They were talking with each other. At that time, the accused went to sleep alongwith his wife and son. Two other children of the accused were sleeping in the room of his grandmother. He called the accused and the

accused also came to the room of his grandmother and started talking. After some time, his aunt left the room for sleeping. Thereafter, he and his mother left their house. At that time, the accused was sitting in the room of his grand parents. After about 10-15 minutes, he heard the sound of door of the house of the accused. He also heard the crying of children. His mother asked him to see as to what was happening. He went to the room of the accused first. He noticed the accused weeping and his wife Sunita was on his lap. He touched the body of his aunt and found her body cold. Thereafter, he called his grandfather. On his asking, firstly the accused started weeping and thereafter he told that his aunt had committed suicide by hanging herself with dupatta/scarf. Then he saw froth coming out from her mouth. They started giving massage on the hands and feet of the deceased but to no use. There was no pulse. In the meantime, his mother also came there. He told his mother that his aunt has died. Thereafter, her mother had gone to the house of Up Pradhan Sh. Ashwani Sood. Thereafter, he along with his mother went to the house of one person, namely, Kuku. He narrated the incident to Kuku, who advised them to inform the police. The police was informed. The police came and recorded his statement vide Ext. PW-1/A. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he denied the suggestion that the police has read over statement Ext. PW-1/A to him. However, the police asked him to sign the statement. He has studied upto 10th standard. He denied the suggestion that he told the police that when he entered the room of the accused, he saw his aunt lying on the bed with face downward and her hair were spread over and the accused was also present in the room. Volunteered that his aunt was lying on the lap of the accused and her hair were spread over. He denied the suggestion that he told the police that on his inquiry from the accused, the accused told him that he had killed his aunt by strangulating her and he was ready to face the consequences. He also admitted in his cross-examination by the learned defence counsel that the police had slapped him twice before recording his statement. He was threatened to sign the statement and he was not given time to read the same.

7. PW-2 Simro Devi also deposed that they heard the noise of weeping of the accused and his child. She sent his son to see and inquire as to what was happening there. At that time, she was standing on the door of her house and she heard his son calling for his grandfather who came down with a glass of water. She also came to the room of the accused on his son's calling her to that room. She saw Sunita lying on her bed on the floor and her face was downwards and her hair were spreading. They asked the accused as to what had happened and as to why he was crying. He told that something had happened to Sunita (deceased) and also asked them to assist him to take his wife to the hospital. Then, her son rubbed the hands and feet of deceased. There was no pulse. The accused told them that the deceased has committed suicide by hanging. Thereafter she informed Up Pradhan Ashwani Sood and then she went to the house of Rakesh Walia who asked her to inform the police. She was also declared hostile and cross-examined by the learned Public Prosecutor. In her cross-examination, she denied the suggestion that her son on coming back told her that the accused had told him that he had killed his wife by strangulating her and that he was ready to face the consequences. She also denied the suggestion that she told Rakesh that the accused had killed his wife by strangulating her.

8. PW-3 Rakesh Kumar deposed that during the intervening night of 26/27.12.2008, he was present in his house. At about 1130 or 11:45 PM, during the night, Simro Devi and Vikas came to his house and informed that accused had killed his wife and asked him to accompany them to their house. He told them that his house is at some distance and they should call their neighbours. He also asked them to inform the police first. The police visited the spot and inquest papers vide Ext. PW-3/A and PW-3/B were

prepared. The police investigated the house of the accused. He denied the suggestion that Vikas informed the police that his aunt committed suicide by hanging.

9. PW-4 Simro Devi wife of Thakur Chand deposed that she went to the house of accused. The dead body of the wife of the accused was lying on the floor.

10. PW-9 Dr. Munish Saroch has conducted the post mortem examination on the dead body on the basis of inquest papers Ext. PW-3/A and PW-3/B. The post mortem report is Ext. PW-9/A. According to him, the cause of death was asphyxia and final opinion was reserved. The probable time that elapsed between injury and death could not be ascertained and the probable time between death and post mortem was 15 hours. According to him, it could be a case of strangulation by way of throttling. In his cross-examination, he deposed that neck was not stretched. There was no bleeding from the mouth, ears and nose. He denied the suggestion that ligature mark was oblique, non continuous placed high up in the neck between the chin and the larynx. He admitted that the ligature mark was visible in the photograph Ext. PW-5/A-4. He admitted that there were no scratches, abrasions and bruises on the face, neck and other parts of the body. He also admitted that in case of hanging, there would be dribbling of saliva from the mouth.

11. PW-11 SHO Sohan Lal was the I.O. He recorded the statement of Vikas Kumar vide Ext. PW-1/A under Section 154 Cr.P.C. He arranged for the photographer and got the photographs of the dead body of Sunita Devi and house of the accused vide Ext. PW-5/A-1 to PW-5/A-6. He inspected the spot and prepared spot map Ext. PW-11/B. The post mortem was got conducted. He also recorded the statement of Simro Devi. He sent the viscera of deceased to FSL, Junga.

12. PW-1 Vikas alias Vicky deposed that the accused started weeping and thereafter told him that his aunt had committed suicide by hanging herself with dupatta/scarf. He saw froth coming out from her mouth. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned defence counsel, he deposed that the police had slapped him twice before recording his statement. He was threatened the sign the statement and was not given time to read the same. He denied the suggestion that he told the police that on his inquiry from the accused, the accused told him that he had killed his aunt by strangulating her and he was ready to face the consequences. Similarly, PW-2 Simro Devi has not supported the case of the prosecution. She was also declared hostile. According to her, the accused told them that Sunita Devi (deceased) had committed suicide by hanging. She also denied the suggestion in her cross-examination by the learned Public Prosecutor after she was declared hostile that her son on coming back told her that the accused had told him that he had killed his wife by strangulating her and that he was ready to face the consequences.

13. The accused has also examined DW-1 Dr. Suresh Sankhyan. He deposed that it was a case of hanging. He had gone through the post mortem report Ext. PW-9/A. He was of the opinion that keeping in view the colour, the course of ligature marks, absence of nail marks around the neck, absence of petechial hemorrhages on face and eyes, sclera & conjunctiva of eyes, absence of struggle, it could be presumed to be a case of hanging. No poison was detected in the viscera as per the report Ext. PW-11/F. PW-9 Dr. Munish Saroch has also admitted in his cross-examination that there were no scratches, abrasions and bruises on the face, neck and other parts of the body.

14. The entire case is based upon circumstantial evidence. In the cases based on circumstantial evidence, the entire chain must be complete and should not be broken. The circumstances should be of conclusive nature. The circumstances must point

exclusively towards the guilt of the accused. In the cases based upon circumstantial evidence, motive also plays an important role. The prosecution has not attributed any motive to the accused.

15. 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."

16. 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."

17. 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."

18. 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."

19. The prosecution has failed to prove the case against the accused beyond reasonable doubt. Thus, there is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 31.12.2009.

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

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

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

Cr. Appeal No. 374 of 2010.
Reserved on: April 12, 2016.
Decided on: April 13, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 500 grams of charas- he was tried and acquitted by the trial Court- held, in appeal that police had not joined any person from locality as a witness- it was stated by PW-1 that jamabandi was also put in parcel along with charas – however, no jamabandi was found in the parcel- register No. 19 containing record of the case property was not produced - instead register No. 9 was produced- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, prosecution case was not proved- accused acquitted. (Para- 14 to 27)

For the appellant: Mr. M.A.Khan, Addl. AG.
For the respondent: Mr. G.S.Rathore, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 6.3.2010, rendered by the learned Special Judge, Solan, H.P., in Sessions case No. 6-S/7 of 2008, whereby the respondent-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 acquitted.

2. The case of the prosecution, in a nut shell, is that on 18.3.2008, ASI Des Raj, Police Station, Dharampur alongwith HC Hakam Singh, HHG Bhupinder Singh and HHG Sunder Lal had laid Naka in front of the gate of Police Station for routine traffic checking. At about 5:30 PM, a bus bearing No. CH 01-G-8817 of CTU Chandigarh bound for Chandigarh from Shimla arrived. It was stopped for checking. During the course of checking a blue coloured bag having a sticker of 'FITNESS' was found on the rack of seat No. 44. On enquiry, person sitting on seat No. 46 disclosed his identity as Rajinder Singh. He was going to Kalka. The police on suspicion got down from the bus the conductor, driver and accused alongwith the bag. On checking the bag, a polythene envelope having imprint Graviera Suiting Chawla Traders in which a black pants, a grey colored T-shirt and copy of Jamabandi was recovered. In another polythene envelope having an imprint of Ambassador Suiting, charas in the shape of wicks kept in a white polythene envelope was found. It weighed 500 grams. Two samples of 25 grams each were taken out of the bulk charas which were sealed with seal bearing impression "N" in a cloth parcel and marked as S-1 and S-2. The remaining charas was sealed in a separate cloth parcel with the same seal. It was marked as R-1. The I.O. filled in the NCB form in triplicate. The samples S-1, S-2 and parcel R-1 were taken into possession and seal after use was handed over to Conductor Ashwani Kumar. The I.O. sent Rukka to the Police station, upon which, FIR was registered at PS Dharampur. The case property was produced before the SHO. He resealed the same and deposited with MHC. One of the sample was sent to FSL Junga. 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 10 witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A.Khan, learned Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. G.S.Rathore, Advocate for the accused has supported the judgment of the learned trial Court dated 6.3.2010.

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

6. PW-1 HC Hakam Singh testified that he alongwith ASI Des Raj, Police Station, Dharampur, HHG Bhupinder Singh and HHG Sunder Lal had laid Naka in front of the gate of Police Station for routine traffic checking. At about 5:30 PM, a bus bearing No. CH 01-G-8817 of CTU Chandigarh came from Shimla towards Chandigarh. It was stopped for checking. During the course of checking, a blue coloured bag was found on the rack of seat No. 44. It was having sticker. On enquiry, the person sitting on seat No. 46 disclosed his identity as Rajinder Singh. He was going to Kalka. The police on suspicion got down

from the bus the conductor, driver and accused alongwith the bag. One polythene bag was found containing pants, T-shirt and jamabandi. In another polythene bag, charas in the form of sticks was found. He was sent to bring the scale and weights. It weighed 500 grams. Two samples of 25 grams each were taken out of the bulk charas which were sealed with seal bearing impression "N" in a cloth parcel and marked as S-1 and S-2. Two seals were affixed on each sample. The sample seal was also taken on cloth vide Ext. PW-1/A. The remaining charas alongwith T-shirt, pants and jamabandi was sealed in a separate cloth parcel with the same seal. It was marked as R-1. These were taken into possession vide recovery memo Ext. PW-1/B. The case property was produced while examining this witness by the learned Public Prosecutor. In his cross-examination, he admitted that there are many residential houses and shops situated near the Police Station. No person from the locality was joined in the Nakka. He also admitted that Chand Kishore was witness in many cases. The proceedings were drawn qua weighing, sampling etc. on the kutcha portion of the road. No person from the locality was called during the proceedings. The jamabandi which was packed in the sealed parcel R-1 was not found in the *"pulinda"* while recording his statement.

7. PW-2 Const. Padam Dev deposed that on 19.3.2008, MHC Parveen Kumar handed over to him a parcel having four seals of "N" and three seals of "A" alongwith NCB form in triplicate, docket, sample of seals "N" and "A" vide RC No. 169/07-08 for taking it to FSL, Junga for analysis. He deposited the same on the same day at FSL Junga under receipt.

8. PW-5 SI/SHO Baldev Thakur deposed that at about 10:00 PM, ASI Des Raj produced before him the parcel of bulk charas sealed with five seals of impression "N" along with two parcels of sample sealed with four seals of impression "N" each. He re-sealed the parcel of charas with four seals of "A". He also re-sealed the parcels of sample with three seals of "A" on each parcel. Sample of seal Ext. PW-5/C was separately drawn on a piece of cloth. He filled in column Nos. 9 to 11 of NCB-I form. After re-sealing, he deposited the parcels of sample and parcel of charas along with NCB form with MHC Parveen Kumar. In his cross-examination, he admitted that within the radius of 75 meters from the Police Station, there are many shops and residential houses. He did not use any cloth for resealing the parcels. He also admitted that columns Nos. 9 to 11 of the NCB form Ext. PW-5/E are not in his hand. Volunteered that these were under his dictation. He also admitted that signatures on Ext. PW-5/D and PW-5/E are different in shape. Volunteered that these were his signatures. He also admitted that Ext. PW-5/D does not mention that two parcels of sample charas was produced. Volunteered that he had mentioned 25/25 grms. charas.

9. PW-6 Narinder Patwari has issued jamabandi to the accused on 18.3.2008 vide Ext. PW-6/A.

10. PW-7 HC Parveen Kumar deposed that on 18.3.2008 at about 10:30 PM, SHO Baldev Thakur deposited the case property with him. He entered it in the malkhana register at Sr. No. 338. He proved extract of the same as Ext. PW-7/A. He handed over the case property to Const. Padam Chand for taking it to FSL Junga vide RC No. 169/07-08. In his cross-examination, he admitted that there the register brought by him is register No. 9 in which the record of convicted persons is maintained. Volunteered that the present register was maintained as malkhana register. He also admitted that there was no endorsement of authority that the register was used as malkhana register. He also admitted that entry No. 338 has no signatures of the depositor. In the entry No. 339 there is no mention of bus tickets.

11. PW-8 Ashwani Kumar deposed that he was the Conductor of bus No. CH 01-G-8817. On 18.3.2008, they were coming from Shimla to Chandigarh. When they reached at Dharampur at about 5:15-20 PM, the police signaled to stop the bus. The driver stopped the bus near the Police Station. The police entered the bus and closed the door and started checking. The police caught one person along with the small bag on the bus rack. The bag was taken to the Police Station. He along with driver and that person were taken to the Police Station. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he deposed that he did not know whether the charas was recovered from the bag. The police recovered some substance. He could not say that the substance recovered was charas. He did not know that police took two samples of 25 grams each, however, his signatures were taken on cloth parcels. He also admitted that bulk quantity was put into separate polythene bag and then in a cloth parcel and his signatures were taken on that. He identified his signatures on Ext. PW-8/C and Ext. PW-8/D. The police filled in NCB forms in his presence and put seal impression "N" over it. The sample seal was signed by him vide Ext. PW-8/E. The police took into possession the recovered material vide Ext. PW-1/B. He signed the same. Sample seal Ext. PW-1/A also bears his signatures.

12. PW-9 Nirmal Singh was also declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination by the learned Public Prosecutor, he admitted that the police recorded his statement but that was not as per his version. His statement mark "Y" was not correctly recorded. Ext. P-6 charas was similar to that which he had seen on the spot. In his cross-examination by the learned defence counsel, he admitted that they were not told the contents of the paper on which police took his signatures.

13. PW-10 ASI Des Raj deposed that enquiries were made from the passenger sitting on seat No. 46. He requested the driver and conductor to come down alongwith the accused and bag. The bag was searched and contraband was recovered. Jamabandi Ext. PW-6/A alongwith the average one year Ext. PW-6/B and Khasra Girdawari Ext. Pw-6/C was found in the bag. The bag was checked. It contained charas. The sealing proceedings were completed on the spot. In his cross-examination, he admitted that recovery proceedings were effected inside the gate of the Police Station in the courtyard after checking the bag on the road and seizure of the charas. He also admitted that he has not mentioned in Ext. PW-1/B, recovery memo that the samples were marked as S-1, S-2 and bulk charas as R-1. He admitted that in Ext. PW-9/A, it has not been mentioned that jamabandi/revenue papers were found in the bag. He also admitted that there is malkhana register in the Police Station which is called Register No. 19. Register No. 9 is different.

14. PW-1 HC Hakam Singh in his cross-examination has categorically admitted that there are many residential houses and shops situated near the Police Station. No person from the locality was joined in the Nakka as a witness. The proceedings were drawn qua weighing, sampling etc. on the kutcha portion of the road. No person from locality was called during the proceedings. According to him, jamabandi was also put in the parcel containing charas alongwith T-Shirt and pants. However, in his cross-examination, he admitted that the jamabandi which was packed in sealed parcel R-1 was not found by him while deposing in the Court. In case jamabandi was put in the same parcel in which the remaining bulk of charas was put, the same ought to have been found in the bag. Thus, the possibility of the bag/parcel being tampered with cannot be ruled out.

15. The place where the charas was recovered was neither isolated nor secluded. There were shops and residential houses near the Police Station. The police ought to have

joined independent witnesses to inspire confidence in search, seizure and sealing proceedings on the spot.

16. PW-5 SHO Baldev Thakur in his examination-in-chief has deposed that he filled in column Nos. 9 to 11 of the NCB form. However, in his cross-examination, he admitted that column Nos. 9 to 11 of Ext. PW-5/E NCB form, were not in his hand writing and volunteered that it was on his dictation. He also admitted that signatures on Ext. PW-5/D and PW-5/E were different in shape. Volunteered that those were his signatures. We have seen the signatures on Ext. PW-5/D and PW-5/E. His signatures are different and contours are also not matching. Thus, it casts doubt on Ext. PW-5/D and PW-5/E. The filling up of column Nos. 9 to 11 is material. These columns are to be filled up by the SHO concerned. It is not an empty formality.

17. The case property was deposited with MHC Parveen Kumar by PW-5 SI/SHO Baldev Thakur. He made entry in the malkhana register at Sr. No. 338. The copy of extract of malkhana register is Ext. PW-7/A. The malkhana register is register No. 19. It is prescribed in the Punjab Police Rules, as applicable to the State of Himachal Pradesh. However, the fact of the matter is that in the instant case, the register brought by MHC Parveen Kumar to the Court was register No. 9, in which record of convicted persons is maintained. PW-10 ASI Des Raj, in his cross-examination, has admitted that register No. 9 is difference and there is malkhana register in the Police Station which is called Register No. 19. Moreover, PW-7 MHC Parveen Kumar has himself admitted in his cross-examination that there was no endorsement of authority that the register brought by him was used as malkhana register.

18. According to PW-7 MHC Parveen Kumar, sample seals “N” and “A” alongwith the docket were handed over to Constable Padam Chand for taking the same to FSL, Junga for chemical analysis, however, there is no reference of sample impressions in Ext. PW-5/F, the report of the FSL, Junga. The police has also not made the sample homogeneous while taking out the sample. They have taken sample from one stick alone.

19. The official witnesses have made statements to the effect that after search, seizure and sealing proceedings were completed, samples S-1, and S-2 were prepared and bulk parcel was marked as R-1. However, in Ext. PW-1/B, property search and seizure form, there is no mention about S-1, S-2 and R-1. PW-8 Ashwani Kumar and PW-9 Nirmal Singh have also not supported the case of the prosecution in entirety.

20. The case property was produced while recording the statement of PW-1 HC Hakam Singh. 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)."

21. 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 re-deposited 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 re-deposited 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.

22. Sub-rule (2) Rule 22.18 of Punjab Police Rules, reads as under:

"(2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.

Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so."

23. Rule 27.18 of Punjab Police Rules, reads as under:

"27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal

order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).

Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

24. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall

initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

25. In Punjab Police Rules, also applicable to the State of Himachal Pradesh, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

26. In the instant case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

27. Thus, the prosecution has failed to prove the case against the accused under Sections 20 of the ND & PS Act that the charas was recovered from the conscious and exclusive possession of the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 6.3.2010.

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

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

State of Himachal Pradesh .....Appellant.

Versus

Sanjay Kumar & ors. .....Respondents.

Cr. Appeal No. 725 of 2008
Reserved on: April 08, 2016.
Decided on: April 13, 2016.

Indian Penal Code, 1860- Section 341, 332, 333, 353 & 506 IPC read with Section 34- Complainant was driver in HRTC- he overtook a private bus- driver of private bus over took the bus of the complainant and halted the same diagonally in front of the bus of the

complainant- driver, conductor and another person got down from the private bus and gave beatings to the complainant- accused were tried and acquitted by the trial Court- held, in appeal that no independent witness was joined, only persons from HRTC were associated as witnesses- view adopted by the trial Court cannot be said to be perverse- appeal dismissed.

(Para-13 and 14)

For the appellant: Mr. Ramesh Thakur, Dy. Advocate General.
For the respondents: Mr. Subhash Sharma, Advocate, for respondents No. 1 & 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 17.7.2008, rendered by the learned Sessions Judge, Una, H.P. in Sessions Case No. 02/2005, whereby the respondents-accused (hereinafter referred to as accused), who were charged with and tried for offences punishable under Sections 341, 332, 333, 353 & 506 IPC read with Section 34 IPC, have been acquitted.

2. The case of the prosecution, in a nut shell, is that complainant Ranbir Singh was serving as driver in Himachal Road Transport Corporation (hereinafter referred to as "HRTC" in short), Una. On 25.5.2003, at about 6:30 AM, the complainant started bus No. HP-20-9416 from Bus Stand Una to Bangana via Talmehra. When the bus reached near the point known as Purana Hospital Chowk, Una, the complainant overtook a bus known as Devi Darshan bearing registration No. HP-19-5555, which was moving slowly ahead of the bus being driven by the complainant. As soon as the bus being driven by the complainant reached the Old Bus Stand, Una, the driver of the Devi Darshan bus overtook the bus of the HRTC and halted the same diagonally in front of the bus being driven by the complainant. Thereafter, the accused Sanjay Kumar and Suresh Kumar, who were driver and conductor of Devi Darshan bus along with one another person got down from that bus. Accused Sanjay Kumar opened the driver's window of the HRTC bus and thereafter all the three accused persons pulled the complainant down from the seat and accused Suresh Kumar administered fist blow on the nose and other parts of his body. Thereafter, accused Sanjay Kumar and Chaman Lal also gave fist blows to the complainant. The complainant was saved from the clutches of the accused by the conductor of the bus and some other persons who gathered on the spot. Accused Sanjay Kumar also threatened the complainant by saying "you consider yourself a faithful worker of the HRTC, you have been saved today and if ever you tried to take panga (tried to affront) with us, you will not be spared". The conductor of the HRTC bus informed the Traffic Manager, Una over telephone, who came on the spot and the police was informed. The accused persons ran from the spot. The police reached the old Bus Stand, Una and recorded the statement of the complainant under Section 154 Cr.P.C., on the basis of which FIR No. 313 of 2003 dated 25.5.2003 was recorded. The clothes of the complainant were taken into possession vide recovery memo. 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 14 witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Ramesh Thakur, Dy. Advocate General, appearing on behalf of the State, has vehemently argued that the prosecution has proved the case against the accused persons. On the other hand, Mr. Subhash Sharma, Advocate has supported the judgment of the trial Court dated 17.7.2008.

5. We have heard learned counsel appearing for both the sides and have also gone through the judgment and records of the case carefully.

6. PW-1 Ranbir Singh testified that on 25.5.2003, he was driving HRTC bus bearing No. HP-20-9416 from Una towards Bangana. He started the bus from Bus Stand, Una at about 6:30 AM. When he reached the point known as Purana Hospital Chowk, Una, he overtook a bus known as Devi Darshan bearing registration No. HP-19-5555, which was moving slowly ahead of the bus being driven by him. When his bus reached the Old Bus Stand, Una, the driver of the Devi Darshan bus overtook his bus and halted the same diagonally in front of the bus being driven by him. Thereafter, accused Sanjay Kumar and co-accused Suresh Kumar, who were driver and conductor of Devi Darshan bus, respectively, along with one another person alighted from that bus. Accused Sanjay Kumar opened the driver's window of his bus and thereafter all the three accused persons pulled him down from the seat and accused Suresh Kumar administered fist blow on the nose and other parts of his body. Thereafter, accused Sanjay Kumar and Chaman Lal also gave fist blows to him. He was saved from the clutches of the accused by the conductor of the HRTC bus and some other persons who had gathered on the spot. Accused Sanjay Kumar and co-accused Suresh Kumar also threatened him. The conductor of his bus informed the Traffic Manager, Una over telephone, who came on the spot and the police was informed. The accused persons ran from the spot. The police reached the old Bus Stand, Una and recorded his statement under Section 154 Cr.P.C. He was medically examined and MLR is Mark "A". The police took into possession his clothes. In his cross-examination, he admitted that there were only 2-3 passengers in his bus. He did not recollect their names and addresses. There were about 5-6 passengers in the Devi Darshan bus. The occurrence had lasted for about 15-20 minutes. The Traffic manager had reached the spot about 10 minutes after he was rung up by the conductor Satish Kumar. He stayed at the spot for about 15-20 minutes. The police also arrived in the meantime. Most of the shops remain closed in the morning. He also admitted that the shop of a confectioner was open at the time the bus driven by him arrived at old Bus Stand, Una. He also admitted that a hotel was also open at that time. The traffic jam lasted for about half an hour. The jam was got cleared by the police.

7. The statement of PW-1 Ranbir Singh has been corroborated by PW-2 Satish Kumar, the manner in which the incident has taken place. He was conductor of the HRTC bus. In his cross-examination, he also admitted that some of the shops at the old bus stop were opened when the bus reached there. The occurrence lasted for about 4-5 minutes. The Traffic Manager reached the spot about 5 minutes after the occurrence. The police also arrived at the spot about 5-10 minutes after the occurrence. He also admitted that the traffic police personnel is deployed at the old Bus Stand, Una.

8. PW-3 Manvir Singh is another employee of the HRTC. He was coming from his house towards the Bus Stand Una to join his duties. He saw that Devi Darshan bus No. HP-19-5555 was parked diagonally in front of the bus of HRTC No. HP-20-9416. He also saw accused persons administering beatings to complainant Ranbir Singh, driver of HRTC bus with fisticuffs. He along with Satish Kumar, conductor of the HRTC bus and some other people intervened and rescued the complainant from the clutches of the accused persons. In his cross-examination, he admitted that there were shops at the old Bus Stand, Una. No

shop except that of one Rana was open at the time of occurrence. He also admitted that the police arrived about 5 minutes after the arrival of the Traffic Manager.

9. PW-4 Raj Kumar Pathak deposed that he was serving as Traffic Manager at the HRTC Depot, Una since May, 2002. On 25.5.2003, he was informed by Satish Kumar, the conductor of HRTC bus No. HP-20-9416 that a Devi Darshan bus bearing No. HP-19-5555 was stopped diagonally in front of their bus and that driver of the bus, complainant Ranbir Singh was beaten up by the accused. Thereafter, he informed the police and rushed to the spot.

10. PW-5 Dr. Manoj Kapoor gave his opinion on x-ray. According to him, there was fracture of the nasal bone.

11. PW-13 HC Subhash Chand testified that on 25.5.2003 at around 7:15 am, he was informed on telephone by the Officer In-charge, Bus Stand, Una that HRTC bus was intercepted by a private bus. He reached the spot alongwith Const. Sher Singh. The passengers of the HRTC bus were stated to have alighted therefrom and gone away. The complainant had received injuries. His statement under Section 154 Cr.P.C. was recorded vide Ext. PA. He also admitted that HRTC work shop was about 200 yards from the new Bus Stand, Una. He also admitted that a traffic police Constable always remains present at the old Bus Stand, Una. He also admitted that there are number of shops in close proximity to the old Bus Stand, Una. He further admitted that all confectionery shops near Bus Stand open at 5:00 AM.

12. PW-14 Dr. C.S.Chauhan has medically examined the complainant. He has issued MLR vide Ext. PW-14/A. The nature of injury No. 1 was opined to be grievous. The injury was caused by blunt weapon. The nature of injuries No. 2 & 3 was simple.

13. The incident has taken place at about 7:15 am on 25.5.2003. It has come in the evidence that there were many shops near the site of occurrence. PW-13 HC Subhash Chand, in his cross-examination, has categorically admitted that HRTC work shop was about 200 yards from the new Bus Stand, Una. He also admitted that a traffic police Constable always remains present at the old Bus Stand, Una. He also admitted that there are number of shops in close proximity to the old Bus Stand, Una and all confectionery shops near Bus Stand open at 5:00 AM.

14. The prosecution has not joined any independent witnesses, though available. There were passengers in both the buses. None of the passengers either from the HRTC bus or from the private pus have been cited as witnesses. The traffic police personnel was also available on the spot, however, he was not examined. The HRTC work shop was about 200 yards from the new Bus Stand, Una. The witnesses produced by the prosecution are from HRTC. The failure of the prosecution to join any of the independent witnesses, though available, creates doubt in the story of the prosecution. Thus, the prosecution has failed to prove the case against the accused. The view adopted by the learned trial Court cannot be termed as perverse. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court dated 17.7.2008.

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

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

State of Himachal Pradesh .....Appellant.
Versus
Shyam Lal .....Respondent.

Cr.Appeal No.226 of 2013.
Reserved on: 01.04.2016.
Date of Decision : 13th April, 2016.

Indian Penal Code, 1860- Section 302 and 201- Complainant was present in his Dhaba at Lalori Jot – deceased and accused were consuming liquor- complainant heard noise - he came out and found deceased and accused quarreling with each other- accused hit the deceased with stone and blood started oozing out- complainant and deceased followed the accused - deceased asked the accused not to follow him, and deceased returned- accused came with knife and stabbed him on the left side of the chest and ran away- deceased was taken to hospital, where he was declared brought dead- matter was reported to the police- FIR was registered- accused was tried and acquitted by the Court- held, in appeal that motive to commit the crime was not proved- investigation was not conducted properly as the cotton swab used to clean the wound was not collected- T-Shirt, Pants and coat of the accused did not bear any blood stain falsifying the version of the prosecution that accused had hit the deceased with stone- complainant had not informed the deceased that accused was carrying knife with him, although, he had a mobile phone with him- deceased was taken to the hospital in a car, however, blood stains were not lifted from the car- there is discrepancy in the medical evidence- complainant had not disclosed the incident for 13 hours to any person which makes his version doubtful- weapon of offence was also not recovered- all these circumstances, make the prosecution case doubtful- trial Court had rightly acquitted the accused- appeal dismissed. (Para-9 to 18)

For the Appellant : Mr.M.A.Khan, Additional Advocate General.
For the Respondent : Mr.Satyen Vaidya, Sr.Advocate with Mr.Vivek Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeal stands directed against the judgment of the learned Sessions Judge, Kinnaur Sessions Division at Rampur Bushehar, Himachal Pradesh, rendered on 22.01.2013, in Sessions Trial No.0100014/2011, whereby the learned trial Court acquitted the accused for committing offences punishable under Sections 302 and 201 IPC of the Indian Penal Code.

2. The facts relevant to adjudicate the instant appeal are that the complainant has his Dhaba at Lalori Jot where Om Parkash @ Pinku (herein-after for short referred to as 'the deceased') was also running a Dhaba. On the night intervening 16/17th June, 2011, when the complainant was present in his Dhaba, allegedly the deceased was consuming liquor, along with Shyam Lal, Police Havaldar (herein-after for short referred to as 'the accused'). It is alleged that at about 12.45 A.M. on 17.6.2011, the complainant heard a noise when he was sleeping in his Dhaba, upon which when he came out, he found

accused and deceased quarrelling. In that process, the deceased hit the accused on his forehead with a stone resulting in an injury sustained by the accused from which blood had started oozing out. It is further alleged that on having suffered such injury, on his forehead, the accused went towards his room. In the meantime, complainant and deceased also followed the accused in order to seek apology from him. At that time, the accused asked the deceased not to come to him. Upon his such asking, the deceased returned. It is further case of the prosecution that allegedly the complainant cleaned the wound of the accused and the accused had proclaimed to kill the deceased and not to spare him. The accused came downwards by taking out a knife kept underneath his pillow. On seeing the accused coming, the complainant went to the deceased while running and made him to run Banjar side. The accused while searching for the deceased came to the Dhaba of the complainant and asked him for the deceased. When the complainant feigned ignorance about the deceased, the accused sat on his cot. It is further alleged that at about 1.30 a.m., the deceased came to the Dhaba of the complainant where the accused was already sitting and the accused by catching hold of the deceased from his collar of his T-Shirt, made him to stand against the wall of Dhaba and stabbed him on the left side of chest and ran away. The complainant had put the deceased in injured condition in his car bearing registration No.HP-01K-1730 and also made Ghanshayam, who was in an inebriated condition, to board the car. Complainant also asked the accused to accompany them to Ani hospital, he refused to do so. In the meantime, the complainant had also telephonically informed the house of the deceased before taking him to CHC, Ani. At Khanag, Daulat Ram (father of the deceased), his uncle Gian Chand and Ramesh also met them. When they reached the hospital, the deceased was declared dead. Having received the information of the death of the deceased, the police reached the hospital and prepared inquest papers and the dead body of the deceased was sent to IGMC for conducting post mortem examination. The spot had been inspected and stood videographed. Consequently, site plan of the occurrence was prepared and statements of witnesses were recorded. The accused was arrested at about 7.30 p.m. on 17.6.2011 and was got medically examined. It is further alleged that while in custody the accused made a disclosure statement and got identified the place from where he had thrown the knife in a dense forest. Consequently, a search was made in order to find out the knife but to no avail. During investigation, it was also revealed that the clothes which the accused was wearing on the date of alleged occurrence were taken into possession and sent to FSL along with other samples/specimen which had also been taken at the time of post mortem examination of the dead body. On receipt of the report of the FSL, the deceased was found to have died as a result of ante mortem stab to lung and heart leading to gross hemorrhagic shock in a case of alcohol consumption and whose blood alcohol concentration was 222 mg% and urine alcohol concentration was 242.65 mg%.

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

4. The accused/respondent stood charged by the learned trial Court for committing offences punishable under Sections 302 and 201 of the Indian Penal Code. In proof of the prosecution case, the prosecution examined 22 witnesses. On closure of the prosecution evidence, the statement of the accused under Section 313 Cr.P.C. stood 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 yet he chose not to lead any evidence in defence.

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

6. The appellant/State stands aggrieved by the judgment of acquittal recorded by the learned trial Court. The learned Additional Advocate General has concerted to vigorously contend qua the findings of acquittal recorded by the learned trial Court standing not based on a proper appreciation of evidence on record, rather, theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of acquittal being reversed by this Court in the exercise of its appellate jurisdiction and theirs being replaced by findings of conviction.

7. On the other hand, the learned counsel for the respondent 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.

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. For clinching the guilt of the accused qua the offences allegedly committed by the latter, the prosecution had placed heavy reliance on the testimony of an ocular witness to the occurrence who stepped into the witness box as PW-10 wherein he rendered a vivid ocular account qua the ill fated occurrence. The testimony of the ocular witness to the occurrence would not stand discounted by this Court unless a close reading of his testimony besides an incisive scrutiny of other pieces of inculpatory evidence pressed into service by the prosecution in purported display of the guilt of the accused underline his testimony standing deprived of veracity.

10. In determining the veracity qua the ocular account of the occurrence rendered by PW-10, it is imperative to allude to the factum as recorded by him in his previous statement recorded in writing besides in his deposition comprised in his examination-in-chief wherein he has voiced the factum of the ill fated occurrence standing engendered by a motive nursed by the accused filliped by the factum of the accused preceding his stabbing the deceased with knife holding a wrangle with the deceased outside the Dhaba of the complainant (PW-10) in course whereof the deceased struck the forehead of the accused with a stone sequelling the oozing of blood there-from. On the accused standing inflicted with an injury on his forehead sequelled by his being struck thereon with a stone pelted by the deceased, he proceeded to his room whereto he stood followed by the complainant and the deceased for seeking an apology from him. However, the accused then refused to meet the deceased which resulted in the latter returning to the premises of the complainant. PW-10 (the complainant) deposes of his cleaning the wound suffered by the accused whereat he deposes of the accused proclaiming to him of his intention to not spare the deceased. Some time later, PW-10 deposes of the accused while holding a knife lifted by him from underneath his pillow arriving at the place where the deceased stood stationed which sequelled the deceased to run towards Banjar side. PW-10 further deposes of the accused, in his endeavour to locate the deceased on the latter's arriving at his Dhaba, his continuing to stay put there in wait for the deceased returning thereat. At about 1.30 A.M. on 17.6.2011 the deceased stands deposed by PW-10 to return to the Dhaba of the complainant where the deceased too was stationed. There exists a communication in the deposition in the examination-in-chief of PW-10 of the accused on sighting the deceased catching him from the collar of his T-Shirt making him stand against the wall of the Dhaba and stabbing him on the left side of the chest whereafter he left the sight of occurrence. The motive as stands ascribed by PW-10 to murder the deceased stands foisted upon the factum of his standing goaded by a vendetta nursed by the factum

of his previously standing struck on his forehead by a stone pelted thereat by the deceased. However, the aforesaid motive ascribed to the accused to murder the deceased is unworthy of credence, with a concomitant effect of the initial genesis of the prosecution story suffering for the reasons herein-after, erosion, (a) the injury/wound purportedly suffered by the accused on his forehead in sequel to a stone flung thereat by the deceased gets no probative succor awakened by the factum of the investigating officer not getting the accused medically examined by a medical practitioner for facilitating him to display in the MLC of injuries occurring on the forehead of the accused nor obviously the prosecution adduced on record the apposite MLC of the accused with an apposite portrayal therein of the forehead of the accused sustaining a bruise or a wound (b) PW-10 though deposes of his cleaning with a cotton swab the wound suffered by the accused on his forehead yet the investigating officer not collecting at the instance of the complainant the cotton swab used by the latter to clean the wound suffered by the accused on his forehead in sequel to his standing struck thereat with a stone flung by the deceased, enfeebles the veracity of PW-10 of his cleaning the wound suffered by the accused on his forehead in sequel to a stone flung thereat by the deceased (c) T-Shirt Ext.PX-3, Pants Ext.PX-4 and coat Ext.PX-5 which the accused wore at the time contemporaneous to the ill fated occurrence not carrying any blood stains even when PW-10 deposes of blood copiously oozing from the wound suffered by the accused on his forehead in sequel to his standing struck thereat by a stone pelted by the deceased, evinces a conclusion from this Court of the complainant falsely deposing of the deceased striking the forehead of the accused with a stone, sequelling copious oozing of blood there-from. Even though, PW-10 has concerted to convey in his deposition in explication of the clothes of the accused not standing stained with blood, of the accused proceeding to his room with his head facing the ground, nonetheless with no portrayal of any trail of blood as oozed from the wound suffered by the accused on his forehead standing detected from the place where the forehead of the accused was hit with a stone flung thereat by the deceased uptil the room whereto he proceeded to subsequently, erodes the effect of the explication purveyed by PW-10 of blood not hence besmearing the clothes of the accused besides gives a fillip to an inference of his prevaricating the genesis of the prosecution version of the accused striking the deceased on the left side of the chest with knife wielded by him in retribution or for wreaking a vendetta upon the deceased aroused by the factum of the latter precedingly striking his forehead with a stone sequelling injuries thereat wherefrom blood oozed copiously. In aftermath, the motive as stands ascribed by the ocular witness to the accused murdering the deceased subsides besides is rendered starkly unsubstantiated. Obviously, a pivotal link in the chain of circumstances gets severed.

11. Be that as it may, with PW-10 in his examination-in-chief deposing of the accused subsequent to his sustaining an injury on his forehead by a stone pelted thereat by the deceased lifting a knife kept underneath his pillow wielding whereof he proceeded to the place occupied by the deceased which sequelled the deceased to run towards Banjar side. However, PW-10 further deposes of the accused continuing to occupy his Dhaba in wait for the return of the accused thereat. He also deposes of the accused while occupying his Dhaba in wait for the deceased returning thereat, throughout the course of his occupying it holding a knife in his hand. However, even though the ill fated stabbing of the deceased by the accused occurred on the accused arriving thereat with 10-15 minutes standing elapsed since the accused standing stationed thereat in wait for the deceased returning there, yet given the existence of a communication in the deposition of PW-10 of both the accused and deceased carrying mobiles with them, the omission on the part of PW-10 to warn the deceased against his returning to his Dhaba given the accused waiting there for him for 10-15 minutes imperatively when the apposite warning if had emanated from PW-10 would have obviated the infliction of a stab injury by the accused upon the

deceased, as a corollary the omission aforesaid bespeaks of a tinge of unnaturalness imbuing/staining his testimony predominantly when for reiteration it was naturally expected of him for forestalling the occurrence warn the deceased of the intentions of the accused to murder him by calling him over his cell phone (b) PW-10 deposes of the car of deceased standing parked at the site of occurrence and of the deceased holding its keys yet PW-10 counseling the deceased to proceed to sleep than to flee from the spot in his car besides the story espoused by PW-10 of the deceased running towards Banjar side, is magnificatory of the fact of the deceased despite his intoxication standing not deprived of his cognitive faculties for de-facilitating him to flee from the site of occurrence for obviating his standing stabbed with a knife by the accused, besides its loudly echoing of PW-10 grinding a false story qua the ill fated occurrence.

12. Furthermore, PW-10 deposes of his lifting the deceased in his car whereat he stood accompanied by PW-11 (Ghanshyam). He deposes of his in the car of the deceased carrying him to hospital where treatment stood afforded to the deceased. Even though he has recorded in his deposition of his not purveying either first aid to the deceased nor cleaning his wounds. However, PW-1 recording in his deposition of his on sighting the body of the deceased noticing wounds occurring thereon to be completely cleaned, factum whereof stands corroborated by PW-17 (ASI Rattan Chand) rears an inference of PW-10 cleaning the wounds of the deceased. In sequel to PW-10 cleaning the wounds of the deceased no stains of blood occurred on the clothes worn by the complainant at the time contemporaneous to his lifting with the aid of PW-11 the body of the deceased in the latter's car for carrying him to hospital for treatment standing afforded thereat to him besides the car wherein the body of the deceased was carried by PW-10 to hospital did not carry any blood stains. With an inference standing formed of PW-10 cleaning the wounds of the deceased yet when neither the clothes worn by him at the time contemporaneous to his lifting with the aid of PW-11 the deceased in the latter's car for carrying him to hospital where treatment stood afforded to him, not gathering any blood stains nor the car wherein the deceased stood carried to hospital also not gathering any blood stains, the apt sequitur thereof is of its hence bespeaking of the former's unnatural conduct standing begotten by his malignant subterranean psyche or mindset goading him to suppress the truth qua the ill fated occurrence. The unnatural conduct of PW-10 as forthcoming from the aforesaid discussion when in its entirety is suppressive of a true unfoldment qua the ill fated occurrence, constrains this Court to conclude of the ocular account qua the occurrence rendered by him being bereft of any credence. Dehors the aforesaid unnatural conduct of PW-10 rendering his testimony to be disimputable to credence, the existence of a disclosure in the deposition of PW-11 of PW-10 omitting to unravel to him at Jalori of the deceased standing stabbed by the accused rather his making a disclosure of the accused stabbing the deceased to PW-11 on the arrival of the deceased at the hospital where he was declared dead is also connotative of a suppressive conduct of PW-10 manifestive of his camouflaging the truth qua the occurrence. Consequently, a suppressed, smothered or a camouflaged ocular or oral version qua the ill fated occurrence rendered by PW-10 cannot warrant acceptance by this Court nor it can thereupon conclude with aplomb of the accused committing the murder of the deceased.

13. Further inroads qua the veracity of the ocular account rendered qua the ill fated occurrence by PW-10 is derivable from the factum of PW-10 deposing qua the accused stabbing the deceased with a knife having a blade of four inches. He also deposes of a knife having a blade of four inches standing not normally used in household activities. His ocular account of the accused wielding a knife with a blade of four inches besides his deposition of the accused stabbing the accused with its user carries no legal efficacy for the reasons (a) his deposing of the accused after striking the deceased with the knife aforesaid

concealing it inside the back of his pocket. He further concedes to the factum of hence blood stains standing necessarily borne on the knife purportedly struck on the deceased by the accused besides blood also staining the inside of the pocket of the pant where the accused kept it after striking the deceased with it. However, with the report of the FSL comprised in Ext.PA omitting to divulge therein of the clothes the accused wore at the time contemporaneous to the occurrence not carrying any blood stains falsifies the deposition of PW-10 of the accused after striking the deceased with knife his keeping it inside the back of his pant (b) With Ext.PW-18/A proven by PW-18 who conducted the post mortem examination on the body of the deceased unfolding therein of the ante mortem injuries found by him to be occurring on the body of the deceased on his subjecting his body to post mortem examination also necessarily entailed in sequel to the offender withdrawing the weapon from the wound the begetting of or occurrence of blood stains on the clothes of the offender whereas for reasons afore-stated with no blood stains occurring on the clothes of the accused, secures a firm conclusion from this Court of PW-10 in his deposition rendering therein a false espousal of the accused in his presence stabbing the deceased with a knife with a blade of four inches (c) With PW-18 deposing of the ante mortem injuries noticed by him to be occurring on the body of the deceased on his subjecting it to post mortem examination being sequelable with *"Chhuri"* used in Dhabas is palpably not in conjunction besides not in tandem with the testimony of PW-10 of the accused stabbing the deceased with a knife not usually used in household activities especially when PW-18 deposes of the knife purportedly wielded by the accused with user whereof he purportedly stabbed the deceased carrying a blade of four inches obviously constituted the latter to be a weapon other than a *"Chhuri"* the latter whereof stands deposed by PW-18 to beget the injuries noticed by him to be occurring on the body of the deceased subjected by him to post mortem examination. In sequitur, a blatant and stark discordance occurs intra-se the injuries noticed by PW-18 to be occurring on the body of the deceased on his subjecting it to post mortem examination standing deposed by him to stand inflicted with "Chhuri" vis-à-vis the ocular account rendered by PW-10 of the accused in his presence stabbing the deceased with knife carrying a blade of four inches user whereof stands dispelled by PW-18. In aftermath, with open discordance or rife/variance existing intra se the testimonies of PW-10 qua the nature of the weapon wielded and used by the accused to stab the deceased, accentuates an inference of the deposition of PW-10 suffering erosion besides losing its creditworthiness in its enunciating of the accused wielding a knife carrying a blade of four inches with user whereof he stabbed the deceased. Naturally the apt concomitant deduction there-from is of the ocular account qua its wielding and consequent user by the accused on the body of the deceased getting discounted (d) PW-17 deposing on oath of PW-10 (Jai Singh) complainant running a Dhaba whereas his on his visiting it his not locating any Chhuri therein bespeaks of its non occurrence therein being unnatural. The unnaturalness qua the non occurrence of a "Chhuri" in the Dhaba of PW-10 undermines the efficacy of his deposition of the accused at all wielding any weapon of offence at the relevant time with user whereof he struck the deceased rather is a portrayal of PW-10 engineering and inventing a false story qua the ill fated occurrence. Consequently, his ocular account qua the occurrence is wholly unreliable.

14. Ext.PW-18/B proven by PW-18 underscores the factum of the latter conducting post mortem examination on the body of the deceased at 3.30 p.m. on 17.6.2011. It also underlines the factum of the time which elapsed inter se the death and injury being immediate and the time elapsing inter se death and post mortem being around 12 hours. The aforesaid communication in Ext.PW-18/B secures a conclusion from this Court of the demise of the deceased occurring at 3.30 a.m. on 17.6.2011 in striking repudiation to the fact propagated by PW-10 of the demise of deceased occurring on 17.6.2011 at 1.30 a.m. Therefore, the deposition of PW-10 of the demise of the deceased

occurring at 1.30 a.m. on 17.6.2011 is discrepant besides unreliable with the resultant effect of his ocular account qua the ill fated occurrence being unworthy for acceptance by this Court.

15. Though the ill fated occurrence stood consummated at 1.30 a.m. yet as apparent from a reading of the testimony of PW-17 a disclosure qua it was made belatedly after elapse of 13 hours on 17.6.2011 at 2.30 p.m. The procrastinated reticence of the complainant is enigmatic especially when no explanation for the ill fated occurrence standing omitted to be promptly reported to the police agency concerned has emanated from PW-10. Obviously the highly procrastinated besides inordinate unexplained delay on the part of PW-10 in reporting the ill fated occurrence to the police authorities concerned begets an inference of PW-10 concocting a false and engineered story qua the occurrence besides an inference of his inventing a false story qua it for misdirecting the entire police investigations for reasons best known to him. The highly discrepant evidence of PW-10 cannot enjoy the confidence or trust of this Court for founding thereupon findings of conviction against the accused.

16. The weapon of offence stood not recovered. However, even in the face of its recovery standing not effectuated by the investigating officer at the instance of the accused, the prosecution relies upon Ext.PW-3/A proven by PW-10 comprising a disclosure statement recorded at the instance of the accused by the investigating officer with a display therein of his indicating the place whereat he had thrown the knife in pursuance whereof the accused led the investigating officer to the place whereat he had thrown the weapon of offence, in sequel whereto memos Ext.PW-3/D and Ext.PW8/A stood prepared. Nonetheless the efficacy thereof garners no evidentiary value in the face of nothing in pursuance thereto standing recovered. Depositions of PW-5 and PW-6 who had purportedly on 17.6.2011 at 8.30 a.m. sighted the accused washing and wiping the blood purportedly occurring on the road at Jalori on strength whereof the prosecution assays to clinch the incriminatory role attributed by it to the accused, nonetheless evidentiary strength if any which their depositions hold, is rendered feeble in the wake of PW-5 deposing of it raining when he had seen the accused washing the blood from the road, especially when the factum of occurrence of rain at the time contemporaneous to the accused purportedly standing sighted by PW-5 washing blood from the road would rather have constrained the accused to not wash blood if any occurring on the road besides when both omitted to promptly report the said factum to the police or to the family members of the deceased reinforcingly coaxes this Court to conclude of both having invented and engineered the factum aforesaid.

17. 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, benefit of doubt ought to go to the accused.

18. 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.

19. 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.

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

State of Himachal Pradesh .....Appellant.

Vs .

Vikas .....Respondent.

Cr. Appeal No. 589 of 2010.
Reserved on: April 08, 2016.
Decided on: April 13, 2016.

N.D.P.S. Act, 1985- Section 20- Accused tried to run away on seeing the police party- he was apprehended- his search was conducted during which 1.7 kg. of charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that entry in the police diary shows that ASI had left the police station with HC Chaman Lal and not with ASI Yashwant Singh- it was further stated that everything was found in order- there was no mention of recovery of charas in the entry- no option to be searched was given to the accused as required under Section 50 of N.D.P.S. Act- there was contradiction regarding the presence of Chaman Lal at the spot- Column No. 7 of NCB form was filled after handing the case property which is contrary to the version that all the columns were filled at the spot- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, accused was rightly acquitted by the trial Court- appeal dismissed. (Para-12 to 21)

For the appellant: Mr. P.M.Negi, Dy. AG.
For the respondent: Mr. Ajay Chandel, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 10.9.2010, rendered by the learned Special Judge (FTC) Kullu, H.P., in Sessions trial No. 07/2010, whereby the respondent-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 acquitted.

2. The case of the prosecution, in a nut shell, is that PW-3 HC Chaman Lal, PW-5 SHO Narain Singh and ASI Yashwant Singh had gone to Larji in official vehicle being driven by Const. Tej Ram on 27.12.2008 at 10:00 AM. PW-4 HC Paras Ram, HC Gulab Chand, Const. Nek Ram, HC Naresh Kumar and Const. Deep Chand were already present at Larji Forest Barrier. Accused came on foot from Larji at about 11:00 AM. He started running on seeing the police. He was carrying a backpack Ext. P-1. He was apprehended. The accused was apprised that police was suspecting some narcotic in his person or in the backpack and therefore, the search of his person and the backpack was to be conducted and that he was having legal right to be searched before a Magistrate or Gazetted Officer.

Accused consented to be searched by the police and memo Ext. PW-1/A was prepared regarding the consent. Paras Ram and accompanying police officials gave their personal search to the accused and memo Ext. PW-1/B was prepared. The backpack was checked and it was found to be containing one polythene bag Ext. P-4 bearing the words "Kotanyi". When the polythene bag was opened, it was found to be containing black coloured substance in the shape of sticks and spheres Ext. P-5 which was wrapped in white polythene. It was found to be cannabis. It weighed 1 kg. 700 grams. Two samples weighing 25 grams each were separated for the purpose of chemical analysis. The remaining cannabis was put in the polythene bag from which it was recovered and it was wrapped in a piece of cloth. Each parcel was sealed with six impressions of seal "H". NCB-I form Ext. PW-4/A was filled in triplicate at the spot. Rukka Ext. PW-4/B was prepared and handed over to HC Chaman Lal with the direction to carry it to the Police Station. He handed over the rukka to MHC Kartar Singh PW-8, who recorded the FIR Ext. PW-8/A and sent the case file to the spot. Site plan Ext. PW-3/C was prepared and statements of the witnesses were recorded. The case property alongwith the sample seal "H", NCB-I form were produced before PW-5 SHO Narain Singh, who resealed the same with three impressions of seal "T". He filled in columns No. 9 to 11 of the NCB-I form Ext. PW-4/A. The case property was deposited with sample seals and NCB-I form with PW-8 Kartar Singh, who made entry at Sr. No. 80 in the malkhana register. The samples were sent to FSL, Junga for analysis. 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 8 witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. P.M.Negi, learned Dy. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Ajay Chandel, Advocate for the accused has supported the judgment of the learned trial Court dated 10.9.2010.

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

6. PW-1 Nirat Singh testified that he was working as Forest Guard in Larji Check Post in the month of December, 2008. There was office of Marketing Committee adjacent to their check post. He alongwith Krishan Chand, Chowkidar were present on 27.12.2008 at about 10:00 AM at check post. A nakka was laid by the police. The police was stopping the vehicles. One HRTC bus was going from Neoli to Kullu which was also stopped. The accused was brought down from the bus by the police. He was not carrying anything. There was a backpack with the police official. When he came to the check post, he told that cannabis was recovered from the accused. It weighed 1 kg. 700 grams. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he admitted that SHO Narain Singh, ASI Yashwant Singh and other police officials came to the check post on 27.12.2008 at 11:00 AM. He denied that HC Paras Ram apprehended the accused with the help of accompanying police officials. He admitted that accused was taken with the bag to the office of Forest Barrier. He admitted that the police associated Krishan Chand as witness. He admitted that the backpack was checked in his presence and in the presence of Krishan Chand and HC Chaman Lal. He admitted that accused revealed his name as Vikas Kumar on inquiry. He admitted his signatures on memo Ext. PW-1/A. He admitted that bag was opened and it was found to be containing a polythene bag having sticks and marble like charas. He admitted that two samples each

weighing 25 grams were separated and were wrapped in different pieces of cloth. He admitted that the remaining charas was put in the same polythene bag from which it was recovered and polythene bag was put in the same backpack. He admitted that the backpack was wrapped in a piece of cloth and sealed with six impressions of seal "H". He denied that the seal was handed over to him, however, he admitted that the charas was seized vide seizure memo Ext. PW-1/C and he also admitted his signatures over the same alongwith the signatures of Krishan Chand and HC Chaman Lal as witnesses. In his cross-examination by the learned defence counsel, he deposed that the bus was enroute from Neoli to Kullu and it arrived at check post at about 10:00 AM. It was stopped in his presence. 4-5 persons were present. Two persons boarded the bus from rear side and one from the front side. The bag which was brought by Constable was in open condition. SHO Nariain Singh reached after the search in the evening. He did not know from whose possession bag was recovered inside the bus. He did not know that bag was unclaimed or that the accused was brought out of the bus on the basis of suspicion. He had put his signatures on all the documents in the evening. He admitted that the police had not given personal search to the accused. He admitted that there is a bazaar in front of their check post which is having 15-20 shops. The police was having traditional balance. He did not know from where they fetched the balance. He admitted that the police had obtained his signatures by saying that since the charas was weighed in his presence, there he was being cited as a witness. He also admitted that the accused stated to him that the bag did not belong to him and was recovered from the bus.

7. PW-2 Const. Pushap Raj deposed that MHC Kartar Singh handed over to him one parcel sealed with six impressions of seal "H" and resealed with three seals of "T", NCB form in triplicate and other documents, copy of FIR, sample seals "T" and "H" on 28.12.2008 with direction to carry the same to FSL, vide RC No. 92/08. He deposited the same in FSL, Junga on 29.12.2008.

8. PW-3 ASI Chaman Lal deposed that the accused was apprehended and he was apprised of his legal right to be searched before a Magistrate or Gazetted Officer. The accused gave his consent vide Ext. PW-1/A. Thereafter, the contraband was recovered from the bag. Sampling proceedings were completed on the spot. NCB-I forms were filled in triplicate. Seal was handed over to PW-1 Nirat Singh after use. His signatures alongwith signatures of witnesses Krishan Chand and PW-1 Nirat Singh were taken vide memo Ext. PW-1/C. The accused put his thumb impression over the same. Rukka, mark-B was prepared and handed over to him. He carried the same to the Police Station and handed over to MHC Kartar Singh. FIR was recorded on the basis of rukka. The accused was arrested vide memo Ext. PW-3/A. The case property was produced while examining PW-3 ASI Chaman Lal. He denied that one unclaimed bag was recovered by the Constables from HRTC bus during routine checking lying in the aisle adjacent to the seat of the accused. He denied that when the bag was checked, it was found to be containing charas and no one claimed the ownership of the bag. He denied that many shops and residential houses were located adjacent to Larji Barrier. They were at a distance of one and a half kilometer. He also admitted that check post belongs to Forest Department. SHO Narain Singh left the spot in the official vehicle prior to the apprehension of the accused about half an hour. ASI Yashwant Singh accompanied him. He admitted that no option was given to the accused to be searched by the police. No memo of personal search was conducted prior to the search of the bag. Rukka was handed over to him at 2:00 PM. He reached at the Police Station at 3:00 PM. He went in a private vehicle. He left the Police Station at 3:30 PM and arrived at the spot at 5:30 PM. His statement was recorded by the I.O. on his arrival at the spot.

9. PW-4 HC Paras Ram also deposed the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. Rukka Ext. PW-4/B was prepared on the spot and handed over to ASI/HC Chaman Lal at 2:00 PM with direction to carry the same to the Police Station. ASI/HC Chaman Lal handed over the case file to him at 5:30 PM. He filled in the relevant columns and documents were prepared by him. The case property was produced before SI/SHO Narain Singh at 8:45 PM on the same day, who resealed the parcels with three seal impressions of seal "T" at 9:05 PM.

10. PW-5 SHO Narain Singh deposed that column numbers 9 to 11 of NCB-I form Ext. PW-4/A were filled by him and seal impression of seal "T" was affixed over it. The case property was handed over to MHC Kartar Singh along with sample seals "T" and "H" and NCB-I form. Earlier, he alongwith ASI Yashwant Singh, HC/ASI Chaman Lal had gone to Larji in official vehicle being driven by Constable Tej Singh on 27.12.2008 at 10:00 AM. He remained at the spot till 10:30 AM and after giving necessary directions, he left the spot in the official vehicle. Earlier, the police officials were present at the nakka at the spot under the supervision of HC Paras Ram.

11. PW-8 MHC Kartar Singh testified that on 27.12.2008 SHO Narain Singh handed over three parcels each of which was sealed with six impressions of seal "H" and resealed with three seal impressions of "T" with sample seals "T" and "H", NCB-I form in triplicate, copy of seizure memo, one backpack to him at 9:05 AM. He made entry at Sr. No. 80 in the malkhana register. He also filled in column No. 12 of the NCB-I form Ext. PW-4/A. The case property was sent to FSL, Junga on 28.12.2008 vide RC No. 92/08 through Const. Pushap Raj.

12. PW-3 ASI Chaman Lal deposed that SHO Narain Singh left the spot in the official vehicle prior to the apprehension of the accused about half an hour. ASI Yashwant Singh accompanied him. However, as per entry made in Ext. D-1, SHO Narain Singh along with HC Chaman lal who had gone towards Larji in official vehicle being driven by Tej Singh returned with Chaman Lal. Everything was found in order. ASI Yashwant Singh was deputed at Larji. Hotels etc. were checked and everything was found to be perfect. This entry clearly demonstrate that PW-5 SHO Narain Singh had left the spot not with ASI Yashwant Singh but with HC Chaman Lal. PW-6 Constable Lal Singh has stated that this report was the true copy of the original and thus authenticity of this report is not in dispute. Since ASI/HC Chaman Lal had left with the SHO Narain Singh, no recoveries were effected in the presence of ASI/HC Chaman Lal. No option was given to the accused of the legal right to be searched before a Magistrate or Gazetted Officer in the presence of ASI/HC Chaman Lal. Neither charas was weighed in his presence nor rukka was handed over to ASI/HC Chaman Lal to be carried to Police Station Bhuntar.

13. PW-4 HC Paras Ram deposed that the recovery was effected in the presence of ASI/HC Chaman Lal, however, it is factually incorrect since ASI/HC Chaman Lal had already left with SHO Narain Singh, as per Ext. D-1. According to PW-4 HC Paras Ram, ASI/HC Chaman Lal left the spot at 2:00 PM. The accused was arrested at 4:00 PM. ASI/HC Chaman Lal came back and handed over the case file at 5:30 PM. However, signatures of ASI/HC Chaman Lal were found on the arrest memo. On a specific question put to him as to how it could be possible. He replied that ASI/HC Chaman Lal was not present at the time of arrest but his signatures were obtained subsequently when he arrived at the spot. Thus, the testimony of this witness cannot be relied upon.

14. According to PW-4 HC Paras Ram and ASI/HC Chaman Lal NCB-I form Ext. PW-4/A was filled at the spot. They deposed that columns No. 1 to 8 were filled on the spot. It is mentioned in column No. 7 that the case property was dispatched to the Police Station on 27.12.2008 at 8:45 PM. It was not possible for the I.O. to know at the spot that the case

property would be deposited at 8:45 PM. It clearly demonstrates that column No. 7 was filled up after handing the case property and the testimonies of these witnesses cannot be believed.

15. The case property was produced while recording the statement of PW-3 ASI/HC Chaman Lal. 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 re-deposited 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 re-deposited 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.

17. Sub-rule (2) Rule 22.18 of Punjab Police Rules, reads as under:

> "(2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.

Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so."

18. Rule 27.18 of Punjab Police Rules, reads as under:

"27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).

Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its

closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

19. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

20. In the instant case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

21. In the instant case, it has also come on record that the shops were also situated near the spot of incidence, however, no independent witnesses were cited by the prosecution. PW-1 Nirat Singh has not supported the case of the prosecution. Thus, the prosecution has failed to prove the case against the accused under Sections 20 of the ND & PS Act that the charas was recovered from the conscious and exclusive possession of the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 10.9.2010.

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

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BEFORE HON'BLE MR.JUSTICE MANSOOR AHMAD MIR, CJ. AND HON'BLE MR.JUSTICE CHANDER BHUSAN, J.

The State of H.P. and another ...Appellants.

Versus

Karam Chand ...Respondent.

LPAs No. 41 to 47 of 2016
Decided on : 13.04.2016.

Industrial Disputes Act, 1947- Section 25- Services of the workmen were terminated- Labour Court held that workmen were entitled to relief - held, that awards passed by the Labour Court are based on the facts- Writ Court cannot sit as an Appellate Court – Appellate Court set aside the award made by the Labour Court- the question of fact cannot be interfered with by the Writ Court- such findings can be questioned if it is shown that the Tribunal has erroneously refused to admit admissible and material evidence or has erroneously admitted inadmissible evidence which influenced the impugned findings - it was not pleaded that inadmissible evidence was recorded or it was made foundation of the awards or the awards were passed without any evidence- appeal dismissed. (Para-7 to 15)

Cases referred:

Bhuvnesh Kumar Dwivedi versus M/s. Hindalco Industries Ltd., 2014 AIR SCW 3157

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

For the Appellants: 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 Respondent(s): Mr. Naresh Kaul, Advocate.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(Oral)*

CMP(M) No. 1504 of 2015 in LPA No. 41 of 2016
CMP(M) No. 1521 of 2015 in LPA No. 42 of 2016
CMP(M) No. 1502 of 2015 in LPA No. 43 of 2016
CMP(M) No. 1523 of 2015 in LPA No. 44 of 2016
CMP(M) No. 1524 of 2015 in LPA No. 45 of 2016
CMP(M) No. 1522 of 2015 in LPA No. 46 of 2016
CMP(M) No. 1503 of 2015 in LPA No. 47 of 2016

By the medium of these limitation petitions, the appellants-applicants have sought condonation of delay, which has crept-in in filing the present appeals.

2. We have gone through the limitation petitions read with the impugned judgments and are of the considered view that the appellants-applicants have carved out sufficient cause for condoning the delay. Accordingly, the delay is condoned. The limitation petitions are disposed of.

LPAs No. 41 to 47 of 2016

3. Appeals are taken on Board.

4. Issue notice. Mr. Naresh Kaul, Advocate, waives notice for the respondent(s) in all the appeals.

5. These appeals are directed against the judgments and orders made by the Writ Courts on different dates, whereby the writ petitions filed by the writ petitioners-appellants herein came to be dismissed (for short "the impugned judgments").

6. We have gone through the impugned judgments, which are legally correct for the following reasons.

7. Services of the respondents were terminated, disputes were raised under the Industrial Disputes Act, 1947, (for short "the Act"), the matters were referred by the competent Authority to the Labour Court-cum-Industrial Tribunal, (for short the "Labour Court").

8. The Labour Court entered into the references and issues were framed. Parties led their evidence and the Labour Court, after examining the pleadings and the evidence led by the parties, held vide the respective awards, that the workmen were entitled to the relief and made the awards.

9. The awards passed by the Labour Court are 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.

10. 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."*

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; **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's case (supra),** 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.

13. It is not the case of the writ petitioners-appellants that inadmissible evidence was recorded and that was made the foundation of the awards or the awards were passed without any evidence. The Writ Courts have rightly made the discussion and conclusions.

14. Having glance of the above discussion, we hold that the impugned judgments are speaking one, require no interference.

15. Viewed thus, the impugned judgments are upheld and the appeals are dismissed alongwith all pending applications.

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

Gian Chand Sharma .....Petitioner.

Versus

State of Himachal Pradesh and others .....Respondents.

CWP No.9494 of 2013.
Judgment reserved on: 07.04.2016.
Date of decision: April 18, 2016.

Constitution of India, 1950- Article 226- Property of the petitioner was damaged by the construction of new road known as Sainj to Manham Road for Parbati Hydro Electric Project- respondents denied the claim of the petitioner- held, that claim of the petitioner was that his property was damaged on 27.6.2008- however, claim was filed on 25.11.2013 after 5 ½ years of the incident- claim for compensation was barred by limitation and writ petition was filed for avoiding the question of limitation- the person who approaches the Court should approach the court at the earliest- further, there are disputed questions and compensation cannot be awarded without deciding them- petition dismissed. (Para-5 to 13)

Case referred:
Municipal Council, Ahmednagar and another versus Shah Hyder Beig and others (2000) 2 SCC 48

For the Petitioner : Mr.Sanjeev Kuthiala, Advocate.

For the Respondents : Ms.Meenakshi Sharma, Additional Advocate General with Ms.Parul Negi and Mr.Pankaj Negi, Deputy Advocate Generals, for respondents No.1 and 2.
Mr.Vijay Arora, Advocate, for respondents No.3 and 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

This writ petition has been filed for the following reliefs:-

"a) To call for the record of the case pertaining to the petitioner from the respondents and after seeing the same to direct the respondents to make compensation to the petitioner in terms of evaluation report annexed as ***Annexure P-25*** to the petition.

b) To direct the respondents to consider the representation of the petitioner as also the legal notice and decide the same within a time bound period and to compensate the petitioner for the damages so occurred.

c) To direct the respondents to decide the application ***Annexure P-16*** and conduct a joint inspection of the spot and give compensation to the petitioner in terms of the Evaluation report annexed as ***Annexure P-25.***

d) To direct the respondents to take appropriate steps to acquire the property of the petitioner at the market rate and to make him the requisite compensation for the damages as also to give the award for the property so acquired."

2. The petitioner claims to have sustained damage to his property on account of construction of a new road known as "Sainj to Manham Road" by respondents No.3 and 4 for their project known as "Parbati Hydro Electric Project". It is averred that during the course of construction of the road, the debris which had accumulated on account of excavation both by way of manual and mechanical means was disposed of by respondents No.2 to 4 by haphazardly dumping the same at the side of the road. The debris that comprised of mud stone and muck was dumped adjacent to the residential house, saw-mill, land and other property of the petitioner. When this debris began rolling down due to heavy rain on 27.06.2008, the petitioner represented orally and by way of written communication, asking the respondents to take preventive measures but to no avail resulting in heavy damage to the property of the petitioner. On the basis of the aforesaid allegations, the petitioner has claimed compensation as per evaluation report Annexure P-25. However, a perusal of Annexure P-25 would go to show that the same is not a evaluation report and infact the evaluation report has been annexed with the rejoinder as Annexure P-29 wherein the total loss has been calculated to be Rs.26,80,931.35/- or say Rs.26,81,000.00/-.

3. In response to the petition, the State Authorities i.e. respondents No.1 and 2 have denied their liability or responsibility by claiming that the road in question has been constructed by respondents No.3 and 4 and damage, if any, caused to the petitioner is to be compensated by the said respondents. Respondents No.1 and 2 have also raised the objection regarding the petition being barred by delay and laches.

4. Respondents No.3 and 4 in their reply have stated that though the road in question was constructed by them in the year 2008 to carry the material for the project, however, the debris or excavated earth was dumped only in pre-defined dumping site and,

therefore, there was no question of causing any damage to the petitioner's property due to construction of this road. It is also averred that the damage, if any, caused to the house and saw-mill of the petitioner has not been caused due to the act of the answering respondents, but the same might have been caused due to the rain water passing through a nullah across "Sainj Bypass Road" which was constructed by respondents No.1 and 2 and, therefore, they are not liable for any damage or loss allegedly sustained by the petitioner. It was also averred that the petitioner was still residing in the same house which he is alleging to have been damaged and rendered inhabitable and at the same time the house of one Shiv Ram located in close proximity to the house and saw-mill of the petitioner coming first in the way of nullah has suffered no damage. The current photographs of the houses showing the status of the petitioner's house and the adjacent houses have been annexed with the reply. Similar contentions have been raised in reply on merits of the case.

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

5. Evidently, it is the case of the petitioner himself that it was on account of heavy rains on 27.06.2008 that his property including house and saw-mill was damaged. If that be so, then what prevented him from approaching a competent Court of law for seeking redressal of his grievance within the period of limitation is not forthcoming. Rather, this Court is of the firm opinion that the instant petition has been filed only to give slip to the law of limitation or else why the same has been filed only on 25.11.2013 i.e. nearly 5 ½ years after the alleged incident. The claim for compensation was obviously time barred before the Civil Court and that is why the petitioner resorted to the remedy under Article 226 of the Constitution of India.

6. No doubt, the provisions of the Limitation Act cannot be invoked in the proceedings under Article 226 but then the principle is that a person who seeks extraordinary jurisdiction under Article 226 must come to the Court at the earliest opportunity. It is a well settled principle of law that while no period of limitation is fixed for entertaining writ petitions but in the normal course of events, the period the parties require for filing the civil proceedings ought to be the guiding factor. (Refer: ***Municipal Council, Ahmednagar and another*** *versus* ***Shah Hyder Beig and others (2000) 2 SCC 48***).

7. The real test would be whether the petitioner is guilty of laches and in every case this fact will have to be tested. Though, there is no hard and fast rule that the High Court should refuse to grant relief only on account of delay and laches, but then delay and laches have been considered to be the important factor in exercise of discretionary relief under Article 226 of the Constitution of India.

8. That apart, the other question which would arise for consideration is as to whether in view of the disputed facts, the writ petition for awarding compensation under the garb of there being violation of constitutional rights would be maintainable. There can be no doubt qua the proposition that the petition under Article 226 making out a case of violation of either the constitutional right or any other right would be maintainable under Article 226 or by way of suit etc. depending upon the facts and circumstances of the case.

9. The only question which remains to be determined is as to whether this Court in exercise of its writ jurisdiction can award compensation when admittedly the basic facts regarding the alleged damage at whose instance and further to what extent are all disputed.

10. It would be noticed that in the writ petition it has been specifically averred that it was respondents No.3 and 4, who had undertaken the execution of the work for

construction of "Sainj to Manham Road" and while doing so had dumped the debris on the side of the road. On account of unscientific dumping, this debris rolled down because of heavy rains on 27.06.2008 and caused damage to the residential house and saw-mill of the petitioner. No allegations at that time were made against respondents No.1 and 2, save and except, that respondent No.2 was also stated to be a party to the execution of "Sainj to Manham Road" alongwith respondents No.3 and 4.

11. Evidently, it is only when respondents No.3 and 4 filed their reply wherein it was alleged that insofar as they are concerned, they have dumped the debris in the pre-defined dumping site on account whereof no damage was caused to the petitioner's property due to the construction of the "Sainj to Manham Road" and had further averred that the damage, if any, caused to the petitioner was on account of respondents No.1 and 2 having constructed "Sainj Bypass Road", that the petitioner turned around completely and then targeted his guns against respondents No.1 and 2 and claimed that all the respondents were jointly liable to make good the damage and compensate the petitioner for the damage caused to his property.

12. As observed earlier, in the absence of there being any material to actually establish on record the alleged damage, the exact cause thereof and the extent of damage, I am afraid that this Court cannot grant any relief to the petitioner.

13. In view of the aforesaid discussion, I find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

****

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

Sh. K.C. Sharma. ...Accused-Petitioner

Versus

State of Himachal Pradesh and others. ...Respondents

Cr.MMO No. 363 of 2015
Judgment reserved on: 8.4.2016
Date of Decision : 18.4.2016.

Code of Criminal Procedure, 1973- Section 156(3)- Complainant filed a complaint pleading that the complainant had deposited Rs.1,62,500/- as security amount by means of a bank draft which was issued through the bank account of the accused- complainant had paid Rs. 1,65,000/-, the demand draft was returned after the completion of work and was presented for encashment- it was returned by the bank with the endorsement- 'DD has been reported lost/Out of date'- it was found out that accused had filed an affidavit in which it was averred that draft had been lost/mis placed and should not be encashed- police concluded that no action was required to be taken as the dispute was of civil nature and of mutual financial transaction- complainant filed a complaint under Section 156(3) before the Magistrate which was forwarded to the police for investigation in accordance with law- aggrieved from the order, accused filed a petition under Section 482 for cancellation of FIR- held, that police was within its power to conduct the investigation and to conclude that no case was made out- direction should not have been issued to register the FIR, unless investigation was shoddy, one sided and contrary to all norms and procedure- Magistrate should have called

the report from the police before proceeding further- complaint was filed to get the accused blacklisted the police had also found that contents of the complaint were baseless- High Court can cancel the FIR in exercise of its inherent powers- petition allowed and FIR cancelled. (Para-13 to 37)

Cases referred:
Lalita Kumari Vs. State of U.P., (2014) 2 SCC 1
Priyanka Srivastava and another Vs. State of Uttar Pradesh and others, (2015) 6 SCC 287
International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and others Vs. Nimra Cerglass Technics Private Limited and another (2016) 1 SCC 348

For the petitioner: Mr.Neeraj Gupta, Advocate.
For the respondents: Ms.Meenakashi Sharma, Additional Advocate General with Ms. Parul Negi and Mr.Parul Negi, Deputy Advocate Generals, for respondents No. 1 and 6.
Mr. Malay Kaushal and Mr.Paresh Sharma, Advocates, for respondent No. 2.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

Can recourse to Section 156(3) of the Code of Criminal Procedure be taken as if it is a routine procedure, especially when the case is predominantly of a civil nature, is the question which falls for consideration in this petition?

2. The petitioner is the accused, who has approached this Court under Section 482 of the Code of Criminal Procedure (for short "Cr.P.C.") for quashing of FIR No. 145 registered at Police Station Sadar, Shimla on 6th July, 2015 under Sections 403, 406, 420, 467 and 468 IPC pursuant to the directions issued by the Judicial Magistrate, Ist Class, Court No. (5), Shimla to this effect in a complaint filed by respondent No. 2 (complaint) under Section 156(3) Cr.P.C. before it.

3. Initially the respondent No. 2 addressed a complaint to the SHO Police Station Sadar, Shimla on 22nd August, 2014 for registration of an FIR against the petitioner on the allegation that he was dealing in business of tour and travels by the name of Jai Maa Bhima Kali Tour and Travels and participated in the tenders invited by the ARTRAC, Shimla for passenger carrying light vehicles. He deposited Rs. 1,62,500/- as security amount with the Station Headquarter Shimla ARTRAC vide bank draft No. 348959 dated 20.3.2012 drawn on UCO Bank ARTRAC Shimla, in favour of Station Commander, which was issued through the bank account of the petitioner, because at that time the complainant had no account in his name in this bank. It is further alleged that for preparing the aforesaid bank draft, the complainant had already paid an amount of Rs.1,65,000/- through cheque bearing No. 179180 in the bank account of the petitioner on 15.1.2013 from the bank account No. 32160648686 SBI Totu of M/s Jai Maa Bhima Kali Tour and Travels.

4. The tender of the complainant was accepted and accordingly the tender work was awarded in his favour. The Station Headquarter Shimla ARTRAC being fully satisfied with the work performed and services rendered by the complainant, renewed/extended the

work for the year 2013-14 i.e. up to September, 2013 and the complainant even got renewed the security amount of Rs. 1,62,500/- in favour of the Station Commander Shimla.

5. The grievance of the complainant is that when on completion of the contract, the Station Commander, Shimla Headquarter ARTRAC released/refunded the security amount to the complainant vide bank draft No. 348959 dated 20.3.2012, (which had been renewed by the complainant on 20.7.2013), the same was presented by him to his banker i.e. SBI Ghanahatti Branch but was returned by the bank vide memo dated 21.10.2013 with the endorsement *"DD has been reported lost/Out of date."* The complainant thereafter visited the UCO Bank ARTRAC from time to time and made oral request for release of the draft, which was not acceded to by the officials of the UCO Bank. Thereafter the complainant approached the Station Headquarter ARTRAC, Shimla, who issued a letter dated 17.2.2014 to the UCO Bank, ARTRACT requesting the bank to credit the draft amount to the account of the complainant.

6. The complainant thereafter sought information from the UCO Bank ARTRAC Branch under the Right to Information Act regarding the nonpayment of the aforesaid draft amount and as per information supplied it transpired that the petitioner had filed an affidavit, wherein apart from other averments it had been averred that the draft in question had been lost/misplaced and therefore, should not be encashed.

7. It appears that the copy of the complaint so preferred by the complainant was also sent to the Deputy Secretary (Home), to the Government of Himachal Pradesh, who endorsed the same to the Director General of Police for taking necessary action in the matter. The Director General of Police inturn forwarded the complaint to the Superintendent of Police, Shimla, vide communication dated 23.9.2014. The complaint was inquired into by one Sh. Mohinder Lal of Police Station Sadar, who after investigating the matter came to the conclusion that no action was required to be taken on the complaint in view of the fact that the dispute between the complainant and the petitioner was of mutual financial transaction and being a dispute of civil nature, no offence was made out.

8. On the basis of the investigation and the report furnished, a communication dated 1.12.2014 was sent to the Director General of Police by Sh. Balbir Singh Jaswal, Additional Superintendent of Police (Urban) and a copy thereof was also sent to the complainant.

9. Once the matter was closed by the police, the complainant thereafter invoked the jurisdiction of the learned Chief Judicial Magistrate, Shimla by filing a complaint under Section 156(3) Cr.P.C., which was registered as case No. 41/4 of 2015.

10. On 8.4.2015, learned Magistrate after perusing the office report ordered the case to be put up for orders on 1.5.2015. On 1.5.2015 it appears that the order was not ready and the case was thereafter ordered to be listed on 7.5.2015 and for the same reasons the case was thereafter ordered to be taken up on 3.6.2015 and on this date again the order was not ready and the case was adjourned to 11.6.2015. It is eventually on 23.6.2015 that the learned Magistrate passed the following order:-

> *"23.06.2015 Present: Complainant in person.*
>
> *Heard. Record perused. The Complainant has filed the present application under Section 156(3) of Cr.P.C. on the ground for committing the offences of Cheating, Fraud, forgery, dishonest intention, misappropriation of property, deceiving the public authority by swearing a false affidavit and disobedience of the law by the public authority. IN the present case, it has been alleged by the Complainant that the respondent No.*

1 filed an affidavit whereby, he swore falsely on the affidavit to the effect of lost of the bank draft no. 348959 dated 20.3.2012 which was renewed on 20.7.2013 because it was handed over to the Complainant on 17.10.2013. Moreover, the accused No. 1 and 2 had no reason to stop the payment in favour of the Complainant. It is alleged that it is the act of the Respondent due to which he has suffered the fraud, cheating and being mislead by the Respondents. Accordingly, there are certain grounds for which the cause of the Complainant appears to be reasonable, hence, the SHO PS Sadar, Shimla is directed to register the FIR against the Respondents and carry out the investigation and take action as per the law."

11. Aggrieved by the order and by the further registration of FIR, the petitioner has approached this Court seeking quashing of the FIR on the ground that once the investigating agency had already investigated the matter and come to a conclusion that the complaint was predominantly of a civil nature and no offence was made out, the learned Magistrate could not have ordered the registration of the FIR, that too on concocted and distorted facts as made by the complainant in his application under Section 156(3) Cr.P.C.

12. It is further alleged that it was not a case where the investigating agency had not carried out proper investigation, rather the record reveals that statements of all concerned persons including the officials of the bank, ARTRAC and even the complainant and the petitioner had been recorded and it is only after thorough investigation that the investigating agency had concluded that being financial transactions, the same did not involve the commission of any offence by the petitioner. It is also averred that the impugned order has been passed by the learned Magistrate without any application of mind and without going through the facts of the case and the complaint and therefore, deserves to be quashed and set aside.

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

13. The Constitution Bench of Hon'ble Supreme Court in ***Lalita Kumari Vs. State of U.P., (2014) 2 SCC 1***, had posed the following two questions:-

"(i) Whether the immediate non-registration of FIR leads to scope for manipulation by the police which affects the right of the victim/complainant to have a complaint immediately investigated upon allegations being made; and

(ii) Whether in cases where the complaint/information does not clearly disclose the commission of a cognizable offence but the FIR is compulsorily registered then does it infringe the rights of an accused."

Answering the questions posed, the larger Bench opined thus:

"49. Consequently, the condition that is sine qua non for recording an FIR under Section 154 of the Code is that there must be information and that information must disclose a cognizable offence. If any information disclosing a cognizable
offence is led before an officer in charge of the police station satisfying the requirement of Section 154(1), the said police officer has no other option except to enter the substance thereof in the prescribed form, that is to say, to register a case on the basis of such information. The provision of Section 154 of the Code is mandatory and the officer concerned is duty-bound to register the case on the basis of information disclosing a cognizable offence. Thus, the plain words of Section 154(1) of the Code have to be given their literal meaning.

* * *

72. It is thus unequivocally clear that registration of FIR is mandatory and also that it is to be recorded in the FIR book by giving a unique annual number to each FIR to enable strict tracking of each and every registered FIR by the superior police officers as well as by the competent court to which copies of each FIR are required to be sent.

* * *

111. ....The Code gives power to the police to close a matter both before and after investigation. A police officer can foreclose an FIR before an investigation under Section 157 of the Code, if it appears to him that there is no sufficient ground to investigate the same. The section itself states that a police officer can start investigation when he has "reason to suspect the commission of an offence". Therefore, the requirements of launching an investigation under Section 157 of the Code are higher than the requirement under Section 154 of the Code. The police officer can also, in a given case, investigate the matter and then file a final report under Section 173 of the Code seeking closure of the matter. Therefore, the police is not liable to launch an investigation in every FIR which is mandatorily registered on receiving information relating to commission of a cognizable offence.

* * *

115. Although, we, in unequivocal terms, hold that Section 154 of the Code postulates the mandatory registration of FIRs on receipt of all cognizable offences, yet, there may be instances where preliminary inquiry may be required owing to the change in genesis and novelty of crimes with the passage of time. One such instance is in the case of allegations relating to medical negligence on the part of doctors. It will be unfair and inequitable to prosecute a medical professional only on the basis of the allegations in the complaint." (emphasis in original)

After so stating the constitution Bench proceeded to state that where a preliminary enquiry is necessary, it is not for the purpose for verification or otherwise of the information received but only to ascertain whether the information reveals any cognizable offence. After laying down so, the larger Bench proceeded to state:-

> *"120.6. As to what type and in which cases preliminary inquiry is to be conducted will depend on the facts and circumstances of each case. The category of cases in which preliminary inquiry may be made are as under:*
>
> *(a) Matrimonial disputes/family disputes*
>
> *(b) Commercial offences*
>
> *(c) Medical negligence cases*
>
> *(d) Corruption cases*
>
> *(e) Cases where there is abnormal delay/laches in initiating criminal prosecution, for example, over 3 months' delay in reporting the matter without satisfactorily explaining the reasons for delay.*

The aforesaid are only illustrations and not exhaustive of all conditions which may warrant preliminary inquiry.

> *120.7. While ensuring and protecting the rights of the accused and the complainant, a preliminary inquiry should be made time-bound and in any case it should not exceed 7 days. The fact of such delay and the causes of it must be reflected in the General Diary entry."*

14. It would be evident from the aforesaid decision that in certain circumstances, the police is also required to hold preliminary inquiry whether cognizable offence is made out or not and therefore, the police was well in its rights to have conducted the aforesaid preliminary inquiry.

15. In view of the aforesaid exposition of law, the learned Magistrate, while dealing with a complaint under Section 156(3) Cr.P.C. had to remain vigilant with regard to the allegations made and the nature of allegations and should have avoided issuing directions to register the FIR without proper application of mind.

16. The learned Magistrate had also to bear in mind as to whether the registration of the case would be conducive to justice and only then should have passed the requisite order. The learned Magistrate was required to take note of the allegations therein in entirety, the date of incident and whether any cognizable case was made out.

17. Therefore, it follows that in case the police had already investigated into the matter, then obviously until and unless the investigation carried out was either shoddy, single sided or contrary to all norms and procedures, more care, caution and circumspection had to be exercised before directing the registration of FIR. That apart, resort to Section 156(3) Cr.P.C. cannot be a routine procedure and in matters which are predominantly of civil nature, recourse of criminal law in a casual and routine manner cannot be permitted.

18. At this stage, it shall be apt to quote the following observations of the Hon'ble Supreme Court in ***Priyanka Srivastava and another Vs. State of Uttar Pradesh and others, (2015) 6 SCC 287:-***

> *"29. At this stage it is seemly to state that power under Section 156(3) warrants application of judicial mind. A court of law is involved. It is not the police taking steps at the stage of Section 154 of the code. A litigant at his own whim cannot invoke the authority of the Magistrate. A principled and really grieved citizen with clean hands must have free access to invoke the said power. It protects the citizens but when pervert litigations takes this route to harass their fellows citizens, efforts are to be made to scuttle and curb the same.*
>
> *30. In our considered opinion, a stage has come in this country where Section 156(3) Cr.P.C. applications are to be supported by an affidavit duly sworn by the applicant who seeks the invocation of the jurisdiction of the Magistrate. That apart, in an appropriate case, the learned Magistrate would be well advised to verify the truth and also can verify the veracity of the allegations. This affidavit can make the applicant more responsible. We are compelled to say so as such kind of applications are being filed in a routine manner without taking any responsibility whatsoever only to harass certain persons. That apart, it becomes more disturbing and alarming when one tries to pick up people who are passing orders under a statutory provision which can be challenged under the framework of said Act or under Article 226 of the Constitution of India. But it cannot be done to take undue advantage in a criminal court as if somebody is determined to settle the scores.*

> *31. We have already indicated that there has to be prior applications under Section 154(1) and 154(3) while filing a petition under Section 156(3). Both the aspects should be clearly spelt out in the application and necessary documents to that effect shall be filed. The warrant for giving a direction that an application under Section 156(3) be supported by an affidavit so that the person making the application should be conscious and also endeavour to see that no false affidavit is made. It is because once an affidavit is found to be false, he will be liable for prosecution in accordance with law. This will deter him to casually invoke the authority of the Magistrate under Section 156(3). That apart, we have already stated that the veracity of the same can also be verified by the learned Magistrate, regard being had to the nature of allegations of the case. We are compelled to say so as a number of cases pertaining to fiscal sphere, matrimonial dispute/family disputes, commercial offences, medical negligence cases, corruption cases and the cases where there is abnormal delay/laches in initiating criminal prosecution, as are illustrated in Lalita Kumari are being filed. That apart, the learned Magistrate would also be aware of the delay in lodging of the FIR."*

19. Here it would be proper that a reference to the precise grievance of the complainant as contained in para 17 of his complaint under Section 156(3) Cr.P.C. be made and the same reads thus:-

> *"17. That aggrieved by the act and conduct of the UCO Bank, ARTRAC Branch and accused persons, the complainant preferred an application/complaint before the S.H.O. Sadar, Shimla for registration of FIR against the accused. Firstly the SHO and his officials straightway refused the complainant to take the complainant Annexure C/12 and the complainant left with no option except to sent the same through registered post to the SHO copy to the Superintendent of police and Secretary (Home). The complainant verily and bonafidely was under the belief that the SHO Sadar, Shimla had registered an FIR against the accused but to the utter surprise of the complainant the SHO Sadar issued a letter to the complainant whereby he has suggested the complainant to file a case before the competent court of jurisdiction. The SHO, Police Station Sadar has totally failed to take note of the fact that swearing of false affidavit that is too intentionally with a view to cause loss to someone is a serious offence under the Indian Penal Code otherwise if such things are allowed to happen the very sanctity of swearing the affidavit will be lost and it will cause law and order problem in the society. The copy of the Communication dated 11.12.2014 is being annexed herewith as Annexufe C/11. However, surprisingly from the perusal of the annexure C/11 which is a investigation report submitted by the Dy.SP to the Inspector General of Police, Himachal Pradesh on the complaint of Complainant, it is also mentioned that the complainant has already filed Civil Suit against the UCO Bank, ARTRAC Branch, Shimla-1. But at this stage here it is submitted the sad fact is erroneous and from what source this fact has come in the knowledge of Police it also cast doubt about the action of the Police because the complainant has not filed any Civil Suit pertaining to the present cause of action against the UCO Bank, ARTRAC Branch, Shimla or any of the above accused persons."*

20. It would be evident from the above that the complainant had specifically stated that the police though had investigated the case, but it failed to take note of the fact that the petitioner had sworn a false affidavit with a view to cause loss to someone, which was a serious offence.

21. Whereas, the record reveals that all the relevant aspects of the matter had infact been duly inquired into by the police and the same have been summarized in the letter sent by the investigating officer to the Superintendent of Police, Shimla, vide Annexure P-3. It has been clearly stated therein that the matter in issue had been thoroughly investigated by associating all concerned and it is only thereafter concluded that the matter was predominantly of civil nature and the parties had also failed to prove and establish the commission of any criminal offence. As noticed earlier, holding of preliminary inquiry in matters of commercial offence is not otherwise prohibited in terms of the law laid down by the Hon'ble Supreme Court in *Lalita Kumari's* case supra.

22. Now adverting to the order passed by the learned Magistrate, the same does not seem to have been passed after application of judicial mind to the facts of the case. Once the police agencies which are primarily entrusted with the task of investigation, had duly submitted their report, then without adverting or touching upon the same, directions to straight away register FIR ought to have been avoided.

23. This however is not to suggest that the Magistrate could not have under any circumstance ordered the registration of the FIR, as this Court is absolutely clear in its mind that for the purpose of enabling the police to start investigation, it is always open to the Magistrate to direct the police to register FIR and there is nothing illegal in doing so. After all registration of FIR involves the process of recording the substance of information relating to commission of cognizable offence in the book kept by the officer in charge of the concerned police station, as indicated in Section 154 of the Code.

24. But here is a case where the preliminary inquiry had already been conducted establishing therein that the dispute inter se the parties was only of civil nature. Therefore, best course for the Magistrate in such circumstances should have been to have called for a fresh report from the police rather than directing the registration of FIR, more particularly when the complainant had not only arrayed the present petitioner, but had also named Sh. B.K. Bhardwaj, Senior Manager, UCO Bank ARTRAC Branch, Incharge/Branch Manager UCO Bank ARTRAC Branch, Shimla and Sh. Balbir Singh, Additional SP (Urban) as accused and against all of whom the FIR has been ordered to be registered.

25. As observed by the Hon'ble Supreme Court in Priyanka Srivastava case supra, the remedy available under Section 156(3) Cr.P.C. is not of routine nature and exercise of powers there under requires application of judicial mind. The Magistrate exercising said powers must remain vigilant with regard to the allegations made in the application and not to issue directions without proper application of mind. The power under Section 156(3) Cr.P.C. cannot be invoked by the litigant at his own whims to harass others. It can be invoked only by a principled and really grieved citizen to approach the Court with clean hands.

26. The aforesaid observations are being made in the backdrop that both the complainant and the petitioner are in the same business and dealing in tenders awarded by the ARTRAC.

27. Moreover, it is the specific case of the petitioner in Cr.M.P. No. 22 of 2016 that the complaint preferred by the complainant under Section 156(3) Cr.P.C. for registration of FIR was only because of the reason that the petitioner had got contracts from the ARTRAC and on account of registration of FIR, the petitioner would be blacklisted and thus deprived of further contracts. This is because of the practice followed whereby, towards the close of every year, the authorities of ARTRAC send request to concerned Police Station to find out whether any case has been registered against the person who has applied

for the grant of contract from market and because of registration of FIR, the petitioner would henceforth be deprived of award of contract.

28. It was after taking into consideration, the averments contained in this application that this Court on 7.1.2016 passed the following order:-

> ***"Cr.M.P. No. 22 of 2016***
>
> *Heard. Taking into consideration the fact that this Court is already seized of the matter, it is made clear that mere registration of FIR No. 145 of 2015 shall not cause any prejudice to the petitioner insofar as it relates to awarding of the tenders/contract. Reply be filed during the course of the day."*

29. The complainant in reply to this application had not denied the procedure being followed by the ARTRAC, but had only stated that the contents of the application were more in the relm of speculation and the application had been filed under mere apprehension without there being any factual proof of the same.

30. The matter can be looked at from yet another angle. The petitioner has arrayed the State of Himachal Pradesh, Sh. Balbir Singh Jaswal, Additional Superintendent of Police (Urban), and SHO, Police Station Sadar, Shimla as party-respondents No. 1, 5 and 6, who in joint reply have categorically stated that even after registration of FIR in compliance to the directions passed by the learned Magistrate, it has yet again been found that the complaint is of a civil nature and therefore, cancellation report was prepared and has been submitted to the appropriate Court.

31. It is apt to reproduce the contents of paras 5, 5A and 8 of the reply, which reads thus:-

> *"5. That in reply to the para 5 of the petition it is submitted that the averments made therein also seems to be based on true facts, as far as the filing of complaint under Section 156(3) of Cr.PC and investigation carried out by concerned Police Official are concerned. It is also further submitted that in the case sections 403, 406, 420, 467, 468 of IPC were added on the basis of complaint made by complainant/respondent No. 2. During the investigation, it was found that the allegation made by complainant/respondent No. 2 in his complaint against the accused/petitioner and other were found baseless and complaitn of respondent No. 2 could not produce any cogent evidence and on the basis of evidence led by the complainant/respondent No. 2 and the evidence collected by the investigation agency were not found sufficient to implicate the accused/petitioner and thus cancellation report was prepared and the same was submitted before the Ld. Chief Judicial Magistrate, Shimla and is still pending in the Ld. Court.*
>
> *5A. That it is further submitted that 3/4 investigation officers of Police Station Sadar investigated the matter of respondent No. 2 and all the investigation official/officers found the matter civil in nature hence, cancellation report was prepared."*
>
> *8. That the contents of para 8 to the petition it is submitted that FIR was registered on the basis of complaint filed and order for further investigation which were issued by Ld. JMIC-5. As far as the allegation the same were found of Civil nature for which the remedy available to the complainant/respondent No. 2 by way of filing of civil suit before the competent Court of law. Therefore, cancellation report was prepared and submitted before the appropriate Court."*

32. It is a settled legal preposition that <u>*criminal liability should not be imposed in the dispute of civil nature*</u>. It is also equally settled that the High Court's inherent powers, be it in civil or criminal matters, is designed to achieve a salutary public purpose and that a Court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution.

33. This settled preposition of law was once again reiterated by the Hon'ble Supreme Court in its recent decision in ***International Advanced Research Centre for Powder Metallurgy and New Materials (ARCI) and others Vs. Nimra Cerglass Technics Private Limited and another (2016) 1 SCC 348***, wherein it was observed as under:-

> *"22. By an analysis of terms and conditions of the agreement between the parties, the dispute between the parties appears to be purely of civil nature. It is settled legal proposition that criminal liability should not be imposed in disputes of civil nature. In Anil Mahajan vs. Bhor Industries Ltd. & Anr. (2005) 10 SCC 228, this Court held as under:-*
>
> > *"6. .....A distinction has to be kept in mind between mere breach of contract and the offence of cheating. It depends upon the intention of the accused at the time of inducement. The subsequent conduct is not the sole test. Mere breach of contract cannot give rise to criminal prosecution for cheating unless fraudulent, dishonest intention is shown at the beginning of* the transaction.
> >
> > * * *
> >
> > *8. The substance of the complaint is to be seen. Mere use of the expression cheating in the complaint is of no consequence. Except mention of the words deceive and cheat in the complaint filed before the Magistrate and cheating in the complaint filed before the police, there is no averment about the deceit, cheating or fraudulent intention of the accused at the time of entering into MOU wherefrom it can be inferred that the accused had the intention to deceive the complainant to pay..... We need not go into the question of the difference of the amounts mentioned in the complaint which is much more than what is mentioned in the notice and also the defence* of the accused and the stand taken in reply to notice because the complainants own case is that over rupees three crores was paid and for balance, the accused was giving reasons as above-noticed. The additional reason for not going into these aspects is that a civil suit is pending inter se the parties for the amounts in question."
>
> *23. In M/s Indian Oil Corporation vs. NEPC India Ltd. & Ors., (2006) 6 SCC 736, this court observed that civil liability cannot be converted into criminal liability and held as under:- (SCC pp. 748-49, paras 13-14)*
>
> > *"13. While on this issue, it is necessary to take notice of a growing tendency in business circles to convert purely civil disputes into criminal cases. This is obviously on account of a prevalent impression that civil law remedies are time consuming and do not adequately protect the interests of lenders/creditors. Such a tendency is seen in several family disputes also, leading to irretrievable breakdown of marriages/families. There is also an impression that if a person could somehow be entangled in a criminal prosecution, there is a likelihood of imminent settlement. Any effort to settle civil disputes and claims, which do not involve any criminal offence, by applying pressure*

through criminal prosecution should be deprecated and discouraged. In G. Sagar Suri v. State of U.P. (2000) 2 SCC 636 this Court observed: (SCC p. 643, para 8)

> *'8……It is to be seen if a matter, which is essentially of a civil nature, has been given a cloak of criminal offence. Criminal proceedings are not a short cut of other remedies available in law. Before issuing process a criminal court has to exercise a great deal of caution. For the accused it is a serious matter. This Court has laid certain principles on the basis of which the High Court is to exercise its jurisdiction under Section 482 of the Code. Jurisdiction under this section has to be exercised to prevent abuse of the process of any court or otherwise to secure the ends of justice.*

14. While no one with a legitimate cause or grievance should be prevented from seeking remedies available in criminal law, a complainant who initiates or persists with a prosecution, being fully aware that the criminal proceedings are unwarranted and his remedy lies only in civil law, should himself be made accountable, at the end of such misconceived criminal proceedings, in accordance with law. One positive step that can be taken by the courts, to curb unnecessary prosecutions and harassment of innocent parties, is to exercise their power under Section 250 CrPC more frequently, where they discern malice or frivolousness or ulterior motives on the part of the complainant. Be that as it may."

24. Learned counsel for the respondent submitted that any defence to be taken by the appellants is to be raised only during the course of trial and is not to be raised in the initial stage of the prosecution. In support of his contention, the learned counsel placed reliance upon Trisuns Chemical Industry vs. Rajesh Agarwal & Ors. (1999) 8 SCC 686; Rajesh Bajaj vs. State NCT of Delhi and Ors. (1999) 3 SCC 259; P. Swaroopa Rani vs. M.Hari Narayana Alias Hari Babu (2008) 5 SCC 765 and Iridium India Telecom Ltd. vs. Motorola Incorporated & Ors. (2011) 1 SCC 74. Learned counsel for the respondent further submitted that when the Magistrate has taken cognizance of an offence and the power of the High Court to interfere is only to a limited extent, the High Court cannot substitute its view for the summoning order passed by the Magistrate. In support of this contention, learned counsel placed reliance upon the decisions of this Court in Fiona Shrikhande vs. State of Maharashtra & Anr. (2013) 14 SCC 44; Bhushan Kumar & Anr. vs. State (NCT) of Delhi & Anr. (2012) 5 SCC 424 and Smt. Nagawwa vs. Veeranna Shivalingappa Konjalgi & Ors. (1976) 3 SCC 736.

25. The above decisions reiterate the well-settled principles that while exercising inherent jurisdiction under Section 482 Cr.P.C., it is not for the High Court to appreciate the evidence and its truthfulness or sufficiency inasmuch as it is the function of the trial court. High Courts inherent powers, be it, civil or criminal matters, is designed to achieve a salutary public purpose and that a court proceeding ought not to be permitted to degenerate into a weapon of harassment or persecution. If the averments in the complaint do not constitute an offence, the court would be justified in quashing the proceedings in the interest of justice."

34. In view of the aforesaid discussion, this Court has no hesitation in concluding that the complaint filed by respondent No. 2 under Section 156(3) Cr.P.C. was neither bonafide and had rather been filed with the sole object of getting the petitioner blacklisted, so as to deprive him from consideration of award of tenders of the ARTRAC. Even in the further investigation carried out by the police after registering of FIR in compliance to the order of the learned Magistrate, it has been found that the contents of the complaint were baseless and the complainant had failed to produce any cogent evidence, which could be found to be sufficient to implicate the petitioner, rather the same has now led to submission of the cancellation report.

35. The complainant in such circumstances cannot, therefore, be termed to be a principled and really grieved citizen and having failed to approach the Court with clean hands cannot, therefore, be provided a free access to invoke the powers of the Magistrate. Powers under Section 156(3) Cr.P.C. only protects the citizens but when pervert litigants like the complainant herein takes this route to harass their fellow citizens, efforts are to be made to scuttle and curb the same. (Refer Priyanka Srivastava case supra).

36. In view of the above discussion, there is merit in this petition and the same accordingly succeeds. Consequently, not only the order passed by the Judicial Magistrate, Ist Class, Court No. (5), Shimla on 23.6.2015, but also the FIR No. 145 dated 6.7.2015, registered pursuant to the aforesaid directions are ordered to be quashed.

37. Since the complainant/respondent No. 2 has unnecessarily harassed the petitioner, he is directed to compensate the petitioner by paying a sum of `50,000/- to him within one month, failing which the petitioner shall be at liberty to recover the same in accordance with law. The petition is disposed of in the aforesaid terms.

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

Kuldeep ...Petitioner.
Versus
Sunita Devi and another ...Respondents.

CMPMO No. 92 of 2015.
Reserved on: 11.4.2016.
Date of decision: 18.04.2016.

Indian Evidence Act, 1872- Section 45- Plaintiff filed an application for conducting DNA test by expert for determining the paternity of minor- it was subsequently asserted in the plaint that defendant had withdrawn from the society of the plaintiff from 28.11.2004 till filing of the suit- therefore, minor baby delivered on 26.08.2007 was not begotten from his loins – application was dismissed by the trial Court- held, that in a dispute concerning the paternity of the child, court had jurisdiction to pass an order for conducting DNA profile of the person who denies the fatherhood- DNA profiling would settle the controversy regarding the infidelity of the defendant- presumption of paternity can be rebutted by non access- application allowed. (Para-2 to 7)

Case referred:
Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633

For the petitioner: Mr. Vikrant Chandel, Advocate.
For the respondents: Mr. Ashok Kumar Verma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The instant petition stands directed against the impugned rendition of the learned Civil Judge (Sr. Division), Nadaun, District Hamirpur, whereby it dismissed an application under Section 45 of the Indian Evidence Act read with Section 151 CPC preferred before it by the plaintiff with a prayer therein for its ordering the holding of a DNA test by the expert concerned for determining the paternity of minor Anjali Kumari. The application aforesaid stood instituted at the instance of the petitioner herein plaintiff before the learned trial Court, in a suit wherein there is a pointed averment of respondent No.1 continuously from 28.11.2004 till the institution of the suit before the learned trial Court by the plaintiff petitioner herein completely alienating herself from the matrimonial company of the plaintiff. Hence, it stood averred by the plaintiff of the minor baby delivered by respondent No. 1 on 26.08.2007 standing not begotten from his loins rather her birth being attributable to respondent No.1 herein holding an adulterous relationship with an unknown person. In the impugned rendition, it stands propounded of the stigma of bastardization standing imputed to the minor child in the event of the out come of the DNA profiling of the blood samples of the petitioner herein with the DNA profiling of the blood samples of the minor child standing opined by the expert concerned to be not matching, constituting the predominant reason for its rejecting the apposite application preferred before it by the petitioner herein besides therein it stands propounded of the apposite application preferred before it at the instance of the petitioner herein entailing rejection on the score of its standing preferred at a belated stage when arguments alone remained to be addressed in the civil suit.

2. The impugned rendition of the learned trial Court is completely off the mark qua the legal principles to be borne in mind by Courts of law while adjudicating upon an application preferred before them by a person who denies on account of infidelity or unchastity of his wife, the factum of the child delivered by his purportedly unchaste wife, his fathering it. The apt legal principles whereof stand encapsulated in a judgement of the Hon'ble Apex Court report in **Bhabani Prasad Jena Vs. Convenor Secretary, Orissa State Commission for Women and another, (2010) 8 SCC 633**, relevant paragraphs stand extracted hereinafter:

> "21. In a matter where paternity of a child is in issue before the court, the use of DNA is an extremely delicate and sensitive aspect. One view is that when modern science gives means of ascertaining the paternity of a child, there should not be any hesitation to use those means whenever the occasion requires. The other view is that the court must be reluctant in use of such scientific advances and tools which result in invasion of right to privacy of an individual and may not only be prejudicial to the rights of the parties but may have devastating effect on the child. Sometimes the result of such scientific test may bastardise an innocent child even though his mother and her spouse were living together during the time of conception.
>
> 22. In our view, when there is apparent conflict between the right to privacy of a person not to submit himself forcibly to medical examination and duty of the court to reach the truth, the court must exercise its discretion only after balancing the interests of the parties and on due

consideration whether for a just decision in the matter, DNA is eminently needed. DNA in a matter relating to paternity of a child should not be directed by the court as a matter of course or in a routine manner, whenever such a request is made. The court has to consider diverse aspects including presumption under Section 112 of the Evidence Act; pros and cons of such order and the test of 'eminent need' whether it is not possible for the court to reach the truth without use of such test.

23. There is no conflict in the two decisions of this Court, namely, Goutam Kundu1 and Sharda2 . In Goutam Kundu1 , it has been laid down that courts in India cannot order blood test as a matter of course and such prayers cannot be granted to have roving inquiry; there must be strong prima facie case and court must carefully examine as to what would be the consequence of ordering the blood test. In the case of Sharda2 while concluding that a matrimonial court has power to order a person to undergo a medical test, it was reiterated that the court should exercise such a power if the applicant has a strong prima facie case and there is sufficient material before the court. Obviously, therefore, any order for DNA can be given by the court only if a strong prima facie case is made out for such a course.

24 Insofar as the present case is concerned, we have already held that the State Commission has no authority, competence or power to order DNA. Looking to the nature of proceedings with which the High Court was concerned, it has to be held that High Court exceeded its jurisdiction in passing the impugned order. Strangely, the High Court over-looked a very material aspect that the matrimonial dispute between the parties is already pending in the court of competent jurisdiction and all aspects concerning matrimonial dispute raised by the parties in that case shall be adjudicated and determined by that Court. Should an issue arise before the matrimonial court concerning the paternity of the child, obviously that court will be competent to pass an appropriate order at the relevant time in accordance with law. In any view of the matter, it is not possible to sustain the order passed by the High Court."

3. Since in the afore extracted paragraphs of the rendition of the Hon'ble Apex Court, the competent court seized of an issue devolving upon the paternity of a child stands clothed with jurisdiction to pass an order for the holding of DNA profiling of the person who denies his fathering the child delivered by his purportedly unchaste wife alongwith the DNA profiling of the child, paternity whereof stands denied by the aggrieved. Since the learned trial Court stood seized of a suit instituted by the petitioner herein with pointed and categorical averments constituted therein of the baby child delivered by respondent No.1 standing not begotten from his loins rather its birth being an outcome of an adulterous relationship which respondent No.1 entered into with an unknown person aroused by the factum of both living apart or both not cohabiting since November, 2004 uptil the respondent No.1 delivered the baby child thereupon constituting a vivid portrayal of both the petitioner and respondent No.1 not holding any opportunity to stand engaged in sexual intercourse, necessarily hence it was incumbent upon the learned trial Court to for setting at rest the pertinent issue of respondent No. 2 standing begotten or not begotten from the loins of the plaintiff petitioner herein, to order for the holding of DNA profiling of blood samples of respondent No.2 along with the DNA profiling of the blood samples of the petitioner herein by an expert concerned. The ordering of by the learned trial Court the holding of the apposite DNA test by an expert concerned would have also set at rest the assertion of the plaintiff qua infidelity of respondent No.1 Furthermore, the holding of a DNA

test and its outcome both being a well approbated scientific method for setting at rest the pertinent issue qua the paternity of a child, issue whereof arose in a litigation of which the learned trial Court should seized of, its being ordered by it to be held by the expert concerned was apt, as given its scientificity it would have forthrightly clinched the issue qua respondent No.2 standing or standing not begotten from the loins of the plaintiff-petitioner herein. Even though the holding of a DNA test is conclusive besides the best evidence for determining the issue of paternity nonetheless the learned trial Court in declining the prayer of the petitioner qua its being directed by it to be held, appears to stand guided by the stigma of bastardization standing imputed to the minor child in case the out come of the DNA test leans in favour of the assertion set up by the petitioner of his not fathering respondent No.2. However, the aforesaid obstacle of a stigma of bastardization standing imputed to the minor child in case the out come of the DNA test leans in favour of the petitioner/plaintiff, as stands propounded by the learned trial Court for its omitting to order for its holding, is a flimsy and specious reason which stands benumbed by a judgement of the Apex Court reported in Nandlal Wasudeo Badwaik vs. Lata Nandlal Badwaik and another, (2014) 2 SCC 576, relevant paragraphs 17 to 19 stand extracted hereinafter.

> "17 We may remember that Section 112 of the Evidence Act was enacted at a time when the modern scientific advancement and DNA test were not even in contemplation of the Legislature. The result of DNA test is said to be scientifically accurate. Although Section 112 raises a presumption of conclusive proof on satisfaction of the conditions enumerated therein but the same is rebuttable. The presumption may afford legitimate means of arriving at an affirmative legal conclusion. While the truth or fact is known, in our opinion, there is no need or room for any presumption. Where there is evidence to the contrary, the presumption is rebuttable and must yield to proof. Interest of justice is best served by ascertaining the truth and the court should be furnished with the best available science and may not be left to bank upon presumptions, unless science has no answer to the facts in issue. In our opinion, when there is a conflict between a conclusive proof envisaged under law and a proof based on scientific advancement accepted by the world community to be correct, the latter must prevail over the former.
>
> 18 We must understand the distinction between a legal fiction and the presumption of a fact. Legal fiction assumes existence of a fact which may not really exist. However presumption of a fact depends on satisfaction of certain circumstances. Those circumstances logically would lead to the fact sought to be presumed. Section 112 of the Evidence Act does not create a legal fiction but provides for presumption.
>
> 19. The husband's plea that he had no access to the wife when the child was begotten stands proved by the DNA test report and in the face of it, we cannot compel the appellant to bear the fatherhood of a child, when the scientific reports prove to the contrary. We are conscious that an innocent child may not be bastardized as the marriage between her mother and father was subsisting at the time of her birth, but in view of the DNA test reports and what we have observed above, we cannot forestall the consequence. It is denying the truth. "Truth must triumph" is the hallmark of justice."

4. Given the expostulations enunciated in the afore extracted relevant paragraphs of the verdict of the Hon'ble Apex Court of even the consequence of the minor child standing imputed with a stigma of bastardization in case the out come of the DNA test leans in favour of the aggrieved, not operating as a deterrent for the Court concerned

whereat the apposite application is laid, to hence order its holding, re-enforcingly unsettles the force of the reason embodied in the impugned rendition of a stigma of bastardization standing imputed to the minor child in case the out come of the DNA test leans in favour of the petitioner herein hence its concomitantly standing constrained to not order for the holding of a DNA test by the expert concerned.

5. Moreover in the impugned rendition the learned trial Court had while rejecting the apposite application preferred before it by the petitioner herein drawn succor from the provisions of Section 112 of the Indian Evidence Act wherein a contemplation exists of a child born during the continuance of a valid marriage and within 280 days after its dissolution, the mother remaining unmarried constituting conclusive proof of the child being the legitimate son of that man unless it is demonstrated by cogent proof of the marital partners holding no access to each other at any time when the child could have been begotten, to conclude of with proof standing adduced at the instance of the plaintiff in support of his averments of his holding no access to respondent No.1 at any time the child could have been begotten, its probative worth being yet available to be weighed by the learned trial Court vigour whereof would stand pronounced in its rendition in the civil suit preferred by the plaintiff before it, carrying a consequential effect of the apposite application being a belated besides an illusory exercise reiteratedly preeminently when in rebuttal to the conclusivity of the paternity of the child as contemplated in the earlier part of the provisions of Section 112 of the Indian Evidence Act the apposite evidence stands already adduced before it. However, the aforesaid reason ought to suffer the fate to its being axed by this Court. The reason for proceeding to do so is of even if proof if any standing adduced before the learned trial Court by the plaintiff petitioner herein qua his holding no access to respondent No.1 at the time when respondent No.2 would have been begotten, which evidence may unsettle the presumption qua conclusivity of paternity of a child on satiation of the ingredients constituted in the earlier part of Section 112 of the Indian Evidence Act which stands extracted hereinafter:

> "112. Birth during marriage, conclusive proof of legitimacy.- The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

6. Nonetheless even in the face of adduction of the aforesaid apposite proof by the plaintiff for benumbing besides rebutting the aforesaid presumption, apart therefrom when its probative vigour and worth yet standing not adjudicated upon by the learned trial Court, cannot oust any concert of the petitioner herein to also displace or dislodge the presumption aforesaid constituted in the earlier part of Section 112 of the Indian Evidence Act in the event of satiation of ingredients enshrined therein by his seeking through an apposite application preferred before it, the ordering by the learned trial Court qua the holding of the DNA profiling of the blood samples of both petitioner and respondent No.2 by the expert concerned**.** The aforesaid concert stands approbated by the Hon'ble Apex Court in the relevant portion of its verdict as stands extracted hereinabove to be a tenable course for unsettling or dislodging the presumption constituted qua conclusivity of paternity of child on satiation of the parameters enshrined in the earlier part of Section 112 of the Indian Evidence Act. In sequel, it was inapt for the learned trial Court to merely for adduction of proof at the instance of the petitioner plaintiff before the learned trial Court for dislodging the presumption qua the conclusivity of paternity of respondent No.2 on purported satiation of the ingredients enshrined in its earlier part proof whereof stands comprised in his

unveiling of his holding no access to respondent No.1 at any time when the child could have been begotten tenacity whereof yet remaining unadjudicated, hence conclude of the apposite application entailing dismissal especially when the holding of a DNA test stands mandated in the afore extracted relevant paragraphs of the rendition of the Hon'ble Apex Court to be the best besides a scientific mode to conclusively determine the paternity of respondent No.2 besides it being an apposite mode to display the presumption qua the conclusivity of paternity of respondent No.2 created by earlier part of Section 112 of the Indian Evidence Act on purported satiation of ingredients enshrined therein hence getting scuttled.

7. In aftermath, the rendition of the learned trial Court is set-aside. However, it would be just and fair to record a caveat of the respondent No.1 being at liberty to on behalf of respondent No.2 refrain the latter from providing her blood samples for theirs being matched on theirs standing subjected to DNA profiling with the DNA profiling of the blood sample of the petitioner herein. She, in case, on behalf of respondent No.2 withholds her to undergo DNA test, then it shall be open to the learned trial Court to draw in terms of the illustration in Section 114(h) of the Indian Evidence Act, which stands extracted hereinafter, an adverse inference against respondent No.1.

(h) That if a man refuses to answer a question which he is not compelled to answer unfavourable to the person who withholds it:

The petition stands disposed of in the aforesaid terms.

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

Prem Lata Thakur ...Petitioner

Versus

State of H.P. & others ....Respondents

CWP No.2313 of 2008.
Reserved On: 11.04.2016.
Decided on: 18.04.2016

Constitution of India, 1950- Article 226- Petitioner filed a writ petition for seeking appointment for the post of Assistant Librarian from the date of her appointment as a Librarian Clerk with consequential relief of pay scale attached to the post of Assistant Librarian- respondents denied the claim of the petitioner- held, that claim of the petitioner was sponsored by the Employment Exchange for participating in the interview to be held by respondent for selection to the post of Assistant Librarian- he was selected for the post of Assistant Librarian- however, corrigendum was issued subsequently by the Principal pointing out the mistake in the letter and stating that post of Librarian Clerk was to be filled up- petitioner was aware that she was being selected for the post of Librarian Clerk- she cannot claim appointment against the post of Assistant Librarian- Writ petition dismissed. (Para-2 to 6)

For the petitioner : Ms.Bhawna Dutta, Advocate.

For the respondents : Mr.Vivek Singh Attri & Mr.Pankaj Negi, Deputy Advocates General, for respondents No.1 & 3.
Mr.J.L.Bhardwaj, Advocate for respondent No.2.
Mr.K.D.Sood, Sr.Advocate with Mr.Mukul Sood, Advocate for respondents No.4 to 6.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge.

The petitioner claims in the instant writ petition for a direction being rendered to the respondents to give her appointment against the post of Assistant Librarian from the date of hers appointment as a Librarian Clerk i.e. 9.10.1997. Moreover, she prays for the consequential relief of the pay scale attached to the post of Assistant Librarian being afforded to her. Apart there-from, a relief is claimed from this Court of the respondents being directed to give her promotion to the post of Assistant Librarian in consonance with Annexure P-11.

2. The petitioner had through various representations made to the authorities concerned as stands comprised in Annexures appended to the writ petition ventilated therein a grievance of the respondent concerned not affording to her the benefit of appointment to the post of Assistant Librarian from her hitherto assignment of a Librarian Clerk. Despite hers representing to the respondent concerned for begetting an appropriate amendment in her appointment letter besides hers standing afforded the consequential benefit of the pay scale attached for the post of Assistant Librarian the respondent concerned declined to afford in her favour the reliefs ventilated by her in her representations. In sequel she stands constrained to institute the instant writ petition before this Court with a prayer made therein of the aforesaid reliefs encapsulated therein being standing directed by this Court for theirs standing afforded to her by the respondent concerned.

3. The respondents filed a detailed reply to the writ petition wherein they contested the entitlement of the petitioner to seek appointment against the post of Assistant Liberian. Also the respondents in their response to the writ petition contested the entitlement of the petitioner to avail the benefit of the pay scale attached to the post of Assistant Librarian.

4. The name of the petitioner stood sponsored by the Employment Exchange/Sub Employment Exchange, Sri Naina Devi Ji for enabling her to participate in the interview to be held by the respondent concerned for adjudging her suitability for selection besides her appointment against the post of Assistant Librarian at Shri Shakti Sanskrit College, Sri Nainadevi Ji, District Bilaspur. Her participation standing elicited by the respondent concerned for adjudging her suitability for selection and appointment against the post of Assistant Librarian is lent sustenance by Annexure P-3/T a perusal whereof depicts of the Principal, Shri Shakti Sanskrit College, Sri Nainadevi Ji, District Bilaspur thereunder requisitioning her to participate in an interview for the post of Assistant Librarian. Thereupon the counsel for the petitioner contends of her standing subsequently appointed by the respondent concerned against the post of Librarian Clerk is in open conflict with the manifestations of Annexure P-3/T. She also contends of hence the respondent concerned untenably denying to her appointment to the post of Assistant Librarian besides the respondent concerned unwarrantedly refusing to afford to her the pay scale attached to the post of Assistant Librarian.

5. Be that as it may, the vigour of the contention of the learned counsel for the petitioner anvilled upon Annexure aforesaid stands blunted by the factum (a) of the Principal, Shri Shakti Sanskrit College, Sri Nainadevi Ji, District Bilaspur, under Annexure R-4/2/T manifestly prepared on a date subsequent to the preparation of Annexure P-3/T intimating all the aspirants seeking theirs being considered for selection and appointment against the post of Assistant Librarian as previously stood intimated to each under

Annexure P-3/T to be available for being filled up qua portrayals in Annexure P-3/T arising from an error necessitating the issuance of a corrigendum comprised in Annexure R-4/2/T with a depiction therein of the post of Librarian Clerk in the pay scale of Rs.950-1800 being rather available for its being filled up. Moreover, a communication stands displayed in Annexure R-4/2/T of a requisition being made to all the aspirants inclusive of the petitioner for participating in an interview to be held for filling up the post of Library Clerk. The petitioner has not placed on record any material in display of the factum of hers not receiving Annexure R-4/2/T. Consequently, the ensuing conclusion is of hers standing apprised by the respondent concerned qua her participation standing elicited by it in an interview to be conducted/held for the post of Library Clerk. Necessarily hence the petitioner cannot contend of the respondent concerned interviewing her for filling up the post of Assistant Librarian. Moreover, with Annexure R-4/2/T standing transmitted besides received by the petitioner on a date prior to the holding of the interview by the respondent concerned for filling up the vacancy of Library Clerk as marked in Annexure R-4/2/T saps the strength of the contention of the counsel for the petitioner herein of the respondent concerned as stands established by Annexure P-3/T requisitioning her participation in an interview to be held for filling up the post of Assistant Librarian and it/theirs in conflict therewith offering her appointment to the post of Library Clerk nor it gives any fillip to the contention of hence the respondent concerned rearing an apposite legitimate expectation in her mind for concomitantly vesting in her right if any to claim appointment against the post of Assistant Librarian with all consequential benefits (b) with a vivid portrayal in Annexure P-4/T of the respondent concerned offering her appointment to the post of Library Clerk a copy whereof stood transmitted and received by her besides also she stood interviewed for adjudging her suitability for selection besides appointment against the post of Librarian Clerk, also when in pursuance whereof she under Annexure P-5/T stood directed to take over the charge of the Library being a Library Clerk from Murari Lal, Library Superintendent, apart therefrom when she under Annexure R-4/2/T in pursuance to her appointment letter comprised in Annexure P-4/T submitted her joining with the respondent concerned as a Library Clerk sequels an inference of hers acquiescing to her standing appointed against the post of Library Clerk carrying a pay scale of Rs.950-1800 with the concomitant effect of hers standing estoped from calling upon the respondent concerned to make an amendment in the nomenclature of the post depicted in her appointment letter besides also estops her to claim the consequential benefits attached to the post of Assistant Librarian, (c) Annexure R-4/4 while unveiling the strength of posts in each category available with Shri Shakti Sanskrit College, Sri Nainadevi Ji also preeminently marks therein the pivotal fact of a post of Library Clerk alone standing borne on the establishment of Shri Shakti Sanskrit College, Sri Nainadevi Ji. Obviously the holding of an interview by the respondent concerned for filling up the post of Library Clerk hence the petitioner's standing appointed against it apart therefrom hers joining as a Library Clerk, is in tandem with and in consonance with the markings in Annexure R-4/4 of the aforesaid post and not the post of Assistant Librarian whereto the petitioner untenably claims an appointment besides the benefit of the pay scale attached to it being available to be filled up in the college concerned. In sequel, the grievance as ventilated by the petitioner through various representations to direct the respondents concerned to appoint her against the post of Assistant Librarian and to afford the pay scale of Rs.10,000-15,200/- cannot come to be countenanced by this Court.

6. The reliance placed by the petitioner upon Annexure P-11 embodying the Recruitment & Promotion Rules for the post of Assistant Librarian, Class III, Technical Education Department, Himachal Pradesh, for on its analogy stake a claim for the respondents being directed to appoint her against the post of Assistant Librarian, is misconceived as the post of Assistant Librarian embodied in Annexure P-11 is available in

the Technical Education Department of the Government of Himachal Pradesh whereas Shri Shakti Sanskrit College, Sri Nainadevi Ji is managed by respondents No.5 and 6 hence with the nomenclature of both the aforesaid being contra-distinct the respondent concerned herein cannot hence be construed to be a part of the Department of Technical Education Government of Himachal Pradesh for hence applying qua their staff/employee the Recruitment & Promotion Rules embodied in Annexure P-11 with a manifestation therein of a post of Assistant Librarian standing borne on its establishment. Moreover, with Annexure R-4/4/T enunciating the factum of the post of only of Library Clerk being available on the establishment of Shri Shakti Sanskrit College, Sri Nainadevi Ji undermines the efficacy besides overcomes the reliance if any as untenably placed by the petitioner upon Annexure P-11 (d) the petitioner has relied upon Annexure D-5 comprising a communication purveyed to her by the District Employment Officer and Public Information Officer, in the month of September 1997 of one post of Pustakalaya Adhyaksha standing advertised for being filled up, for contending of the post as advertised in the month of September, 1997 by the respondent concerned for being filled up was not of a Library Clerk rather was of a Assistant Librarian. However, the information purveyed in Annexure D-5 to the petitioner of a post of Pustakalaya Adhyaksha standing advertised by the respondent concerned for its being filled up, cannot at all lend any sustenance to the contention of the learned counsel for the petitioner of it carrying a parlance equivalent to the one borne by Assistant Librarian. As a sequitur, no reliance can be placed by the learned counsel for the petitioner upon the information purveyed to her under Annexure D-5 of hence the post of Assistant Librarian standing advertised by the respondent concerned besides gives no empowerment to her to contend of hers participating in an interview to fill up the post aforesaid. Contrarily in the face of the aforesaid discussion, unfolding the prima donna factum of only a post of Library Clerk standing borne on the establishment of the college concerned for its being filled up in consonance whereof apposite communications stood addressed to the petitioner prior to hers facing an interview for the post of Library Clerk besides on hers standing declared successful by the Interviewing Board concerned she stood appointed against the post of Library Clerk by the respondent concerned also when she put in her joining in the college concerned as a Library Clerk divests her to at all contend mainly on Annexure D-5 with a communication therein of the post of Pustakalaya Adhyaksha standing advertised to be filled up in the college concerned which nomenclature is contra-distinct to the parlance borne by the term Assistant Librarian besides hence not equitable to it, to also debar her to contest the efficacy of all the aforesaid Annexures palpably displaying of hers standing appointed as a Library Clerk.

7. In view of the above discussion, the writ petition stands dismissed along with all pending applications. No costs.

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

State of H.P. .....Appellant.

Versus

Raj Kumar .....Respondent.

Cr. Appeal No. 331 of 2010.
Reserved on: April 12, 2016.
Decided on: April 18, 2016.

Indian Penal Code, 1860- Section 376 and 506- Prosecutrix was alone in her house, when the accused came and raped her- accused also threatened to kill the prosecutrix in case of disclosure to this fact to any person- accused also raped her subsequently on different occasions- incident was narrated to her mother by the prosecutrix on which FIR was registered – accused was tried and acquitted by the trial court- held, in appeal that prosecutrix was major at the time of incident- the version that she was repeatedly raped and had not disclosed the incident to any person cannot be believed as the prosecutrix was supposed to narrate the incident to her mother- accused had handed over a letter to her which shows that accused and prosecutrix were closely known to each other- there were discrepancies in the testimonies of witnesses recorded by the police and as deposed in the Court- prosecutrix was not willing for medical examination earlier- in these circumstances, trial Court had rightly acquitted the accused- appeal dismissed. (Para-11 to 14)

For the appellant: Mr. M.A.Khan, Addl. Advocate General.
For the respondent: Mr. Rajesh Mandhotra, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment dated 23.12.2009, rendered by the learned Addl. Sessions Judge (FTC), Kangra at Dharamshala, H.P., in RBT Sessions Case No. 7-B/VII/09, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 376 and 506 IPC has been acquitted.

2. The case of the prosecution, in a nut shell, is that the prosecutrix lodged the FIR in Police Station Baijnath on 28.4.2008 on the allegations that she was resident of village Kahan, PO Dagoh, Tehsil Jaisinghpur, Distt. Kangra, H.P. She had appeared in 10th standard examination. Her father was in private job at Delhi whereas she alongwith her mother and two younger brothers used to reside in the village. In September, 2007, when she was alone in her house, the accused came to her house and without her consent forcibly committed rape with her. The accused threatened her not to reveal this occurrence to anybody otherwise he would kill her. Thereafter, again in December, 2007, accused committed sexual intercourse with her and out of fear she did not reveal it to anybody. On 26.4.2008, the accused took the prosecutrix to the fields after deceiving her and again committed rape with her. The occurrence was narrated by the prosecutrix to her mother and consequently the matter was reported to the police. The FIR was registered. The police took into possession the clothes of the prosecutrix and underwear of the accused. The prosecutrix was taken to the Medical Officer for medical examination but she refused. Her statement was recorded under Section 164 Cr.P.C. The case was investigated and challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 15 witnesses. The accused was also examined under Section 313 Cr.P.C. He pleaded innocence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. M.A. Khan, Addl. Advocate General has vehemently argued that the prosecution has proved its case against the accused persons. On the other hand, Mr. Rajesh Mandhotra, Advocate for the accused has supported the judgment of the learned trial Court dated 23.12.2009.

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

6. PW-1 Dr. Priti Sood testified that on 28.4.2008, the police moved an application Ext. PW-1/A for examining the prosecutrix. She issued MLC Ext. PW-1/B. The victim had refused to get pelvic medical examination. There was an alleged history of rape in September, 2007 and on 26.4.2008. Again on 4.6.2008, the prosecutrix was examined by her and Dr. Mrs. Sushma Sood on the application of police Ext. PW-1/C. On that day, the prosecutrix had given in writing not to get herself medically examined. She issued MLC Ext. PW-1/D.

7. PW-2 is the prosecutrix. She testified that accused had come to her in the month of September, 2007. She was alone in her house. Her mother had gone to market and her brothers had gone out to graze cattle. The accused committed sexual intercourse with her forcibly. Accused had threatened her not to reveal this incident to her mother otherwise he would kill her. In December, 2007 again accused committed sexual intercourse with her. On 26.4.2008, accused again came to her and gave her a letter and took her to jungle where he forcibly committed sexual intercourse with her. She identified letter mark-K. On 26.4.2008 she narrated to her mother the episode of sexual intercourse. Next day her father came from Delhi and her mother informed him. He went to the Police Station and informed the incident to the police. FIR Ext. PW-2/A was registered. In her cross-examination, she admitted that many houses are situated around her house. Her father used to visit home after 2/3 months. She knew accused Raj Kumar for the last 4/5 years. She admitted that on 26.4.2008, she had gone out on foot. Accused had taken her out at a distance of 1 ½ km. It was evening time.

8. PW-3 Jaswant Singh testified that on 26.4.2008, his wife telephonically informed him qua the incident. When he came to his house, her daughter handed over Mark-K which was given to her by the accused.

9. PW-8 Dr. Sudesh Kaul has examined the accused and issued MLC Ext. PW-8/B.

10. PW-12 ASI Rajinder Paul deposed that he was handed over the investigation of the case. On 29.4.2008, he visited the spot and prepared spot map Ext. PW-12/A. On 28.4.2008, the prosecutrix was sent for medical examination. No lady doctor was available in Baijnath hospital, so she was taken to Palampur hospital where she refused to get her medically examined. On 8.5.2008, father of the prosecutrix came to the Police Station and handed over the letter allegedly written by the accused. In this regard memo Ext. PW-6/A was prepared. On 1.7.2008, SHO Mangat Ram moved an application before the JMIC, Baijnath for obtaining specimen handwriting of the accused. He obtained the specimen handwriting of the accused vide Ext. PW-12/D to PW-12/P. On 29.5.2008 the statement of the prosecutrix was recorded under Section 164 Cr.P.C. vide Ext. PW-12/Q before the JMIC, Baijnath. The prosecutrix was taken to Baijnath hospital for medical examination but she again refused for medical examination.

11. The prosecutrix was major at the time of the incident. The version of the prosecution cannot be believed that accused had raped her in the month of September, December, 2007 and on 26.4.2008. In case she had been raped in the month of September/December, 2008, she should have definitely narrated the incident to her mother. The prosecution case is that on 26.4.2008, the prosecutrix was deceived by the accused and raped against her will. It has come in the statement of the prosecutrix that she knew the accused for the last 4/5 years. According to the prosecutrix, the accused had handed over letter to her. The letter was sent for comparison to question document examiner to compare

it with specimen handwriting. The expert opinion is Ext. PC. It is proved that Mark-K, letter is in the hand of accused Raj Kumar. The contents of the letter demonstrate that the accused and the prosecutrix were closely intimated to each other.

12. The statement of the prosecutrix was also recorded under section 164 Cr.P.C. before the learned JMIC, Baijnath vide Ext. PW-12/Q. According to her statement, in the month of September, 2007, accused had raped her 1-2 times and in the month of December, 2007, he had raped her 3-4 times. However, in the FIR, the prosecutrix stated that the accused had raped her on one occasion each in the month of September and December, 2007.

13. The prosecutrix was taken for medical examination before PW-1 Dr. Preeti Sood. The application was moved by the police vide Ext. PW-1/A. The prosecutrix was not willing for medical examination. She was again taken for medical examination. The prosecutrix again was not willing for the same rather on the second occasion, she has given in writing before the lady doctor that she was not willing for medical check-up. PW-1 Dr. Preeti Sood has testified that the prosecutrix revealed that she was subjected to rape but there is no such written statement of the prosecutrix on MLC Ext. PW-1/D. If the prosecutrix could inform the doctor about the alleged rape, there is no reason why she has not subjected herself to medical examination.

14. On 26.4.2008, the prosecutrix was missing. She was traced in the cowshed at 11:30 PM. This fact has been admitted by PW-3 Jaswant Singh, father of the prosecutrix. PW-12 ASI Rajinder has also admitted this fact. PW-15 Manoj Kumar who is cousin of the prosecutrix deposed that on 26.4.2008, he received telephone that the prosecutrix had run away. Consequently, he along with Sanjay, Purshotam and Des Raj went in search of the prosecutrix and she was found in the cowshed. She was brought back and handed over to her mother. He has admitted that when he went in search of the prosecutrix, accused Raj Kumar was also with him. This establishes that the accused could not be culprit as he had joined the persons who had gone in search of the prosecutrix. According to the prosecutrix, she was taken after deceiving her at 3:30 PM. The accused threatened not to move out of the cowshed. However, the fact of the matter is that she was recovered at 11:30 PM. If the prosecutrix has remained alone from 3:30 PM to 11:30 PM, she could always escape from the cowshed.

15. Thus, the prosecution has failed to prove the case against the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 23.12.2009.

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

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE CHANDER BHUSHAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant

Versus

Manoj Kumar and others .....Respondents

Cr. Appeal No. 594/2010
Reserved on: April 12, 2016
Decided on: April 18, 2016

Indian Penal Code, 1860- Section 302- Complainant had gone to attend the marriage where a quarrel took place – accused came out with iron object and started beating 'S', when the complainant tried to save 'S' he was also beaten - dead body of 'S' was found subsequently- accused were tried and acquitted by the trial Court- held, in appeal that PW-1 should have tried to save the deceased but he ran away which is unusual conduct- PW-6 denied the prosecution version- there are contradictions in the testimony of PW-1 in the Court and statement recorded before the police- there was no mention of administering beatings in the inquest report- last seen theory was also not established- in these circumstances, trial Court had rightly acquitted the accused. Appeal dismissed. (Para-16)

For the appellant : Mr. M.A. Khan, Additional Advocate General.
For the respondents : Mr. Vikas Rathore, vice Counsel, for respondents No.1 and 4.
Kanwar Virender Singh, Advocate, for respondent No. 2.

The following judgment of the court was delivered:

Per Rajiv Sharma, Judge:

This appeal has been instituted against judgment dated 17.5.2010 rendered by learned Additional Sessions Judge, Mandi, HP in Sessions Trial No. 21 of 2006/2005 whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Section 302 read with 34 IPC, have been acquitted.

2. Case of the prosecution, in a nutshell, is that the complainant Ranjeet Singh, resident of village Dul had gone to attend the marriage of Rajinder Kumar on 8.5.2005 at 10 PM at Mata Jalpa Temple Galu. His uncle Shakat Ram was also present in the marriage. A quarrel took place in the marriage amongst *Baratis*. At about 11 PM, he alongwith Shakat Ram was going to attend another marriage at village Ropa Padhar. Both of them reached at Galu bridge. Accused persons came there armed with iron objects. They started administering beatings to Shakat Ram without any cause. Complainant tried to save Shakat Ram from the wrath of the accused but fist blow was given to his chest and due to fear he fled away from the spot. Accused persons continued administering beatings to Shakat Ram and took him away from the spot. Complainant returned back and he intimated *Baratis* about administering of beatings to Shakat Ram by the accused persons. On this, the complainant alongwith Desh Raj, Raj Kumar and Chaman Lal came to bridge in search of Shakat Ram but neither accused persons nor Shakat Ram was found there. On 9.5.2005 at about 4.30 PM, Surinder Kumar resident of village Fegru informed complainant that the dead body of Shakat Ram has been found lying in the plot of Chandresh Malhotra at Balu Nalla beneath *Dhank*. It was suspected by complainant that Shakat Ram had been done to death by accused persons. Statement of complainant was recoded under Section 154 CrPC on the basis of which FIR was lodged. Dead body was photographed. Inquest report was prepared. Dead body was taken to Civil Hospital, Jogindernagar for conducting post mortem examination. Viscera of deceased was handed over to Police for analysis by the Medical Officer. Dead body was handed over to Sohan Singh. Report of FSL Junga was received. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 15 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Learned trial Court acquitted all 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. Mr. Vikas Rathore and Kanwar Virender Singh, Advocates, have supported the judgment of acquittal dated 17.5.2010.

6. We have heard the learned counsel for the parties and also gone through the judgment and record carefully.

7. PW-1 Ranjeet Singh testified that they reached Galu at 10 PM. Marriage of Rajinder was being celebrated on that day at village Galu. A quarrel had taken place among the persons who were attending the marriage party. At about 11 PM, he alongwith Shakat Ram was going to village Ropa Padhar. When they reached at Galu bridge, accused Manoj Kumar, Swaroop, Raj Kumar and Gopal came from the behind. Accused Swaroop was carrying an iron object. All the accused started beating him and his maternal uncle Shakat Ram. When he tried to rescue the deceased, accused gave a fist blow to his chest. Due to fear he ran away from the spot. Accused kept beating the deceased. He went to village Galu and told this occurrence to Raj Kumar, Desh Raj and Chaman Lal. When he alongwith Raj Kumar, Desh Raj and Chaman Lal returned to the place of occurrence at Galu bridge, none was present there. On the next day, Surinder Pal told him on telephone that the dead body of Shakat Ram was lying at Galu Bridge. When he reached Galu Bridge, dead body of Shakat Ram had already been taken away from the spot for conducting post mortem examination. SHO recorded his statement on 9.5.2005. He did not remember the subsequent dates when his statements were recorded second and third time. His statement was recorded at the Police Station. Inquest report was not prepared in his presence. He made statement to the police that he has told Surinder Pal and Sohan that accused had beaten up Shakat Ram on the previous night at Galu Bridge. He was confronted with Ext. PW-1/A, the supplementary statement Mark A, wherein it is not so recorded. There were about 250-300 persons in the marriage party.

8. PW-2 Ram Lal deposed that 3-4 years back, he was going to village Jogindernagar on foot. When he reached village Galu, he saw police officials and other persons on the road. He did not go to the spot and went to Galu from where he went to Jogindernagar. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has admitted that on 9.5.2005, when he reached shop of Hukam Chand, he saw a dead body lying in the plot of Chandresh Malhotra. He saw the dead body from a distance of 100-200 metres, therefore, he could not say what was the condition of the dead body. He denied the suggestion that Surinder Pal and Sohan Singh came to the spot on that day. He denied that inquest report was prepared by the police in his presence.

9. PW-3 Mangat Ram deposed that Shakat Ram on 8.5.2005 had gone to attend a marriage at village Fegru alongwith other villagers. Shakat Ram did not return home from the marriage. Next day, information was given on telephone that dead body of Shakat Ram was lying at village Galu. He alongwith his father Sohan Singh and cousin Surinder Pal went to village Galu. Police had reached the spot. Photographs were taken. Blood stained soil alongwith blood was collected from the place of occurrence. These were packed. In his cross-examination, he admitted that the soil which was taken into possession from the spot, was not shown to him while recording his statement.

10. PW-4 Surinder Pal deposed that at about 2.30-3 PM, Sohan Singh and Mangat Ram told that the dead body of Shakat Ram was lying at village. He hired a taxi and went alongwith Sohan Singh and Mangat Ram to village Galu and saw the dead body lying in the field of Chandresh Malhotra. In his cross-examination, he has admitted that the blood

stained soil, which was collected from the spot, was not shown to him while recording statement.

11. PW-5 Desh Raj deposed that he alongwith Raj Kumar, Chaman Lal and Shakat Ram had gone to marriage of Rajinder Kumar at village Fegru. Thereafter, they had gone to village Galu. Accused persons were also in the marriage. At about 11.30 PM, Ranjeet came back to village Galu where they were attending the marriage party. He apprised that accused persons were giving beatings to Shakat Ram at village Galu. They went to Galu bridge but none was found.

12. PW-6 Rattan Lal testified that about two years back, he attended the marriage of Rakesh Kumar at village Ropa Padhar. He did not remember the date of marriage. He was invited to another marriage of Rajinder and he went to attend the marriage of Rajinder Kumar which was being celebrated in a temple at village Galu. Persons attending the marriage were coming and going. No quarrel has taken place in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that accused were in the marriage party and that they had quarrel with Shakat Ram. He did not try to save Shakat Ram and that accused had beaten him. His statement was recorded on 12.5.2005. He did not make portion A to A of statement mark D to the police. Later on, dead body was found lying in the plot of Malhotra.

13. PW-7 Tilak Raj deposed that at about 10/10.30 PM Shakat Ram came to his house at village Ropa Padhar and told that his shirt had been torn and he asked him to give him shirt. He gave Shakat Ram a Tee Shirt on which letter 'M' was inscribed. He was also declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that Shakat Ram told him that shirt was torn in a quarrel. He did not make statement to the police that he met him at village Galu and that he handed over Tee shirt at village Galu.

14. PW-10 Dr. B.M. Sharma, has conducted post mortem. He issued MLC Ext. PW-10/A. According to him, cause of death was due to injury to the fatal organ i.e. brain due to fracture (depressed) of occipital bone. Probable time between death and injury was one hour and time between death and post mortem was between 12 to 24 hours. Injuries detailed in the post-mortem report were sufficient in the ordinary course of nature to cause death. In the cross-examination, he deposed that the police had written in the application that the deceased was intoxicated and had fallen during the night from height and died.

15. PW-15 SI Shiv Chand was the IO. According to him, on 9.5.2005, Ram Lal, Pradhan Gram Panchayat, Ropa Padhar, informed over the telephone that a dead body was lying in Malhotra's complex. He reached the spot in the official vehicle. He prepared search memo Ext. PW-3/B. Post mortem was got conducted after identification of the body. Statement of Ranjeet Singh was recorded under Section 154 CrPC, Ext. PW-1/A. He also collected blood stained soil from the spot and prepared parcel in which blood stained soil was collected. Ext. PW-3/A was prepared. Statements of witnesses were recoded. Accused were arrested.

16. PW-1 Ranjeet Singh deposed that they were going to attend another marriage. Accused accosted them. They started beating Shakat Ram. He tried to save Shakat Ram, however he was also given beatings by the accused. He ran away out of fear. He came back to village Galu and narrated the incident to the other parties. Conduct of PW-1 Ranjeet Singh is unusual. He should have remained on the spot and tried to save deceased instead of running away from the spot. Statement of PW-6 Rattan Lal was recorded under Section 161 CrPC. He deposed that at about 10.30, he heard noise from Galu side. He came towards Galu side. Accused were giving beatings to the deceased. They were asked not

to do so. They kept on giving beatings to Shakat Ram. They took him towards Galu Bridge. When they were resisted, they tried to beat him also. However, while appearing as PW-6, Rattan Lal has categorically deposed that no quarrel has taken place in his presence. He has denied the suggestion in the cross-examination by the learned Public Prosecutor that the accused were present in the marriage party and they had quarrel with Shakat Ram and that he had tried to save Shakat Ram and he was also beaten up. There is no evidence on record that quarrel has taken place between deceased and accused at Galu. In Ext. PW-1/A, it is stated that accused were carrying iron objects however, when PW-1 appeared in the Court, he deposed that iron object was carried only by Swaroop at the time of incident. Police has come to the conclusion as per inquest papers that Shakat Ram had died due to fall from *Dhank* under the influence of liquor. Inquest papers were signed by Sohan Singh and Surinder Pal. PW-1 Ranjeet Singh deposed that he went to Galu Bridge and when they reached Galu Bridge, dead body had been taken away from the spot for conducting post mortem. However, PW-3 Mangat Ram deposed that Ranjeet Singh told the police as well as to them in the marriage that a quarrel had taken place during previous night in the marriage party. PW-1 Ranjeet Singh had left the spot at 4.30 PM when they were taking body to the hospital. PW-4 Surinder Pal, in his cross-examination deposed that in Ext. PW-4/A, cause of death was shown to be fall from a cliff. He has signed Ext.PW-4/A. Since PW-1 Ranjeet Singh has reached the spot as per statement of PW-3, Mangat Ram where dead body was lying, he should have told the police that deceased was beaten up by the accused. However, in the inquest report, which was prepared immediately after recovery of dead body, there is no mention about administering beatings however, as noticed above, it is stated that deceased died due to fall from *Dhank*. PW-1 Ranjeet Singh deposed that he was beaten up when they were going to village Ropa Padhar. According to his statement neither he nor Shakat Ram reached village Ropa Padhar. However, PW-7 Tilak Raj deposed that Shakat Ram came to his house at village Ropa Padhar and asked for a shirt from him since his shirt was torn. He provided Tee shirt to Shakat Ram and there was letter 'M' inscribed on it. In the inquest report PW-4/A, deceased was shown to have worn Tee shirt with 'M' letter. Thus, it cannot be held that deceased was seen alive last in the company of the accused persons at Galu bridge. PW-1 Ranjeet Singh has deposed that the deceased was beaten up with iron object however, no recovery of iron object was made by the police.

17. Prosecution has failed to prove case against the accused. There is no occasion for us to interfere with the well reasoned judgment passed by the learned trial Court.

18. Thus, the appeal being without merits, is accordingly dismissed. All pending applications, are also disposed of. Bail bonds are discharged.

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

Devi Ram. .....Petitioner.

Versus

Smt. Kaushalya Devi & ors. .....Respondents.

CMPMO No. 14 of 2016.
Date of decision: April 19, 2016.

Code of Civil Procedure, 1908- Section 151- Plaintiff sought to produce in evidence the certified copy of registered sale deed, spot inspection report allegedly prepared by 'R' after

conducting spot inspection, and also to examine said 'R' as witness in the suit- case was listed for recording the evidence of the plaintiff in rebuttal- plaintiff instead of producing the evidence in rebuttal filed an application to allow her to lead additional evidence-application was allowed by trial court - held, that spot inspection report is dated 17.4.2015 which was prepared after 12.3.2015 on which date, plaintiff had failed to produce the evidence and had sought opportunity for this purpose- allowing the plaintiff to produce the report of spot inspection and to record the statement of 'R'- when the evidence has already been closed would amount to filling up the lacuna left by the plaintiff- plaintiff could have been permitted to produce the certified copy of the registered sale deed which is per se admissible- trial Court had erred in permitting the plaintiff to lead evidence- application partly allowed- plaintiff permitted to lead additional evidence by filing certified copy of the sale deed. (Para-4 and 5)

For the petitioner : Mr. Dalip K. Sharma, Advocate.
For the respondents : Mr. Sanjay Kumar Sharma, Advocate, for respondent No. 1.
None for respondent No. 2.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. ***(Oral)***

Heard. Challenge herein is to an order dated 9.12.2015 Annexure P-3 (colly) allowing thereby the respondent No. 1-plaintiff to produce in evidence the certified copy of registered sale deed and also spot inspection report allegedly prepared by one Shri R.P. Swami after conducting spot inspection on 17.4.2015. Respondent No. 1-plaintiff has also been permitted to examine said Shri R.P. Swami as witness in the suit.

2. The suit after the parties on both sides closed their evidence in affirmative was at the stage of recording the plaintiff's evidence in rebuttal. Instead of producing the evidence in rebuttal she has filed an application under Section 151 CPC with a prayer to allow her to lead additional evidence as aforesaid.

3. Application though was resisted and contested by the petitioner-defendant. However, the trial Court while arriving at a conclusion that the opportunity to produce the document and examine Shri R.K. Swami as witness is required to be given to respondent No. 1-plaintiff has allowed the application.

4. If not shocking, it is surprising enough that the additional evidence has been allowed to be produced vide order passed in an application under Section 151 of the Code of Civil Procedure that too at a stage when the parties on both sides had already closed the evidence in affirmative. Interestingly enough the spot inspection report based upon the so called report of Shri R.P. Swami expert witness is dated 17.4.2015 viz after 12.3.2015 on which day the respondent No. 1-plaintiff had failed to produce the rebuttal evidence and had sought last opportunity for the purpose. Allowing to produce the spot inspection report in evidence and also the recording of statement of its author Shri R.K. Swami at such a stage when the parties have already closed the evidence is nothing but amount to fill-up the lacuna left in the case of respondent No. 1-plaintiff. As a matter of fact the report which is obtained after the parties had already adduced the evidence should have not been allowed to be produced in the evidence nor its author Shri R.K. Swami examined as witness. Otherwise also, if there exist a passage over the land in dispute, the reference thereto must be in the registered sale deed. Therefore, respondent No.1-plaintiff at the most could have been permitted to produce in evidence the certified copy of the registered sale deed which

otherwise is per se admissible in evidence and as such learned Counsel representing her in his own statement can tender the same in evidence.

5. The trial Court, therefore, has not only erred legally but factually also in allowing the respondent No.1-pliantiff to produce in evidence the spot inspection report and also the permission to examine Shri R.K. Swami in evidence. That part of the impugned order being illegal and unsustainable is hereby quashed and set aside. The statement of Shri R.K. Swami and the spot inspection report if already recorded/produced in evidence shall not form the part of the evidence. Learned Counsel representing the respondent No. 1-plaintiff however is at liberty to tender in his own statement the certified copy of the sale deed, if so advised and the production whereof in evidence shall not be objected to on behalf of petitioner-defendant also as has said by learned Counsel representing him at the Bar.

6. This petition is, therefore, partly allowed and stands accordingly disposed of. Pending application(s), if any, shall also stands disposed of.

7. Authenticated copy, to learned trial Court for record and compliance.

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

Hargopal Singh and others .....Petitioners.

Versus

Prem Sagar & others .....Respondents.

CR No.187 of 2008.
Decided on: 19th April, 2016.

Code of Civil Procedure, 1908- Order 22 Rule 4- Court dismissed the application for substitution of legal representatives of deceased defendant No. 1 on the ground that it is barred by limitation- held, that no sufficient cause was shown in the application for delay in filing the application- therefore, Court was justified in dismissing the application- however, liberty granted to file the application for setting aside the abatement and for condonation of delay. (Para-1 to 4)

Cases referred:

Ram Nath Sao alias Ram Nath Sahu and others vs. Gobardhan Sao and others, (2002) 3 Supreme Court Cases 195

K. Rudrappa vs. Shivappa, AIR 2004 Supreme Court 4346

For the petitioners : Mr. Ajay Sharma, Advocate.

For the respondents No.1 & 2 : Mr. Sanjeev Sood, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

Order passed in Civil Misc. Appeal No.5 of 2008/06 is under challenge before this Court in this petition. As a matter of fact, learned lower Court has affirmed an

order passed by the learned Civil Judge (Senior Division), Ghumarwin, District Bilaspur, in an application on 21.9.2005 under Order 22 Rule 4 of the Code of Civil Procedure, whereby the application was dismissed and the prayer made for substitution of the legal representative of deceased defendant No.1 Sant Ram, was declined on the ground that neither the application has been filed within the period of limitation nor accompanied by an application under Order 22 Rule 9 of the Code of Civil Procedure. Also that on the expiry of the period of 90 days, prescribed for substitution of legal representative of the deceased defendant No.1 Sant Ram abatement of the suit was automatic and that the application for substitution of his legal representative could have not been entertained without any prayer for condonation of delay as occurred in taking consequently steps and setting aside the abatement of the suit.

2. This Court finds no illegality or infirmity with the order under challenge as Hon'ble Apex Court in ***(2002) 3 Supreme Court Cases 195,*** titled ***Ram Nath Sao alias Ram Nath Sahu and others vs. Gobardhan Sao and others*** has held that in an application filed for substitution of legal representative of deceased party and setting aside the abatement of the appeal the party seeking such relief must how sufficient cause for seeking the condonation of delay so occurred. No doubt the Apex Court in ***AIR 2004 Supreme Court 4346*** titled ***K. Rudrappa vs. Shivappa*** has held that even a simple application filed under Order 22 Rule 4 of the Code of Civil Procedure can also be entertained in order to decide the question of the abatement of proceedings and substitution of legal representative of the deceased party, however, in the case before Hon'ble the Apex Court the facts were different from the present one before this Court.

3. The perusal of the application under Order 22 Rule 4 of the Code of Civil Procedure (**Annexure P-3**) amply demonstrates that what to speak of the sufficient cause even the factual aspect such as the date of death of deceased defendant No.1 Sant Ram, what prevented the plaintiff from taking consequential steps well within the period of limitation is also missing. Therefore, on merits it would not be appropriate nor in the ends of justice to set aside the abatement of the suit and allow the substitution of legal representative of deceased defendant No.1 Sant Ram in modification of the order passed by learned trial Court and affirmed by the learned Appellate Court, however, this Court feel that the impugned order is not only harsh, but oppressive also as the suit itself stand disposed of thereby without adjudication of dispute on merits.

4. I, therefore, set aside the judgment under challenge in this petition and allow the petitioners-plaintiffs to file application (s) for seeking the relief of setting aside the abatement of the suit, if any, on the death of deceased defendant Sant Ram and also substitution of his legal representative (s) on condonation of delay. The judgment under challenge is, therefore, quashed and set aside. Parties through learned counsel representing them are directed to appear before the learned trial Court on ***21st June, 2016.*** The petitioners-plaintiffs shall file an application as aforesaid in the learned trial Court on the next date. In view of the suit is old one the trial Court to dispose of the same at the earliest preferably within a period of three months.

5. This petition is, accordingly, allowed and stands disposed of. Pending applications, if any shall also stands disposed of.

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

RSA No. 529/2004 alongwith RSA No. 597/2005
Reserved on: 4.4.2016
Decided on: 19.4.2016

1. RSA No. 529/2004

Hem Raj. ...Appellant

Versus

Meera Devi and others. ...Respondents.

2. RSA No. 597/2005

Meera Devi. ...Appellant.

Versus

Hem Raj and others. ...Respondents.

Specific Relief Act, 1963- Section 34- Plaintiff filed a civil suit pleading that he is grand-son of T- the property was mutated in the name of the defendants No. 1, 3 and 4- deceased T had executed a Will in favour of the plaintiff- plaintiff had no knowledge of the Will as the will was kept by Vice-president of Gram Panchayat- he came to know subsequently about the Will- plaintiff claimed that mutation of inheritance was wrong- defendants denied the case of the plaintiff- suit was partly decreed- appeal was preferred which was allowed- aggrieved from the order of the Appellate Court, RSA was filed before the High Court- held, in appeal that there was no occasion for T to leave the Will with S- S had deposed that he had apprised the plaintiff about the Will- S stated that names of the witnesses and their addresses were typed, whereas, they were hand written in the Will- Appellate Court had wrongly held that Will was legally executed- defendant No. 2 had sold the land, inherited by her and M is bona-fide purchaser for consideration. (Para-19 to 25)

Cases referred:

Anil Kak versus Kumari Sharda Raje and others, (2008) 7 SCC 695

Mahesh Kumar (dead) by LRs. vs Vinod Kumar and others, (2012) 4 SCC 387

Dhannulal and others vs. Ganeshram and another, (2015) 12 SCC 301

For the Appellant(s) : Mr. Neeraj Gupta, Advocate for the appellant in RSA No. 529/2004 and for respondent No.1 in RSA No. 597/2005

For the Respondent(s): Mr. Vinay Kuthiala, Sr. Advocate with Mr. Diwan Singh, Advocate for respondent No.1 in RSA No. 529 and for the appellant in RSA No.597/2005.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since common questions of law and facts are involved in both these appeals, the same were taken up together for hearing and are being disposed of by a common judgment.

2. These two appeals are directed against the judgments rendered by the learned Additional District Judge, Mandi in Civil Appeal No. 87/2002 dated 28.9.2004 and Civil Appeal No. 99/2002 decided on 28.9.2004.

3. "Key facts" necessary for the adjudication of these appeals are that the appellant in RSA No. 529 of 2004, namely, Hem Raj filed a Civil Suit against the respondents-defendants, namely, Veena, Meera Devi, Sohanu and Lali for declaration and possession and consequential relief. According to the plaintiff, he was grand son of Thakru. He was minor and attained the age of majority on 4.5.1996. The suit was instituted on 22.1.1997. According to him, deceased Thakru had 3537 shares out of 6092 shares in the land comprised in Khewat Khatauni No. 314 min/399 min, Khasra Nos. 13 and 15/2 measuring 15-4-12 bighas. Similarly, deceased Thakru had 586 shares in land comprised in khewat/khatauni No.315/400, Khasra No.18 measuring 7-8-11 bighas situated in Mauja Behna/210 Om Illaqua Balh, Tehsil Sadar, District Mandi, H.P. The suit land was mutated in the name of defendant Nos.1, 3 and 4 as per the cause title of the suit land vide mutation Nos. 753 and 253 respectively. According to the plaintiff, deceased Thakru had executed a genuine and valid will in his favour on 18.12.1991 in the presence of witnesses. However, he had no knowledge of the Will since it was kept by Sidhu Ram, Vice President of Gram Panchayat. When defendant No.1 sold land out of the suit land in favour of defendant No.2, namely, Meera Devi then plaintiff came to know about the Will in his favour in the month of November, 1996. The Will was handed over to him. It was scribed by Baghirath. On the basis of Will, plaintiff became owner in possession of the suit land and the mutation of inheritance attested in favour of defendant Nos. 1, 3 and 4 was sought to be declared null and void. It is further stated that on the basis of wrong mutation, defendant No.1 has sold her entire share in favour of defendant No.2 without delivering the possession of the same. The sale deed dated 18.12.1996 bearing No.1443 was also sought to be declared null and void.

4. The suit was contested by defendants. According to the written statement filed by defendant Nos. 1 and 2, after the death of Thakru, mutation was rightly attested. Mutation No. 823 pertained to partition and not regarding inheritance. Thakru had not executed any Will in favour of the plaintiff. Defendant No.1 was in joint possession of the suit land qua her share alongwith defendant Nos. 3 and 4 and being owner, she has rightly sold her share for consideration in favour of defendant No.2 Meera Devi. Defendant No.2 was *bona fide* purchaser. Defendant Nos. 3 and 4 in their written statement have admitted that they were not aware about the Will.

5. Learned Sub Judge 1st Class, Court No.1, Mandi framed issues on 4.3.1999. He partly decreed the suit to the effect that the sale deed executed by defendant No.1 in favour of defendant No.2 was held to be illegal, null and void. Suit of the plaintiff was dismissed to the effect that he has failed to prove that he was joint owner in possession of the suit land by virtue of Will. Defendant No.2 Meera Devi instituted Civil Appeal No. 87 of 2002 against the judgment and decree dated 27.5.2002. Learned Additional District Judge, Mandi allowed the same on 28.9.2004. Plaintiff also filed Civil Appeal No. 99 of 2002 against the judgment and decree dated 27.5.2002 before the Additional District Judge, Mandi. He allowed the same and the findings returned by the Sub Judge 1st Class on issue Nos.1 and III were set aside. Hence, the plaintiff has instituted an appeal bearing RSA No. 529/2004 against the judgment and decree dated 28.9.2004 rendered by the Additional District Judge, Mandi in Civil Appeal No. 87 of 2002. It was admitted on the following substantial questions of law on 2.12.2004:

1. Whether the judgment and decree of the reversal assed by the first appellate court reversing the findings of the trial court on issue No.2 is dehors the evidence on record and against the law and facts?
2. Whether the first appellate court erred in holding that Meera Devi, respondent No.1 was a bonafide purchaser of the land sold to her by

Smt. Veena Devi and the finding is against the pleadings and settled position of law?

6. Similarly, Meera Devi also filed an appeal bearing RSA No. 597/2005 against the judgment and decree dated 28.9.2004 rendered by the Additional District Judge, Mandi in Civil Appeal No. 99 of 2002. It was admitted on the following substantial questions of law on 26.3.2007:

1. Whether the Ld. 1st Appellate Court misconstrued and misinterpreted the evidence to the effect that the Will in question as well as other documents have not been proved in accordance with law especially when the second attesting witness has not been examined?
2. Whether the Ld. Court below has ignored the effect in law of the late production of the Will and the manner in which the same has been proved?
3. Whether the Ld. Court below has erred in not appreciating that the appellant was a bona fide purchaser as envisaged by section 41 of the Transfer of Property Act?
4. Whether the Ld. Court below has erred in disregarding the contradiction in the statements of the plaintiff's witnesses?

7. Mr. Neeraj Gupta, learned counsel appearing for appellant in RSA No. 529 of 2004, on the basis of the substantial questions of law framed, has vehemently argued that reversal of findings of the trial court on issue No.2 by the Additional District Judge in Civil Appeal No. 87 of 2002 was dehors the evidence. He has also contended that the first appellate court erred in holding that Meera Devi was a bona fide purchaser of the land sold to her by Veena Devi.

8. Mr. Vinay Kuthiala, learned Senior Advocate has vehemently argued that the Will dated 18.12.1991 was shrouded in mystery. It has not been proved in accordance with law.

9. I have heard the learned counsel for the parties and have gone through the records carefully.

10. The Court is of the considered view that the Additional District Judge ought to have clubbed Civil Appeal No. 87 of 2002 and 99 of 2002 since same substantial questions of law were involved.

11. Since all the substantial questions of law in both the appeals are interlinked and interconnected, the same are taken up together for determination to avoid repetition of discussion of evidence.

12. The Will Ex.PW-2/A is dated 18.12.1991. Case of the plaintiff is that he came to know about the execution of Will only when the land was sold by Veena in favour of Meera Devi in the month of November, 1996. His grand father had handed over the Will to PW-2 Sidhu Ram. He handed over the Will to him at his house. It is in these circumstances, prayer was made that the Will was valid and genuine. The inheritance made in favour of defendant Nos. 1, 3 and 4 was wrong and null and void. The land could not be sold by Veena to Meera Devi. The sale deed is dated 18.12.1996 bearing No. 1443.

13. PW-1 Hem Raj has testified that he was grand son of Thakru. At the time of death of his grand father, he was minor. Thakru had only one son Sohnu and daughter Veena. His grand father died in the year 1992. His property was inherited by his son

Sohnu and daughter Veena. The mutation was not challenged by them. He did not know about the mutation. He came to know about the Will in the month of December, 1996 when Veena sold the suit land in favour of Meera Devi that Thakru had executed Will in his favour. The possession was never handed over to defendant. He has proved Will mark X, mutation Ex.PA & PB, Jamabandis Ex.PC & PD, sale deed mark Y, death certificate mark Z and Pariwar register mark Z-1. In his cross-examination, he has categorically admitted that the Pradhan had brought the Will to his house. His mother, father and grand mother were present. He came to his house in the month of November, 1996 in the evening.

14. PW-2 Sidhu Ram has testified that Thakru came to him in the month of December, 1991. He told him that he wanted to execute a Will in the name of his grand son. They reached Mandi. The Will was scribed by Bhagirath. The contents of the Will were read over to Thakru. Thereafter, he alongwith Nanki signed the same. He proved Will Ex.PW-2/A. It was earlier marked as mark X. Thakru died in the year 1992. He forgot to handover the Will. He went to Patwarkhana in the year 1996 and then he came to know that the land has been sold by Thakru's daughter to the wife of Kishan. Thereafter, he told the plaintiff about the Will. He handed over the Will to him. Thakru at the time of execution of Will was in his senses. He was not sick. In his cross-examination, he has deposed that he sent the information about the execution of Will through Mast Ram, Ramesh and Sukh Ram. Thereafter, plaintiff and his son came to his house and he handed over the Will to him in the morning.

15. PW-3 Bhagirath has deposed that he has scribed the Will. He made the entry in the register on 18.12.1991 bearing No. 1950. Thakru had put his signatures on Ex.PW-2/A. He identified his signatures on the Will. He had scribed the Will at the instance of Thakru. In his cross-examination, he has categorically admitted that the Will neither bears the name of identifier nor his signatures.

16. DW-1 Veena has testified that she inherited the property of Thakru. The land was in joint ownership. She has sold her share to Meera Devi for consideration of Rs. 45,000/-. Thakru had never told her about any Will. He had not executed any Will. She used to look after Thakru.

17. DW-2 Sohan Lal has deposed that Sidhu Ram through Mast Ram had told him about the Will. Thereafter, he had visited the house of Sidhu Ram to get the Will.

18. DW-3 Meera Devi has deposed that she has purchased the land on 18.12.1996 for a sum of Rs. 45,000/-. The land was in the ownership of Veena and now she was owner of the same.

19. The alleged Will was executed on 18.12.1991. Thakru died in the year 1992. There was no occasion for Thakru to leave the Will with PW-2 Sidhu Ram. PW-1 Hem Raj has testified that PW-2 Sidhu Ram had come to his house and delivered the Will to him. He came to know about the Will only when Veena executed sale deed in favour of defendant No.2. However, PW-2 Sidhu Ram in his cross-examination has categorically admitted that he apprised the plaintiff about the Will through Mast Ram, Ramesh and Sukh Ram and thereafter plaintiff came to his house. According to PW-2 Sidhu Ram, names of the witnesses and their addresses were typed. However, as per the Will Ex.PW-2/A, the address of one of the witnesses Nanki Devi is hand written and there is a seal of Up-Pradhan, Gram Pradhan, Bhadyal. The version of PW-2 Sidhu Ram that he forgot to handover the Will to the plaintiff cannot be believed. Thus, the first appellate court has come to a wrong conclusion in Civil Appeal No. 99 of 2002 that the Will was legally and validly executed. The plaintiff has not proved the due execution of the Will Ex.PW-2/A.

20. Defendant Veena had inherited the property from her father alongwith her brother. The mutation was duly attested in their favour. The same is on record. Therefore, the land was sold by defendant No.1 to defendant No.2 Meera Devi for consideration of Rs. 45,000/-. The sale deed is dated 18.12.1996. The mutation was attested in favour of Veena before this date. Thus, Meera Devi is *bona fide* purchaser of the suit land and the findings given by the learned Additional District Judge to this effect vide judgment dated 28.9.2004 in Civil Appeal No. 87 of 2002 are upheld. Meera Devi had no knowledge of the alleged Will dated 18.12.1991 at the time of execution of sale deed on 18.12.1996. The Will has not been produced for five years. The findings given by the learned Additional District Judge, Mandi in Civil Appeal No. 99 of 2002 are set aside.

21. Their Lordships of the Hon'ble Supreme Court in ***Anil Kak*** versus ***Kumari Sharda Raje and others***, (2008) 7 SCC 695 have held that mere proving of signatures of executors and the attesting witnesses is not sufficient. Their Lordships have further held that unlike an ordinary document it must fulfill the conditions imposed by section 63 (c) of Succession Act and section 68 of Evidence Act.

22. Their Lordships of the Hon'ble Supreme Court in ***Mahesh Kumar (dead) by LRs***. vs ***Vinod Kumar and others***, (2012) 4 SCC 387 have held that onus is on propounder to dispel suspicious circumstances.

23. Their Lordships of the Hon'ble Supreme Court in ***Dhannulal and others*** vs. ***Ganeshram and another***, (2015) 12 SCC 301 have held that execution of a document does not mean mechanical act of signing document or getting it signed, but an intelligent appreciation of contents of document and signing it in token of acceptance of those contents. Proof of a will stands in a higher degree in comparison to other documents. Their Lordships have held as under:

> "[18] It is evident from the findings recorded by the High Court in the paragraph referred to hereinabove that the Will suffers from serious suspicious circumstances. The execution of a document does not mean mechanical act of signing the document or getting it signed, but an intelligent appreciation of the contents of the document and signing it in token of acceptance of those contents."

24. The substantial questions of law are answered accordingly.

25. Accordingly, in view of the analysis and discussion made hereinabove, the RSA No. 597 of 2005 is allowed and RSA No. 529 of 2004 is dismissed. Meera Devi is held to be *bona fide* purchaser of the suit land and the Will dated 18.12.1991 is declared not to be valid and genuine. Pending application(s), if any, also stands disposed of. No costs.

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

Maj. General (Retd.) S.C.Suri .....Petitioners.

Versus

Himalayan Brahmo Samaj Mandir & Others .....Respondents.

Civil Revision No.40 of 2016.
Decided on: 19th April, 2016.

Code of Civil Procedure, 1908- Section 92- There is no statutory requirement to issue notice of the application to seek the leave to institute the suit to the defendant - however, Court should normally issue notice to the defendants to prevent the harassment to them- even if no notice had been issued to the defendants, defendants can approach the Court for revocation of the leave granted by it- petition disposed of with liberty to approach the trial Court. (Para- 1 and 2)

Case referred:
R.M. Narayana Chettiar and another vs. N. Lakshmanan Chettiar and others, 1991 (1) Supreme Court Cases 48

For the petitioner	:	Mr. Ajay Kumar, Sr. Advocate with Mr. Dheeraj Vashisht, Advocate.
For the respondents No.1 to 3	:	Mr. Rajender Sharma, Advocate.
For the respondents No.8	:	Mr. S.C. Sharma, Advocate.
For the respondent No.10	:	Mr. Virender Verma, Addl. Advocate General.

None for respondents No.2, 3, 4 and 5.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary, J. (oral).

The complaint is that notice has not been issued to the petitioners/defendants before the leave to institute the suit is granted. Learned counsel representing the parties on both sides are in agreement that there is no statutory requirement to issue prior notice to the defendants of the application filed to seek the relief to institute the suit under Section 92 of the Code of Civil Procedure, however as a rule of caution the Court should normally issue notice to the defendants before granting the leave in order to prevent the harassment of the defendants or to save him money required to be spent on the expenses to be incurred upon in case the suit being filed is reckless or frivolous.

2. The reliance on both sides has been placed on the judgment of Hon'ble Apex Court in ***1991 (1) Supreme Court Cases 48 titled R.M. Narayana Chettiar and another vs. N. Lakshmanan Chettiar and others***. Learned Counsel are, therefore, in agreement that in the event of no notice is issued and leave to institute the suit is granted, the defendants may approach the Court concerned itself to seek the revocation of leave to appeal as granted. Learned Senior Advocate has submitted that the defendants have even approached the learned trial Court for revocation of the leave so granted. In this view of the matter, the remedy to the petitioner is available in the learned trial Court itself by filing the appropriate application for seeking revocation of the leave so granted. This petition, is therefore, disposed of with liberty reserved to the petitioners-defendants to approach the learned trial Court, for needful.

3. This petition stands disposed of. Pending applications, if any shall also stands disposed of. ***Copy dasti***.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Om Prakash Sharma ....Petitioner

Versus

State of H.P. and others ....Respondents.

CWP No. 4240 of 2015
Judgment reserved on: 06.04.2016
Date of Decision : April 19, 2016.

Constitution of India, 1950- Article 226- Petitioner claims that he is non-agriculturist and is not entitled to purchase the land in Himachal Pradesh except with the prior permission of the Government- he had earlier filed two writ petitions which were dismissed- an appeal was preferred before the Hon'ble Supreme Court which was disposed of with a direction to petitioner to produce the required documents before the State Authorities and State Authorities were directed to consider the case of the petitioner in accordance with law- petitioner was called upon to submit the document- petitioner assailed the same by filing the present writ petition- held, that petitioner had failed to comply with the directions of Apex Court and had failed to file the document specified by the Hon'ble Supreme Court within the prescribed time- co-owner had not given the No Objection Certificate to sell the land- it was for the petitioner to attend to the queries raised by the State- he has filed the petition against the requirement mentioned in the letter- Court proceedings could not be abused by unscrupulous litigants- petition dismissed with cost of Rs.15,000/-.

(Para-3 to 26)

Cases referred:

Subrata Roy Sahara vs. Union of India, (2014) 8 SCC 470

K.K.Modi vrs. K.N.Modi and others, (1998) 3 SCC 573

Kishore Samrite vs. State of Uttar Pradesh and others, (2013(2) SCC 398

For the Petitioner	:	In person.
For the respondents	:	Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K.Verma, Deputy Advocate General, for respondents No. 1 and 2. Nemo for respondents No. 3 and 4.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

One of the reasons for overflow of Court dockets is the frivolous litigation in which the Courts are engaged by the litigants. Therefore, one of the greatest challenge before the judiciary today is to curb and tackle the frivolous litigation. The judicial system is being not only choked but flooded with false claims and scarce and valuable time of the Court is being consumed for a wrong cause. Undeniably, false claims are a huge strain on the judicial system.

2. In a recent judgment in ***Subrata Roy Sahara vs. Union of India, (2014) 8 SCC 470***, the Hon'ble Supreme Court observed that the Indian judicial system is grossly afflicted with frivolous litigation and ways and means need to be evolved to deter litigants

from their compulsive obsession towards senseless and ill-considered claims. The Hon'ble Supreme Court discussed the menace of frivolous litigation in the following terms:

> *"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved, to deter litigants from their compulsive obsession, towards senseless and ill-considered claims. One needs to keep in mind, that in the process of litigation, there is an innocent sufferer on the other side, of every irresponsible and senseless claim. He suffers long drawn anxious periods of nervousness and restlessness, whilst the litigation is pending, without fault on his part. He prays for the litigation, from out of his avings (or out of his borrowings), worrying that the other side may trick him into defeat, for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for, what he has lost, for no fault?....*
>
> *Xxx xxx xxx*
>
> *194. Does the concerned litigant realize, that the litigant on the other side has had to defend himself, from Court to Court, and has had to incur expenses towards such defence? And there are some litigants who continue to pursue senseless and ill-considered claims, to somehow or the other, defeat the process of law. …"*

3. This is the third writ petition at the instance of the petitioner. The claim of the petitioner relates to permission to buy land as he is a non-agriculturist and therefore not entitled to purchase land in Himachal Pradesh except with the prior permission of the Government in terms of Section 118 of the H.P. Tenancy and Land Reforms Act, 1972. He firstly approached this Court by filing CWP No. 5264 of 2012, which was dismissed vide order dated 19.7.2012 and same reads as under:-

> *"Learned counsel for the petitioner, on instruction, seeks permission to withdraw the writ petition without prejudice to his liberty to file an appropriate writ petition. Though, ordinarily such requests are not entertained, since the writ petition was argued for admission on more than three occasions, in view of the persuasive submissions made by the learned counsel for the petitioner, apologetically for the misconceived averments and prayers, the writ petition is dismissed as withdrawn, so also the pending application(s), if any."*

4. The petitioner thereafter filed CWP No. 5922 of 2012 which was held to be an attempt on the part of the petitioner to abuse the process of the Court and the same was consequently dismissed with costs of Rs.50,000/- on 30.8.2012.

5. Notably, the Court while adjudicating upon CWP No. 5922 of 2012 took serious note of the conduct of the petitioner, when he had filed the earlier petition being CWP No. 5264 of 2012 in the following manner:

> "2. The petitioner had earlier filed CWP No. 5264 of 2012, in which his grievance was that whereas his case for grant of permission to purchase the land under Section 118 of the H.P. Tenancy & Land Reforms Act, 1972 had not been decided within time, the cases of influential people had been decided within days or months and that the State was not acting in an equitable manner.
>
> 3. On 9.7.2012, the matter came up before this very Bench for admission since the Bench presided over by the Hon'ble Chief Justice was not available. Though, it is not so recorded in the order, but we clearly

remember that we had directed that notices be issued only to the official respondents and not to the private respondents At that stage, learned counsel for the petitioner had submitted that the notices be also issued to the private respondents. We had not agreed to this request and directed the matter to be listed before the appropriate Bench. We had passed this order, because on that day, we were hearing the matters which were normally to be listed before the Hon'ble Chief Justice because the Hon'ble Chief Justice was not present in Court on that day.

4. On 10.7.2012 i.e. the next day, the matter came up before a Bench headed by Hon'ble the Chief Justice, wherein the following order was passed: -

> " The petitioner prays for detailed arguments tomorrow. Post on 11th July 2010. We make it clear that the contents of the writ petition shall not be published in any print or electronic media without the permission of the Court
>
> (K.J.),CJ
>
> (D.C.C.) J"

5. It is apparent that the said Bench also felt that this petition was only filed to gain publicity because the Bench directed that the contents of the writ petition shall not be published in any print or electronic media without the permission of the Court. The matter was again taken up on 11.7.2012 when the petitioner appeared in person and submitted that his counsel Shri R.L.Chaudhary may be heard.

6. Thereafter, the matter was listed on 19.7.2012, on which date the same was disposed of with the following observations:

> "Learned counsel for the petitioner, on instruction, seeks permission to withdraw the writ petition without prejudice to his liberty to file an appropriate writ petition. Though, ordinarily such requests are not entertained, since the writ petition was argued for admission on more than three occasions, in view of the persuasive submissions made by the learned counsel for the petitioner, apologetically for the misconceived averments and prayers , the writ petition is dismissed as withdrawn, so also the pending application(s), if any.
>
> (Emphasis supplied)
>
> (Justice Kurian Joseph)
>
> Chief Justice
>
> (Justice Dharam Chand Chaudhary)
>
> Judge"

7. Thereafter, the present writ petition was filed on 23.7.2012, in which only the State and its functionaries were impleaded as respondents and the persons from whom the petitioner was to purchase the land were impleaded as proforma respondents. None of the persons, impleaded as respondents No. 5 to 9 in the earlier writ petition, were impleaded as parties in the present writ petition.

8. In para-43 of the petition, the petitioner averred as follows:

> "43. That the petitioner has preferred a Civil Writ Petition before this Hon'ble Court, which was registered as C.W.P. No. 5264/2012 and the same was dismissed as withdrawn with liberty to file afresh."

The statement made in para-43 may technically be true, but in the affidavit which has been filed in support of the writ petition, it is also stated that material facts have not been concealed. Writ petitions are decided on the affidavits of the parties and the Court expects that the affidavits are not only true but there is no concealment of facts. It is a well established principle that there should not be any suppression or concealment of the facts. "Supressio veri" and "suggestio falsi"are the two grounds on which the writ petitions can be rejected. If the material facts are suppressed or if wrong suggestions are made, the Court has the right to reject the writ petition without even going into the merits of the case. Though, the petitioner may have, as observed above, prayed for and granted the liberty to withdraw the earlier petition with a liberty to file fresh one, he deliberately withheld from this Court the order dated 10.7.2012 which clearly indicated that this Court had grave reservation about the publicity aspect of this petition. He also withheld relevant portions of the order dated 19.7.2012. In fairness to this Court, the writ petitioner should have brought all these facts to the notice of the Court.

9. The second petition was filed and marked to this Bench. We issued notice to respondents No. 1 to 4 i.e. the official functionaries only. Thereafter, the petitioner had the audacity and temerity to file an application under Order 1 Rule 10 CPC bearing No. 2268 of 2012 praying that five persons be impleaded as party respondents in the present petition. These five persons are the same, who were respondents No. 5 to 9 in the earlier writ petition. The explanation given by the petitioner for non-impleadment of these respondents is as follows:

> "It is further submitted that while filing the above mentioned writ petition, the above mentioned persons could not be impleaded as respondents inadvertently, but in view of the submissions made hereinabove and in view of the submissions made in the Civil Writ Petition qua the above mentioned persons, it will be in the interest of justice that they may be impleaded as Respondents No. 7 to 11."

10. Keeping in view what we have stated, it is more than obvious that this averment on the face of it is totally false and there was no inadvertence in arraying these respondents. It is obvious that the petitioner wants to gain mileage by impleading Smt. Priynaka Vadra as party to this petition. As far as her case is concerned, the question relating to grant of permission to her to purchase the land was the subject matter of CWPs No. 138 of 2006 and 139 of 2006, decided by one of us (Rajiv Sharma, J), wherein the permission granted in her favour was upheld. Letters Patent Appeals No. 96 of 2008 and 97 of 2008 filed against the said judgment were dismissed by a Division Bench of this Court on 9.4.2010. This Court cannot re-open these matters and it is more than obvious that the petitioner is time and again trying to implead Ms. Priyanka Vadra as a party without any other purpose but to gain cheap publicity.

13. We are of the considered view that this petition is only an attempt to abuse the process of the Court. Therefore, the same is dismissed with costs

of Rupees 50,000/- The cost shall be paid to the Kasturba Gandhi Bal Ashram, Shimla. The pending application(s), if any, are also disposed of."

6. The aforesaid order was assailed by the petitioner before the Hon'ble Supreme Court, but the same was not interfered with and rather the petition was disposed of by the Hon'ble Supreme Court on 14.3.2014 by directing the petitioner to produce the required documents by the end of April, 2014 and the State authorities were directed to consider the same in accordance with the Rules and Policies in force and pass fresh orders within two months of the receipt of the documents.

7. It is apt to reproduce paras 3 to 7 of the order, which reads thus:

"3. The grievance of the appellant is that he had applied for permission way back in February, 2007 under Section 118 of the Himachal Pradesh Tenancy and Land Reforms Act, for purchasing a land in the State of Himachal Pradesh as per the policy of the State but he has not been granted such permission while others had been granted such permission who had applied later than him.

4. The State Government has filed a reply before us stating therein that the appellant was requested by letters dated 9th July, 2007, 10th December, 2007, 13th August, 2008, 7th August, 2009, 13th August, 2009, 9th December, 2009, 30th December, 2009 and 19th May, 2010 and 13th September, 2010 to furnish papers as required under the Himachal Pradesh Tenancy and Land Reforms Rules, 1975 but the appellant did not furnish the papers as required and in the circumstances, the State Government had no option but to ultimately reject the application of the appellant in the year 2012.

5. The appellant who has personally appeared before this Court submitted that given a chance he will furnish the documents required by the State Government by the end of April, 2014.

6. We, therefore, direct that if the appellant furnishes the required documents by the end of April, 2014, the authorities of the State Government will consider the application of the appellant in accordance with the Rules and Policies in force and pass fresh orders within two months of the receipt of the documents.

7. The appeals stand disposed of in the above terms."

8. The petitioner has now by way of this writ petition assailed the letter dated 16.1.2015 issued by respondent No.2 whereby he has been called upon to submit afresh the following documents:

(i) NOC of co-sharers of the land afresh;

(ii) Latest copy of jamabandi and tatima from the Patwari afresh and;

(iii) 30 years Bonafide Resident Certificate in Himachal Pradesh.

Instead of furnishing reply and submitting the aforesaid documents, the petitioner once again approached this Court for quashing the aforesaid letter and has averred that the Deputy Commissioner has not only given a false affidavit before the Hon'ble Supreme Court regarding the non-submission of the documents, but is further guilty of having committed contempt of the Hon'ble Supreme Court because as against the two months granted by the

Hon'ble Supreme Court, the respondent No.2 even after having received the letter addressed by the petitioner on 25.4.2014 replied to the same after more than a month.

9. On the basis of the aforesaid averments, the petitioner has sought the following substantive reliefs:

> *"(i) That writ of certiorari may kindly be issued quashing and setting aside order dated 16.01.2015 (Annexure P-5) passed by the Deputy Commissioner, Solan.*
>
> *(ii) That writ of mandamus may kindly be issued directing the respondents to grant permission to the petitioner and proforma respondents within time bound period for purchasing land in Himachal Pradesh under Section 118 of the H.P. Tenancy and Land Reforms Act since the petitioner has applied for the same on 09.03.2007, but till date, without any justification the said permission has not been granted, whereas the respondents have granted the said permission to other people within 4 days and 14 days."*

10. In response to the petition, the respondents No. 1 and 2 have filed reply wherein preliminary submissions have been raised to the effect that the claim of the petitioner is baseless as he failed to comply with the codal formalities with respect to his application seeking permission to purchase the land, which till date, have not been furnished. It is further averred that the petitioner was asked to submit some documents as per amended Rules and Policies in force vide their letter dated 27.5.2014 and in the meanwhile, a clarification was also sought by the respondent from the Government in respect of the petitioner's case to the extent as to whether his case would be governed by old or amended rules.

11. The Principal Secretary (Revenue) issued clarification that the case of the petitioner would be governed by the amended provisions and he was accordingly directed to submit the aforesaid documents for ensuring compliance of sub-rule 38-A of the H.P. Tenancy and Land Reforms Act, 1972, as amended in the year 2011. Thereafter, reminders were also issued to the petitioner on 10.10.2014 and 28.11.2014 (Annexures R-5 and R-6) but he failed to produce the requisite documents.

12. Insofar as non-compliance of the order passed by the Hon'ble Supreme Court within the stipulated period is concerned, the respondents have categorically stated that it was on account of the failure of the petitioner to submit the documents as per the amended Rules that the matter has been delayed. It has further been averred that the petitioner is habitual of making unnecessary correspondence with the respondent and has repeatedly indulged himself in filing number of RTI applications which amounts to wastage of financial and manual resources of the State.

13. It is thereafter specifically averred that the petitioner had applied for grant of permission to purchase the land comprised in Khata/Khatauni No. 30/44 Khasra No. 106/999/2/1 measuring 0-11 biswas which was a joint ownership, whereas the petitioner intends to purchase the land by carving out a tatima qua separate khasra number but the co-owners have not given No Objection Certificate to sell the land in shares. Therefore, in absence of these documents, no permission can be granted and the petitioner was once again intimated to supply the documents along with his application, but he failed to meet the requisite codal formalities.

We have heard the petitioner and Mr. J.K. Verma, learned Deputy Advocate General for respondents No.1 and 2 and gone through the records of the case carefully.

14. It is rather intriguing to note that a person of nearly 85 years of age is filing such cantankerous litigation one after the other and instead of replying to the queries as raised by respondent No.2 in discharge of his official business, would approach this Court at the drop of the hat.

15. The petitioner has sought quashing of the order dated 16.1.2015, the operative portion whereof reads as under:

> *"…. The applicant filed a CWP No. 5922/2012 titled as Om Parkash vs. State of H.P. in the Hon'ble High Court of H.P., which was dismissed with the cost vide order dated 30.8.2012. The applicant filed a civil appeal No. 4246-4247 of 2014 (arising out of SLP (c) NO. 14901-14902 of 2013 before the Supreme Court of India which was decided vide order dated 14.3.2014 with the direction to the undersigned that if the applicant will file the required documents before the authorities, the State Government will consider the application of the appellant in accordance with the rules and policies in force. This office vide letter No. PSH/11-4901/07-KGT-1448 dated 27.5.2014 intimated the applicant to submit the required documents. The applicant was again reminded vide letter No. PSH/11-4901/07-KGT dated 29.8.2014 and again vide letter No. PSH/11-4901/07-KGT-3012 dated 10.10.2014. The applicants neither submitted the NOC of all the co-sharers of the land nor resident certificate of 30 years in H.P. as required under amended rules notified on 29.7.2011. The Government has again directed to the applicant vide its letter No. B.F(10)-269/2011 dated 19.07.2014 to file his application as per amended rule. Therefore, the application of the applicant is rejected due to non-compliance of the required formalities."*

16. It was for the petitioner to have attended to the queries as raised by respondent No.2, but instead of doing so the petitioner has once again indulged in leveling all sorts of allegations against the respondent No.2 by stating that he does not have courage to even ask the VVIPs and higher-ups to meet with the requirement as sought from the petitioner vide impugned letter.

17. It is rather shocking that the petitioner despite having been reprimanded by this Court in the first case has not learnt any lesson. Even at that stage this Court was constrained to observe that it was only in view of the persuasive submissions made by the learned counsel for the petitioner, apologetically for the misconceived averments and prayers that the writ petition is dismissed.

18. Thereafter again, this Court made serious observations against the petitioner's conduct and dismissed the petition being CWP No. 5922 of 2012 with costs of Rs.50,000/-. Yet, un-deterred the petitioner has approached this Court, that too, against the contents of a letter which only call upon him to furnish certain documents. But the inflated ego of the petitioner probably drives him to file the instant litigation. In such scenario, it is the bounden duty of the Court to curb such kind of litigation. Such like petitions cannot be encouraged since the judicial system in the country is already choked and such litigants are only consuming Courts time for a wrong cause.

19. It has to be remembered that the Court proceedings are sacrosanct and cannot therefore be permitted to be polluted. Judicial system cannot be allowed to be abused and brought to its knees by unscrupulous litigants.

20. This aspect of the matter has been elaborately dealt with by the Hon'ble Supreme Court in ***K.K.Modi vrs. K.N.Modi and others, reported in (1998) 3 SCC 573*** has

dealt in detail with the proposition as to what would constitute an abuse of the process of the Court, one of which pertains to re-litigation. It has been held at paragraphs 43 to 46 as follows:

> *43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the Court" thus: "This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. . . . . .*
>
> *The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."*
>
> *44. One of the examples cited as an abuse of the process of Court is re-litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.*
>
> *45. In the case of Greenhalgh v. Mallard (1947) 2 All ER 255, the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.*
>
> *46. In Mcllkenny v. Chief Constable of West Midlands Police Force (1980) 2 All ER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs ' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels.*

21. Similarly, the Hon'ble Supreme Court in ***Kishore Samrite vs. State of Uttar Pradesh and others, reported in (2013(2) SCC 398***, has dealt in detail with "abuse of process of Court" in the following terms:

> ***Abuse of the process of Court*** :
>
> "*31. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision.*
>
> *32. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:*
>
> *32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.*
>
> *32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.*
>
> *32.3. The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.*
>
> *32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.*
>
> *32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands isnot entitled to any relief, interim or final.*
>
> *32.6. The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.*
>
> *32.7. Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.*
>
> *32.8. The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new*

problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [Refer : Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors. (2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402].

33. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In P.S.R.Sadhanantham v. Arunachalam & Anr. (1980) 3 SCC 141, the Court held:

> *"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:*
>
> > *"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic 'human-right' of a system which purports to guarantee legal rights."*
>
> .....

12. The further question which now arises is as to how to curb this tendency of abuse of process of court. As suggested in Kishore Samrita (supra), one of the ways to curb this tendency is to impose realistic or punitive costs. The Hon'ble Supreme Court inRamrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249 took judicial notice of the fact that the courts are flooded with these kinds of cases because there is an inherent profit for the wrongdoers and stressed for imposition of actual, realistic or proper costs and it was held:-

> *"52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:*
>
> *A. Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.*
>
> *B. The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.*
>
> *C . Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may*

consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.

D. The court must adopt realistic and pragmatic approach in granting mesne profits. The court must carefully keep in view the ground realities while granting mesne profits.

E. The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.

F. Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No One should be allowed to abuse the process of the court.

G. The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.

H. Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the problem within the framework of law and in accordance with the well-settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right form filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearing fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."

22. Adverting once again to the facts of the case, we are at a complete lose to understand as to how the letter dated 16.1.2015 which only calls upon the petitioner to submit certain documents can furnish a cause of action for filing the present writ petition. After all, it is for the petitioner to satisfy the requirement of law and not bulldoze to this Court. The Court cannot encourage this kind of adventurous litigation which has to be curbed with the heavy hand.

23. In view of the aforesaid discussion, we find no merit in this petition and are rather of the firm view that the same is absolutely frivolous and, therefore, deserves to be dismissed with costs. We might have though taken into consideration the advanced age of the petitioner and also the fact that he had appeared in person, but then bearing in mind the fact that the petitioner has not learnt any lesson from the result of the previous two writ petitions and has again indulged in an otherwise avoidable litigation, the petitioner cannot go scot-free.

24. This petition is accordingly dismissed with costs of Rs.50,000/- to be paid by the petitioner to the H.P. State Legal Services Authority (for short 'Authority') within a period of three months. On failure to do so, the Authority shall be competent to execute this judgment through the process of the Court.

25. Similarly, in case the petitioner has not already paid the costs as imposed earlier by this Court on 30.8.2012 in CWP No. 5922 of 2012, the same shall also be recovered by the Director, H.P. Social Justice and Empowerment Department in the same manner as aforesaid.

26. Since the petitioner has appeared in person, let a copy of this judgment be sent to him free of costs at his last known address. Copy of this judgment be also sent to the Authority and Director, H.P. Social Justice and Empowerment Department for doing the needful in terms of the aforesaid judgment.

****

BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Ranjan Singh & others ...Petitioners

Versus

State of Himachal Pradesh and others. ...Respondents

CWP No. 359 of 2016
Judgment reserved on: 11.4.2016
Date of Decision: 19.4.2016.

Constitution of India, 1950- Article 226- Government intended to create sub-Tehsil H to provide better service to nearby villages- some circles were excluded from another sub-Tehsil 'N' and were included in sub Tehsil H- report of Deputy Commissioner was called and government upgraded sub-Tehsil N - patwar circle C was excluded- a writ petition was filed pleading that decision was taken illegally without conducting inquiry or affording opportunity of hearing- held, that representations were received from residents of the patwar circle for including C in sub Tehsil N and the decision was taken on the basis of this resolution- further held, that it is not within the domain of the Court to inquire as to whether the particular public policy is wise or not - Court can only interfere if the policy framed is capricious, not informed by reasons, totally arbitrary or founded on ipse dixit- decision, to exclude C from sub Tehsil H and to include it in Sub Tehsil N was a policy decision- even a resolution was passed by Gram Panchayat - it was not shown as to how the decision was arbitrary, irrational, capricious or whimsical- petition dismissed. (Para-10 to 19) Title: Ranjan Singh & others Vs. State of Himachal Pradesh and others (D.B.)

Cases referred:

Nand Lal and another Vs. State of H.P., CWP No. 621 of 2014(2) HLR (DB) 982

Surinder Kumar Vs. State of H.P. and others, I L R 2015 (IV) HP 600 (D.B.)

Gramin Janta Kalyan Samiti, Kuthera Vs. State of H.P. and others, I L R 2016 (II) HP 574 (D.B.)

Census Commissioner and others vs. R. Krishnamurthy (2015) 2 SCC 796

For the Petitioners: Mr.Raju Ram Rahi, Advocate.

For the Respondents: Mr. Shrawan Dogra, Advocate General with Mr.Anup Rattan, Mr.Romesh Verma, Additional Advocate Generals and Mr.J.K. Verma, Deputy Advocate General, for respondents No. 1 to 5.
Mr.R.L. Chaudhary, Advocate, for respondents No. 6 to 21.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The petitioners are residents of Patwar Circle Charana, consisting of four Mohals and are aggrieved by the action of the respondents, whereby the aforesaid Patwar Circle has been excluded from Sub Tehsil Haripurdhar and included in upgraded Tehsil Nohradhar.

2. It is averred that in the year 2013, the Government had intended to create Sub Tehsil, Haripurdhar due to geographical conditions of the area as also to provide better services to the people of the nearby villages and also to further avoid inconvenience faced by them pertaining to revenue work. This decision was also aimed to have better administrative control by excluding some Patwar Circles from Tehsil Renukaji and some Patwar Circles from Sub Tehsil Nohradhar and in this process four Patwar Circles of Charana i.e. P.C. Tikkri Dasakna, Badhol, Bhalai & Bhavi were excluded from Sub Tehsil Nohradhar and had been included in Sub Tehsil Haripurdhar.

3. For this purpose, the Deputy Commissioner, Sirmour had directed the Sub-Divisional Officer Sangrah to enquire into the matter and submit his report. The said officer conducted the enquiry and also sought consent of the concerned Patwar Circle and Panchayats and submitted his detailed report vide letter dated 1.11.2013. On the basis of this report, Sub Tehsil Haripurdhar came to be created, which apart from other Patwar Circles comprised of four Patwar Circles of Charana.

4. However, thereafter the Government issued notification dated 4th February, 2016, whereby Sub Tehsil Nohradhar was upgraded to that of a Tehsil with its headquarter at Naura, which though consisted of nine Patwar Circles, but the Patwar Circle Charana was excluded.

5. This action of the respondents has been impugned in this writ petition on the ground that the aforesaid decision has been taken illegally, arbitrarily without seeking public opinion or conducting any enquiry or affording opportunities of hearing or filing objections to the effected residents and therefore, should be quashed and set aside.

6. The respondents in their reply have stated that earlier also the Patwar Circle Charana was a part and parcel of Sub Tehsil, Nohradhar and when Sub Tehsil Haripurdhar was created by the Government vide notification dated 25.7.2014, the Patwar Circle Charana was excluded from Sub Tehsil Nohradhar and included in newly created Sub Tehsil Haripurdhar.

7. However, some residents of the Patwar Circle Charana had been raising their voice time and again through various representations against inclusion of Patwar Circle, Charana in Sub Tehsil Haripurdhar. Thereafter, when members of Gram Panchyat of Sub Tehsil Nohradhar including Gram Panchayat, Charana requested to upgrade Sub Tehsil Nohradhar, then, the Government after considering the demand of the local people and further in order to provide better services to the people of the nearby villages, excluded Patwar Circle Charana from Sub Tehsil Haripurdhar and included the same to the upgraded Tehsil Nohradhar.

8. Before proceeding further, we may notice that as many as sixteen residents of Charana have moved application being CMP No. 1821 of 2016, seeking their impleadment as party-respondents and this Court vide order dated 4.4.2016 permitted these applicants to assist the Court.

9. These applicants have opposed the claim of the petitioners by filing an application for vacation of interim order which had earlier been passed by this Court on 17.2.2016. It was averred that the revenue Circle Charana was rightly included in Tehsil Nohradhar as per demand of general public, which was evident from the representation submitted by the general public on 17.7.2014 to the Sub Divisional Officer, Sangrah, wherein it was requested that Patwar Circle, Charana may not be included in Sub Tehsil, Haripurdhar and same be included in Tehsil Nohradhar. Thereafter, separate representations were received from various authorities/persons/bodies to the similar effect, on the basis of which enquiry was conducted through Naib Tehsildar Nohradhar, who recommended that Patwar Circle Charna should be kept in Tehsil Nohradhar.

We have heard learned counsel or the parties and gone through the records of the case.

10. The moot question that arises for consideration is whether the decision made by the Government for excluding the Patwar Circle, Charna from Sub Tehsil, Haripurdhar and including it to upgraded Tehsil Nohradhar, District Sirmour, is open to judicial review, if so to what extent.

11. It is not in dispute that the official respondents prior to taking the impugned decision and issuing notification dated 4.2.2016 had received various representations including those from the residents of Patwar Circle, Charana itself for including them in Sub Tehsil Nohradhar. It was only thereafter that based on the enquiry report submitted by the Sub Divisional Officer, Sangrah that impugned notification dated 4.2.2016 was finally issued.

12. This Court in ***CWP No. 621 of 2014, titled Nand Lal and another Vs. State of H.P.,*** reported in ***2014(2) HLR (DB) 982***, was dealing with identical issue, wherein the petitioners had called in question the decision made by the Government, whereby it decided to open a degree college at Diggal, District Solan, instead of Ramshaher (Nalagarh), District Solan and it was held that since it was a policy decision, the same was not open to judicial review. It is apt to reproduce the following observations:-

> "*4. Heard. The moot question for consideration in this writ petition is-whether the petitioners can question the decision made by the Government for opening a Government Post Graduate College at Diggal, District Solan?*
>
> *5. During the process of consideration of the issue, the residents of various Gram Panchayats of Ramshehar area made resolution(s) and represented to the Government for sanctioning and opening a Degree College at Ramshehar (Nalagarh), District Solan, instead of at Diggal, District Solan. After considering all the documents and keeping in view the policy-norms, governing the field, the respondents made decision to open the said college at Diggal.*
>
> *6. The petitioners are aggrieved for the reason that the State Government has not made decision in accordance with the facts, their contentions read with norms and policy.*
>
> *7. It is a beaten law of land that Government decision and policy cannot be subject matter of a writ petition, unless its arbitrariness is shown in the decision making process.*

8. It is averred that Panchayats of the area of Ramshehar have made demand for sanctioning and opening the said college at the said place, which is centrally located and is feasible also.

9. The Apex Court in Sidheshwar Sahakari Sakhar Karkhana Ltd. Vs. Union of India and others, 2005 AIR SCW 1399, has laid down the guidelines and held that Courts should not interfere in policy decision of the Government, unless there is arbitrariness on the face of it.

10. The Apex Court in a latest decision reported in Manohar Lal Sharma Vs. Union of India and another, (2013) 6 SCC 616, also held that interference by the Court on the ground of efficacy of the policy is not permissible. It is apt to reproduce paragraph 14 of the said decision as under:

> *"14. On matters affecting policy, this Court does not interfere unless the policy is unconstitutional or contrary to the statutory provisions or arbitrary or irrational or in abuse of power. The impugned policy that allows FDI up to 51% in multi-brand retail trading does not appear to suffer from any of these vices."*

14. The Apex Court in the case titled as Mrs. Asha Sharma versus Chandigarh Administration and others, reported in 2011 AIR SCW 5636 has held that policy decision cannot be quashed on the ground that another decision would have been more fair, wise, scientific or logical and in the interest of society. It is apt to reproduce para 10 herein:

> *"10. The Government is entitled to make pragmatic adjustments and policy decisions, which may be necessary or called for under the prevalent peculiar circumstances. The Court may not strike down a policy decision taken by the Government merely because it feels that another decision would have been more fair or wise, scientific or logic. The principle of reasonableness and non-arbitrariness in governmental action is the core of our constitutional scheme and structure. Its interpretation will always depend upon the facts and circumstances of a given case. Reference in this regard can also be made to Netai Bag v. State of West Bengal [(2000) 8 SCC 262 : (AIR 2000 SC 3313)]."*

15. It appears that the respondents have examined all aspects and made the decision. Thus, it cannot be said that the decision making process is bad. The Court cannot sit in appeal and examine correctness of policy decision. The Apex Court in the case titled as Bhubaneswar Development Authority and another versus Adikanda Biswal and others, reported in (2012) 11 SCC 731 laid down the same principle. It is apt to reproduce para 19 of the judgment herein:

> *"19. We are of the view that the High Court was not justified in sitting in appeal over the decision taken by the statutory authority under Article 226 of the Constitution of India. 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. The Court confines*

itself to the question of legality and is concerned only with, whether the decision making authority exceeded its power, committed an error of law, committed a breach of the rules of natural justice, reached an unreasonable decision or abused its powers."

13. Similar reiteration of law thereafter are found in decisions rendered by this Court in ***CWP No. 4625 of 2012***, titled as ***Gurbachan Vs. State of H.P. and others,*** decided on 15.7.2014, ***CWP No. 3862 of 2014***, titled as ***Surinder Kumar Vs. State of H.P. and others***, decided on 15.7.2015 and yet again in a recent decision in ***CWP No. 4044 of 2015***, titled as ***Gramin Janta Kalyan Samiti, Kuthera Vs. State of H.P. and others***, decided on 28.3.2016.

14. The scope of judicial review and its exclusion was a subject matter of a recent decision by three Judges of the Hon'ble Supreme Court in ***Census Commissioner and others vs. R. Krishnamurthy (2015) 2 SCC 796*** and it was held that it is not within the domain of Courts to embark upon enquiry as to whether particular public policy is wise and acceptable or whether better policy could be evolved, Court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded on ipse dixit offending Article 14. It was held as under:

"23. The centripodal question that emanates for consideration is whether the High Court could have issued such a mandamus commanding the appellant to carry out a census in a particular manner.

24. The High Court has tried to inject the concept of social justice to fructify its direction. It is evincible that the said direction has been issued without any deliberation and being oblivious of the principle that the courts on very rare occasion, in exercise of powers of judicial review, would interfere with a policy decision.

25. Interference with the policy decision and issue of a mandamus to frame a policy in a particular manner are absolutely different. The Act has conferred power on the Central Government to issue Notification regarding the manner in which the census has to be carried out and the Central Government has issued Notifications, and the competent authority has issued directions. It is not within the domain of the Court to legislate. The courts do interpret the law and in such interpretation certain creative process is involved. The courts have the jurisdiction to declare the law as unconstitutional. That too, where it is called for. The court may also fill up the gaps in certain spheres applying the doctrine of constitutional silence or abeyance. But, the courts are not to plunge into policy making by adding something to the policy by way of issuing a writ of mandamus. There the judicial restraint is called for remembering what we have stated in the beginning. The courts are required to understand the policy decisions framed by the Executive. If a policy decision or a Notification is arbitrary, it may invite the frown of Article 14 of the Constitution. But when the Notification was not under assail and the same is in consonance with the Act, it is really unfathomable how the High Court could issue directions as to the manner in which a census would be carried out by adding certain aspects. It is, in fact, issuance of a direction for framing a policy in a specific manner.

26. In this context, we may refer to a three-Judge Bench decision in Suresh Seth V. Commr., Indore Municipal Corporation, (2005) 13 SCC 287 wherein a prayer was made before this Court to issue directions for appropriate amendment in the M.P. Municipal Corporation Act, 1956 so that a person may be debarred from simultaneously holding two elected offices, namely, that of a

Member of the Legislative Assembly and also of a Mayor of a Municipal Corporation. Repelling the said submission, the Court held: (SCC pp. 288-89, para 5)

> *"5……In our opinion, this is a matter of policy for the elected representatives of people to decide and no direction in this regard can be issued by the Court. That apart this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under out constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation. In Supreme Court Employees' Welfare Assn. v. Union of India (1989) 4 SCC 187 (SCC para 51) it has been held that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of a subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which it has been empowered to do under the delegated legislative authority. This view has been reiterated in state of J & K v A.R. Zakki, 1992 Supp (1) SCC 548. In A.K. Roy v. Union of India, (1982) 1 SCC 271, it was held that no mandamus can be issued to enforce an Act which has been passed by the legislature."*

27. At this juncture, we may refer to certain authorities about the justification in interference with the policy framed by the Government. It needs no special emphasis to state that interference with the policy, though is permissible in law, yet the policy has to be scrutinized with ample circumspection.

28. In N.D. Jayal and Anr. V. Union of India & Ors.(2004) 9 SCC 362, the Court has observed that in the matters of policy, when the Government takes a decision bearing in mind several aspects, the Court should not interfere with the same. In Narmada Bachao Andolan V. Union of India (2000) 10 SCC 664, it has been held thus: (SCC p. 762, para 229)

> *" 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."*

29. In this context, it is fruitful to refer to the authority in Rusom Cavasiee Cooper V. Union of India, (1970) 1 SCC 248, wherein it has been expressed thus: (SCC p. 294, para 63)

> *"63….It is again not for this Court to consider the relative merits of the different political theories or economic policies... This Court has the power to strike down a law on the ground of want of authority, but the Court will not sit in appeal over the policy of Parliament in enacting a law".*

30. In Premium Granites V. State of Tamil Nadu, (1994) 2 SCC 691 while dealing with the power of the courts in interfering with the policy decision, the Court has ruled that: (SCC p.715, para 54)

> *"54. it is not the domain of the court to embark upon unchartered ocean of public policy in an exercise to consider as to whether a particular public policy is wise or a better public policy could be evolved. Such exercise must be left to the discretion of the executive and legislative authorities as the case may be. The court is called upon to consider the validity of a public policy only when a challenge is made that such policy decision infringes fundamental rights guaranteed by the Constitution of India or any other statutory right."*

31. In M.P. Oil Extraction and Anr. V. State of M.P. & Ors.(1997) 7 SCC 592, a two-Judge Bench opined that: (SCC p. 611, para 41)

> *"41..... The executive authority of the State must be held to be within its competence to frame a policy for the administration of the State. Unless the policy framed is absolutely capricious and, not being informed by any reason whatsoever, can be clearly held to be arbitrary and founded on mere ipse dixit of the executive functionaries thereby offending Article 14 of the Constitution or such policy offends other constitutional provisions or comes into conflict with any statutory provision, the Court cannot and should not outstep its limit and tinker with the policy decision of the executive functionary of the State."*

32. In State of M.P. V. Narmada Bachao Andolan & Anr.(2011) 7 SCC 639, after referring to the State of Punjab V. Ram Lubhaya Bagga (1998) 4 SCC 117 , the Court ruled thus: (SCC pp. 670-71, para 36)

> *"36. The Court cannot strike down a policy decision taken by the Government merely because it feels that another decision would have been fairer or more scientific or logical or wiser. The wisdom and advisability of the policies are ordinarily not amenable to judicial review unless the policies [pic]are contrary to statutory or constitutional provisions or arbitrary or irrational or an abuse of power. (See Ram Singh Vijay Pal Singh v. State of U.P., (2007) 6 SCC 44, Villianur Iyarkkai Padukappu Maiyam v. Union of India, (2009) 7 SCC 561 and State of Kerala v. Peoples Union for Civil Liberties, (2009) 8 SCC 46.)"*

33. from the aforesaid pronouncement of law, it is clear as noon day that it is not within the domain of the courts to embark upon an enquiry as to whether a particular public policy is wise and acceptable or whether a better policy could be evolved. The court can only interfere if the policy framed is absolutely capricious or not informed by reasons or totally arbitrary and founded ipse dixit offending the basic requirement of Article 14 of the Constitution. In certain matters, as often said, there can be opinions and opinions but the Court is not expected to sit as an appellate authority on an opinion."

15. Notably, scope of judicial review was yet again subject matter of a very recent decision rendered by the Hon'ble Supreme Court in ***Center for Public Interest Litigation Vs. Union of India W.P.(C) No. 382 of 2014, decided on 8.4.2016,*** wherein the spectrum usage charges granted to various telecom companies by the Government of India was questioned and it was held that unless a policy decision was found to be arbitrary, based on irrelevant considerations or malafide or against statutory provisions, the same does not call

for any interference by the Court in exercise of powers of judicial review. It is apt to reproduce the following observations:-

> *"**19**. Such a policy decision, when not found to be arbitrary or based on irrelevant considerations or mala fide or against any statutory provisions, does not call for any interference by the Courts in exercise of power of judicial review. This principle of law is ingrained in stone which is stated and restated time and again by this Court on numerous occasions. In Jal Mahal Resorts (P) Ltd. v. K.P. Sharma, 2014 8 SCC 804, the Court underlined the principle in the following manner:*
>
> > *116. From this, it is clear that although the courts are expected very often to enter into the technical and administrative aspects of the matter, it has its own limitations and in consonance with the theory and principle of separation of powers, reliance at least to some extent to the decisions of the State authorities, specially if it is based on the opinion of the experts reflected from the project report prepared by the technocrats, accepted by the entire hierarchy of the State administration, acknowledged, accepted and approved by one Government after the other, will have to be given due credence and weightage. In spite of this if the court chooses to overrule the correctness of such administrative decision and merits of the view of the entire body including the administrative, technical and financial experts by taking note of hair splitting submissions at the instance of a PIL petitioner without any evidence in support thereof, the PIL petitioners shall have to be put to strict proof and cannot be allowed to function as an extraordinary and extra-judicial ombudsmen questioning the entire exercise undertaken by an extensive body which include administrators, technocrats and financial experts. In our considered view, this might lead to a friction if not collision among the three organs of the State and would affect the principle of governance ingrained in the theory of separation of powers. In fact, this Court in M.P. Oil Extraction v. State of M.P., (1997) 7 SCC 592 at p. 611 has unequivocally observed that:*
> >
> > > *"41. The power of judicial review of the executive and legislative action must be kept within the bounds of constitutional scheme so that there may not be any occasion to entertain misgivings about the role of judiciary in outstepping its limit by unwarranted judicial activism being very often talked of in these days. The democratic set-up to which the polity is so deeply committed cannot function properly unless each of the three organs appreciate the need for mutual respect and supremacy in their respective fields."*
> >
> > *117. However, we hasten to add and do not wish to be misunderstood so as to infer that howsoever gross or abusive may be an administrative action or a decision which is writ large on a particular activity at the instance of the State or any other authority connected with it, the Court should remain a passive, inactive and a silent spectator. What is sought to be emphasised is that there has to be a boundary line or the proverbial laxman rekha while examining the correctness of an administrative decision taken by the State or a central authority after due deliberation*

and diligence which do not reflect arbitrariness or illegality in its decision and execution. If such equilibrium in the matter of governance gets disturbed, development is bound to be slowed down and disturbed specially in an age of economic liberalisation wherein global players are also involved as per policy decision."

20. *Minimal interference is called for by the Courts, in exercise of judicial review of a Government policy when the said policy is the outcome of deliberations of the technical experts in the fields inasmuch as Courts are not well-equipped to fathom into such domain which is left to the discretion of the execution. It was beautifully explained by the Court in Narmada Bachao Andolan v. Union of India, (2000) 10 SCC 664 and reiterated in Federation of Railway Officers Assn. v. Union of India (2003) 4 SCC 289 in the following words:*

"12. In examining a question of this nature where a policy is evolved by the Government judicial review thereof is limited. When policy according to which or the purpose for which discretion is to be exercised is clearly expressed in the statute, it cannot be said to be an unrestricted discretion. On matters affecting policy and requiring technical expertise the court would leave the matter for decision of those who are qualified to address the issues. Unless the policy or action is inconsistent with the Constitution and the laws or arbitrary or irrational or abuse of power, the court will not interfere with such matters."

21. *Limits of the judicial review were again reiterated, pointing out the same position by the Courts in England, in the case of G. Sundarrajan v. Union of India[6] in the following manner:*
15.1. Lord MacNaughten in Vacher & Sons Ltd. v. London Society of Compositors (1913 AC 107: (1911-13) All ER Rep 241 (HL) has stated:

"... Some people may think the policy of the Act unwise and even dangerous to the community. But a judicial tribunal has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. The duty of the court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction."

15.2. In Council of Civil Service Unions v. Minister for the Civil Service (1985 AC 374, it was held that it is not for the courts to determine whether a particular policy or particular decision taken in fulfilment of that policy are fair. They are concerned only with the manner in which those decisions have been taken, if that manner is unfair, the decision will be tainted with what Lord Diplock labels as "procedural impropriety."

15.3 This Court in M.P. Oil Extraction v. State of M.P. (1997) 7 SCC 592 held that unless the policy framed is absolutely capricious, unreasonable and arbitrary and based on mere ipse dixit of the executive authority or is invalid in constitutional or statutory mandate, court's interference is not called for.

15.4 Reference may also be made of the judgments of this Court in Ugar Sugar Works Ltd. v. Delhi Admn. (2001) 3 SCC 635, Dhampur

Sugar (Kashipur) Ltd. v. State of Uttaranchal (2007) 8 SCC 418 and Delhi Bar Assn. v. Union of India (2008) 13 SCC 628.

15.5. We are, therefore, firmly of the opinion that we cannot sit in judgment over the decision taken by the Government of India, NPCIL, etc. for setting up of KKNPP at Kudankulam in view of the Indo-Russian Agreement."

***22**. When it comes to the judicial review of economic policy, the Courts are more conservative as such economic policies are generally formulated by experts. Way back in the year 1978, a Bench of seven Judges of this Court in Prag Ice & Oil Mills v. Union of India and Nav Bharat Oil Mills v. Union of India, (1978) 3 SCC 459 carved out this principle in the following terms:*

"We have listened to long arguments directed at showing us that producers and sellers of oil in various parts of the country will suffer so that they would give up producing or dealing in mustard oil. It was urged that this would, quite naturally, have its repercussions on consumers for whom mustard oil will become even more scarce than ever ultimately. We do not think that it is the function of this Court or of any court to sit in judgment over such matters of economic policy as must necessarily be left to the government of the day to decide. Many of them, as a measure of price fixation must necessarily be, are matters of prediction of ultimate results on which even experts can seriously err and doubtlessly differ. Courts can certainly not be expected to decide them without even the aid of experts.

***23**. Taking aid from the aforesaid observations of the Constitution Bench, the Court reiterated the words of caution in Peerless General Finance and Investment Co. Limited v. Reserve Bank of India, (1992) 2 SCC 343 with the following utterance:*

"31. The function of the court is to see that lawful authority is not abused but not to appropriate to itself the task entrusted to that authority. It is well settled that a public body invested with statutory powers must take care not to exceed or abuse its power. It must keep within the limits of the authority committed to it. It must act in good faith and it must act reasonably. Courts are not to interfere with economic policy which is the function of experts. It is not the function of the courts to sit in judgment over matters of economic policy and it must necessarily be left to the expert bodies. In such matters even experts can seriously and doubtlessly differ. Courts cannot be expected to decide them without even the aid of experts.

***24**. It cannot be doubted that the primary and central purpose of judicial review of the administrative action is to promote good administration. It is to ensure that administrative bodies act efficiently and honestly to promote the public good. They should operate in a fair, transparent, and unbiased fashion, keeping in forefront the public interest. To ensure that aforesaid dominant objectives are achieved, this Court has added new dimension to the contours of judicial review and it has undergone tremendous change in recent years. The scope of judicial review has expanded radically and it now extends well beyond the sphere of statutory powers to include diverse forms of 'public' power in response to the changing architecture of the Government. (See : Administrative Law: Text and Materials (4th Edition) by Beatson, Matthews,*

and Elliott) Thus, not only has judicial review grown wider in scope; its intensity has also increased. Notwithstanding the same,

> *"it is, however, central to received perceptions of judicial review that courts may not interfere with exercise of discretion merely because they disagree with the decision or action in question; instead, courts intervene only if some specific fault can be established for example, if the decision was reached procedurally unfair.*

***25**. The raison d'etre of discretionary power is that it promotes decision maker to respond appropriately to the demands of particular situation. When the decision making is policy based judicial approach to interfere with such decision making becomes narrower. In such cases, in the first instance, it is to be examined as to whether policy in question is contrary to any statutory provisions or is discriminatory/arbitrary or based on irrelevant considerations. If the particular policy satisfies these parameters and is held to be valid, then the only question to be examined is as to whether the decision in question is in conformity with the said policy."*

16. It would be noticed that though there may be certain sections of general public which may not subscribe and approve the decision of the Government, but the same cannot be nullified on this ground alone. It is more settled that individual interest must yield in favour of social and public interest and this Court would only interfere with the policy decision if the petitioners can carve out a case falling within the well settled parameters of law relating to judicial review.

17. The official respondents have in their reply clearly set out the facts, circumstances and the events leading to the exclusion of Patwar Circle Charana from Sub Tehsil Haripurdhar and including the same in the upgraded Tehsil, Nohradhar. The decision to upgrade Tehsil Nohradhar arose because it had the requisite infrastructure and was already having various government offices/branches and institutions, such as, the Executive Engineer and Assistant Engineer, I&PH, Assistant Engineer (PWD), Range Officer (Forest), Range Officer (Wildlife), Medical Officer (PHC), Veterinary Officer, Police Chowki, Sub Treasury, Junior Engineer (Electricity), a branch of Horticulture, Agriculture and Civil Supplies Corporation, ITI, and Government Senior Secondary School. It was only when the residents of Patwar Circle, Charna themselves began protesting and raising their voice time and again against the inclusion of Patwar Circle, Charana in Sub Tehsil Haripurdhar, that the impugned decision was taken at the level of government.

18. Evidently, even the Gram Panchayat, Charana vide its resolution No.8 dated 23.4.2013 itself had requested to upgrade the Sub Tehsil Nohradhar to a Tehsil. Once, it is so, this Court cannot ignore the resolution passed by the Gram Panchayats as these resolutions are the true representations of the voice of the people at grass root level, who would ultimately be affected by the decision. We observe so, because the members of Gram Panchayats are democratically elected and therefore, represent the voice of the people.

19. The petitioners have failed to point out as to how and in what manner the impugned decision of the Government is either arbitrary, irrational, much less, capricious or whimsical. They have further failed to point out that the decision is either arbitrary or based on irrelevant consideration or is malafide or against any statutory provisions, thus calling for no interference.

Having said so, there is no merit in this petition and the same is dismissed accordingly, leaving the parties to bear their costs.

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

State of Himachal Pradesh .....Appellant.
Versus
Dharam Pal Singh & ors. .....Respondents.

Cr. Appeal No. 371 of 2010.
Reserved on: April 13, 2016.
Decided on: April 19, 2016.

N.D.P.S. Act, 1985- Section 20- Vehicle of the accused was intercepted which was checked- 3 kg. of charas was recovered during search which was concealed inside the inner of accused 'R' - 2 kg. 490 grams of charas was found inside the inner of accused L and 1 kg. 985 grams of charas was recovered from the bag having the words PICCACHOSE, 2 kg of charas was recovered from the other bag having the words "PICCACHOSE" written over it and 4 kg 855 grams of charas was recovered from the third bag having words "PICCACHOSE" written over it- accused were tried and acquitted by the trial Court- held, in appeal that DW-1 deposed that he was driver of the vehicle bearing registration no. HP-37-0020- he specifically stated that he had not taken the vehicle bearing registration no. HP-34A-0049 which was stated to be used by police to arrive at the spot – hence, prosecution version becomes highly doubtful- according to log book, vehicle started at 2:30 A.M and returned at 6:30 P.M. - the purpose of the visit was recovery of 17 kg charas by CIA staff - this entry makes the prosecution case doubtful- prosecution witnesses stated that search of the accused was also conducted at the spot – there was discrepancy regarding the person who carried out the investigation - call details have also not been proved in accordance with law- all these circumstances, make the prosecution case doubtful- trial Court had rightly acquitted the accused- appeal dismissed. (Para-20 to 30)

For the appellant: Mr. P.M.Negi Dy. AG.
For the respondents: Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 2.
Mr. Dinesh Bhanot, Advocate, for respondent No. 7.
Mr. G.K.Nadda, Advocate, for respondent No. 8.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 19.4.2010, rendered by the learned Special Judge (FTC), Kullu, H.P., in Sessions Trial No. 41 of 2007, 15 of 2008, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Section 20 read with Section 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), have been acquitted.

2. The case of the prosecution, in a nut shell, is that police party comprising of PW-20 Insp. Manohar Lal, PW-19 Pune Ram and others went in police vehicle bearing registration No. HP-34A-0049 to set up a nakka near Sai Ropa, Bathar-Banjar road on 3.2.2007 at about 10:00 PM. A vehicle bearing registration No. HP-58A-4000 came from the Larji at about 4:30 AM, which was going towards Bathar. It was signaled to stop. Jaswinder, Pradhan of Gram Panchayat Larji was driving it. PW-20 Insp. Manohar Lal was

talking to him when he noticed the headlights of a vehicle coming from Bathar. The vehicle was signaled to stop. It was stopped at some distance from the nakka. PW-20 Insp. Manohar Lal inquired the name of the driver. The driver got perplexed. He was asked to open the dicky. The dicky was having one envelope containing pants and shirt, polythene bag containing small towels, CD case, one TV screen and three bags, out of which two were coloured red and black and one was coloured yellow and black. The bags were checked. Black coloured substance appearing to be charas was found in the bags. The charas was also wrapped in the polythene and some was kept open. When inquiries were made from the occupants about the ownership of the bags, none of them claimed its ownership. It was dark and rain was about to start. No independent person was available. It was difficult to carry out investigation at the spot, therefore, the police party decided to move towards Police Station Banjar. The accused were taken to the room of SHO, Police Station Banjar alongwith the bags. It was noticed that accused Raj Kumar, Lakhwinder and Surjit were wearing trousers which were inflated below the knees. PW-20 Insp. Manohar Lal got suspicious and he obtained the written consent of the accused in the presence of PW-19 Pune Ram and Jaswinder after informing them that they had right to be searched in the presence of Executive Magistrate or Gazetted Officer or by the police. Memos Ext. PA/F to Ext. PA/H were prepared which were signed by the witnesses. Accused Raj Kumar, Lakhwinder and Surjit also put their signatures on the same. PW-1 Mukesh and PW-13 G.R.Verma also arrived at the spot and search of the accused was conducted in their presence. Accused Raj Kumar was wearing inner inside the pants. Charas was recovered inside the inner which was tied with the help of cello tape. It weighed 3 kgs. Charas was also found to be wrapped with the help of cello tape below the knees of accused Surjit. It was removed. It weighed 2 kg. 490 grams. Accused Lakhwinder was also wearing inner in which he had concealed charas by sticking it with the help of cello tape. It was also removed. It weighed 2 kg. 670 grams. Two samples each weighing 25 grams were taken out from the charas recovered from accused Raj Kumar, Lakhwinder and Surjit. The remaining charas was put in the polythene bag and it was wrapped in a piece of cloth. The samples were wrapped in separate pieces of cloths and were sealed with seal “T”. Memos Ext. PG, Ext. PH and Ext. PJ were prepared. One bag having words “just look” written over it was found to be containing stick like charas. It weighed 1 kg. 985 grams. The other bag coloured black and red having the words “PICCACHOSE” written over it was found to be containing 2 kg of charas. The third bag coloured black and yellow having words, “PICCACHOOSE” written over it was found to be containing 4 kg 855 grams stick like charas. Two samples, each weighing 25 grams were taken out of the recovered charas. The remaining charas was put in the same envelope and same bag from which it was recovered. Each sample and each bag containing charas were wrapped in separate pieces of cloths and sealed with seal “T”. The charas was seized vide seizure memo Ext. PK. The sample seals Ext. PA to Ext. PF were taken on separate pieces of cloth and seal was handed over to witness Jaswinder after the use. Rukka Ext. PA/J was prepared and sent to Police Station Banjar through Const. Amar Singh for registration of FIR. Const. Amar Singh carried the same to Police Station Banjar where FIR Ext. PU was registered. Accused Lakhwinder made statement Ext. PA/S under Section 67 of the Act stating that he had purchased the charas from Lal Chand. I.O. Dorje (PW-11) was sent to the spot for assisting PW-20 Insp. Manohar Lal. S.I. Dorje took over the custody of accused Lakhwinder alias Junga. Accused Lakhwinder took SI Dorje to village Tinder where he identified the house. Lal Singh came out and the search of his house was conducted. No incriminating material was recovered from the house of Lal Singh. Spot map Ext. PY was prepared. Column Nos. 1 to 8 of NCB-I form Ext. PX/1 to Ext. PX/6 were filled in by PW-20 Insp. Manohar Lal. The case property was handed over to PW-10 SHO Mathru Ram, PS Banjar, who resealed it with seal “M”. The case property along with the documents was handed over to MHC Chaman Lal (PW-9), who

deposited the same in the malkhana vide entry Ext. PQ. He filled in column No. 12 of the NCB-1 form. The contraband was sent to FSL, Junga through Const. Guddu Ram vide RC No. 11 of 2007. 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 20 witnesses. The accused were also examined under Section 313 Cr.P.C. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. P.M.Negi, learned Dy. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused persons. On the other hand, M/S Naveen K. Bhardwaj, Dinesh Bhanot and G.K. Nadda, Advocates for the respective accused have supported the judgment of the learned trial Court dated 19.4.2010.

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

6. PW-1 Mukesh Sharma testified that he took photographs of 3-4 persons at Police Station Banjar. The persons were asked to lift their pants towards the knee portion. Something was found wrapped. At that time, Pradhan of Gram Panchayat Larji and Naib Tehsildar were also present. The articles wrapped on their legs were removed and perhaps, according to him, it was "Bhang". He did not know how much of the "Bhang" was recovered from each accused. The recovered "Bhang" was weighed. He was declared hostile and cross-examined by the learned Public Prosecutor. He admitted that three pithus (rucksacks) were lying in the vehicle. He also admitted that charas was recovered from these pithus. The case property was produced before the Court while examined him as PW-1. In his cross-examination by the learned counsel appearing on behalf of accused, he admitted that only three persons were present at Police Station Banjar when he took photographs. He remained in Police Station Banjar for about two hours. The entire proceedings were conducted by ASI Mathru Ram. Voluntarily stated that one another police officer was also present at the relevant time. He did not remember who had weighed the charas in the Police Station. The rucksacks (Pithus) were not recovered from the dicky of the vehicle in his presence.

7. PW-2 Kuram Dutt deposed that he was salesman in a sweets shop at Banjar. The police had taken electronic scale from their shop last year. In his cross-examination, he deposed that he had not gone to the Police Station. He was called to the Police Station at 11:00 AM by ASI Mathru Ram. Nothing had happened at Police Station Banjar in his presence.

8. PW-5 Const. Guddu Ram testified that on 5.2.2007, MHC Chaman Lal handed over six sealed parcels containing charas 25 grams each, samples of seal impressions "T" and "M", NCB-I form in triplicate, copy of FIR and seizure memo to him vide RC No. 11/07 with direction to take the same to FSL, Junga. He deposited the articles at FSL, Junga in intact position.

9. PW-7 Dharmesh Gupta, testified that a request was received from the police for supply of call details of No. 201062 of Bahu Exchange, Banjar pertaining to Lal Singh w.e.f. 1.2.2007 to 7.2.2007. The details were prepared by him and handed over to the police vide memo Ext. PL. In his cross-examination, he admitted that he did not know the date of installation of the telephone connection. He did not know to whom telephone No. 09876783602 belongs to in Punjab.

10. PW-9 MHC Chaman Lal deposed that on 4.2.2007, ASI Mathru Ram deposited 18 sealed parcels containing charas with him. He filled in column No. 12 of NCB-I form on 5.2.2007. Thereafter, he sent the case property through Const. Guddu Ram to FSL, Junga.

11. PW-10 ASI Mathru Ram testified that on 4.2.2007, he was performing the duties of SHO at Police Station Banjar. At 10:35 AM, one rukka was received at Police Station Banjar through Const. Amar Singh, upon which FIR Ext. PU was registered. On the same day, at 3:00 PM, PW-20 Insp. Manohar Lal of CIA staff, Kullu had produced 18 sealed parcels before him for the purpose of resealing. He completed the resealing proceedings. All the articles were deposited the MHC Chaman Lal at Police Station Banjar at 3:45 PM. In his cross-examination, he deposed that the proceedings were conducted by the CIA staff in the room of SHO at Police Station Banjar. When he came to SHO room, CIA staff was busy in conducting proceedings and he merely showed his presence there and came back.

12. PW-11 SI Dorje Ram deposed that when he reached Police Station Banjar, PW-20 Insp. Manohar Lal handed over the custody of accused Lakhwinder alias Jugga to him. Accused Lakhwinder took them to village Tinder. Co-accused Lal Singh came out of his house. The house of accused Lal Singh was searched but no incriminating material was recovered from the house.

13. PW-13 G.R.Verma, Tehsildar, testified that Head Constable came to his residence from the Police Station Banjar. He was called to the Police station. Jaswinder Singh, President Gram Panchayat Larji was present there. Mukesh Sharma, photographer and servant of Hema Sweets Shop were also in the Police Station Banjar. Accused Raj Kumar, Lakhwinder and Surjit were present in the Police Station. They had wrapped charas with the aid of cello tapes on their legs below knee portion. Firstly, charas was recovered from accused Raj Kumar. It weighed 3 kgs. Secondly, charas was recovered from accused Surjit. It weighed 2 kg. 490 grams. Thirdly, charas was recovered from accused Lakhwinder. It weighed 2 kg. 670 grams. Three bags were also lying in the Police Station Banjar. The search of the bags was carried out in his presence. It contained charas weighing 1 kg 985 grams, 2 kg. and 4 kg 855 grams, respectively.

14. PW-14 Raj Kumar testified that he was owner of taxi No. HP-01 K-0996. He sold this taxi.

15. PW-16 Arun Kumar, Sub Divisional Engineer testified that a letter was received in their office from Superintendent of Police, Kullu for supply of call details of mobile No. 94181-83347 along with the address of the sim holder. The call details were supplied vide Ext. PA/C. The name of sim holder was Naranjan Singh r/o village Langha, PO Nadha Ropa, Tehsil Banjar. Mobile No. 98767 83602 did not belong to Himachal Pradesh.

16. PW-18 Const. Amar Singh testified the manner in which vehicle bearing registration No. PB-11Z-7290 was intercepted. Pradhan Gram Panchayat Larji Jaswinder Singh was also accompanying them. The dicky of the vehicle was searched. It contained two polythene bags. One of these bags contained three pants and the other bag contained two shirts. Then corrected to state that the second bag contained two small towels, one small TV screen and one VIDEO CD player. Besides this, three bags which were having zips were also recovered. All these were containing polythene packs. Inquiries were made from the accused. The accused persons were taken to the room of the SHO. The pants of Raj Kumar, Surjit and Lakhwinder were found to be inflated below knees. The pants were checked and were found to be containing hard substance. The charas was recovered from

the persons of accused Raj Kumar, Surjit and Lakhwinder. It weighed 3 kg, 2 kg 490 grams and 2 kg 670 grams, respectively. The charas was also recovered from the bags. It weighed 1 kg 985 grams, 2 kg and 4 kg 855 grams. The sampling proceedings were completed on the spot. In his cross-examination, he categorically admitted that after the occupants got down from the vehicle, their personal search was conducted and thereafter the dicky was searched.

17. PW-19 HC Pune Ram deposed the manner in which the accused were apprehended and charas was recovered from the accused, namely, Raj Kumar, Surjit and Lakhwinder.

18. PW-20 Manohar Lal, Dy. S.P., Ani testified that the vehicle was apprehended and the accused were directed to open the dicky. It was opened by the driver. The bags were recovered from the dicky. The accused were taken to the Police Station Banjar. He had also issued notice under Section 50 of the Act in the presence of Jaswinder, Mukesh and Executive Magistrate. He inquired from the accused whether they intend to be searched in the presence of Executive Magistrate or the Gazetted Officer. They intended to be searched by him. He prepared memos Ext. PA/F to Ext. PA/H in this regard. The search of the accused was carried out. The charas was recovered. The bags were searched and charas was recovered from them. Sealing proceedings were completed on the spot.

19. DW-1 HHC Amar Lal (driver) testified that he was posted as Driver to Addl. S.P., Kullu, since June, 2008. He has produced the Log Book of the vehicle bearing registration No. HP-37-0020. This vehicle was attached to Addl. SP, Hardesh Bisht on 4.2.2007. Nihal Singh was its driver earlier. The copy of the Log Book is Ext. DW-1/A. He has not driven the vehicle bearing registration No. HP-34A-0049 on 3rd and 4th February, 2007. He was not cross-examined.

20. The case of the prosecution, in a nut shell, is that the police party went to the spot on 3.2.2007 at 8:00 PM in vehicle driven by HHC Amar Lal bearing registration No. HP-34A-0049. They had laid nakka near Bathar. One vehicle bearing registration No. HP-58A-4000 came from the Larji at about 4:30 AM, which was going towards Bathar. It was signaled to stop. Jaswinder, Pradhan of Gram Panchayat Larji was driving the vehicle. PW-20 Insp. Manohar Lal was talking to him when he noticed the headlights of a vehicle coming from Bathar. The vehicle was signaled to stop. It was stopped at some distance from the nakka. The police made inquiries. Bags were recovered. The accused were taken to Police Station Banjar. They were given option by PW-20 Insp. Manohar Lal to be searched before the Executive Magistrate or the Gazetted Officer. The charas was recovered from their person. PW-20 Insp. Manohar Lal prepared consent memos Ext. PA/F to Ext. PA/H. Sealing proceedings were completed on the spot. The charas was produced before PW-10 ASI Mathru Ram. He resealed the same. It was sent to FSL, Junga.

21. The case of the prosecution has been demolished by DW-1 HHC Amar Lal (driver). According to him, he was posted as Driver of vehicle bearing registration No. HP-37-0020. This vehicle was attached to Addl. S.P., Hardesh Bisht on 4.2.2007. Earlier, its driver was Nihal Singh. The copy of the Log Book is Ext. DW-1/A. He has not taken the vehicle bearing registration No. HP-34A-0049 on 3rd and 4th February, 2007. He was not cross-examined by the learned Public Prosecutor. The prosecution case that the police officials travelled in vehicle bearing registration No. HP-34A-0049 to Sai Ropa where they had laid nakka becomes highly doubtful. Thus, the case of the prosecution that police party went to Sai Ropa in official vehicle bearing registration No. HP-34A-0049 is doubtful and thus the version of the prosecution that vehicle No. PB-11Z- 7290 was intercepted cannot be accepted.

22. According to Log Book Ext. DW-1/A, the vehicle started at 2:30 AM and came back at 6:30 PM on 4.2.2007. The purpose of the visit was recovery of 17 kg charas by CIA staff at Banjar. It is intriguing to note as to how Hardesh Bisht started journey at 2:30 AM and could have known about the recovery of 17 kg of charas when police itself was unaware of the exact quantity of charas at least prior to 6:00 AM. The recovery of charas, as per Ext. DW-1/A has been shown at Banjar. The case of the prosecution is that the recovery of contraband was at Sai Ropa. Addl. S.P. Hardesh Bisht was the best person to explain these facts. The prosecution has withheld this witness, more particularly, when there is no cross-examination of DW-1 HHC Amar Lal, driver.

23. According to the prosecution, when the police party was present at Sai Ropa and vehicle bearing registration No. HP-58-4000 came from Larji side. It was driven by Jaswinder. He was taken to Police Station along with the accused. His signatures are also found in seizure memos Ext. PG to PK. He was also not examined by the prosecution. He was an independent witness and ought to have been examined by the prosecution. Further, the case of the prosecution is also that accused Raj Kumar, Surjit and Lakhwinder were taken to Police Station Banjar. They were asked to roll up their pants and charas was recovered. PW-18 HC Amar Singh, in his cross-examination has categorically admitted that when these accused were asked to get down from the vehicle, their personal search was carried out by PW-20 Insp. Manohar Lal. It suggests that nothing was recovered from them on the spot. Thus, the version of the prosecution that the accused persons were found to be carrying charas on their legs cannot be believed. If they were searched by PW-20 Insp. Manohar Lal, on the spot, he could easily detect the charas, if any, wrapped on the legs of the accused.

24. PW-1 Mukesh Sharma testified that the entire investigation was carried out by ASI Mathru Ram. However, ASI Mathru Ram, while appearing as PW-10, has categorically testified in his cross-examination that when he came to SHO room, CIA staff was busy in conducting proceedings and he merely showed his presence there and returned back.

25. PW-13 G.R.Verma, has deposed that scale was not electronic. It was traditional scale. Though, the case of the prosecution is that the charas was weighed with the help of electronic scale brought from the sweets shop at Banjar.

26. The case of the prosecution is also that samples were taken at the spot. These were sealed with impression “T”. The samples were thereafter re-sealed with seal impression “M”. The report of the FSL, Junga is Ext. PZ which depicts that six sealed parcels each bearing four seals of “T” and resealed with four seals of “M” were mentioned. According to this report, inner and outer seals were found intact and tallied with the seal impression sent by the SHO on NCB-I form. It is not explained by the prosecution as to what was meant by “inner and outer seals were found intact”. It was not the case of the prosecution that these were six parcels on which inner and outer seals were put in.

27. The call details have also not been proved in accordance with Section 65 B of the Indian Evidence Act. PW-16 Arun Kumar supplied the call details of mobile No. 94181-83347. It belonged to Naranjan Singh. According to him, mobile No. 98767 83602 did not belong to Himachal Pradesh. The identity of the person to whom this phone belonged was not established.

28. PW-3 Const. Chand Mishra is stated to be the member of the police party. His name was mentioned in rukka Ext. PA/J. He appeared as PW-3 and testified that he was directed by PW-20 Insp. Manohar Lal to bring independent witnesses to Police Station

Banjar. He went to the residence of Sh. G.R.Verma, Naib Tehsildar, Banjar and requested him to come to Police Station Banjar. Thereafter, he went to the shop of photographer Mukesh Sharma. He also went to Hema Sweets Shop to bring electronic scale. He brought the electronic scale and handed over the same to PW-20 Insp. Manohar Lal. In his cross-examination, he has categorically admitted that no proceedings took place in his presence on that date. Thus, the version of the prosecution that he was present with the police party is falsified by his testimony.

29. The prosecution case is also that PW-19 HC Pune Ram was member of the police party. He was present on the spot at Sai Ropa. The vehicle was intercepted in his presence. The contraband was also recovered in his presence and the other codal formalities were completed in his presence, including the preparation of consent memos. His statement was recorded by the police under Section 161 Cr.P.C. vide Mark –A. It is not stated by him that he was present with the police party at Sai Ropa on 4.2.2007 in the vehicle bearing registration No. HP-34A-0049. There is no mention that the driver was asked to open the dicky and three bags were recovered from the dicky. It is also not stated that the bags were opened and charas was recovered. Thus, the statement made by him, while appearing as PW-19, is improvement. In case he was present on the spot, he should have mentioned what happened on that date in his statement recorded under Section 161 Cr.P.C.

30. Thus, the prosecution has failed to prove the case against the accused persons under Sections 20 read with Section 29 of the ND & PS Act. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 19.4.2010.

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

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.

Versus

Santokh Singh alias Sukha .....Respondent.

Cr. Appeal No. 534 of 2012.
Reserved on: April 13, 2016.
Decided on: April 19, 2016.

N.D.P.S. Act, 1985- Section 18- Accused became perplexed on seeing the police party- his search was conducted during which 3.200 kgms of charas was recovered- accused was tried and acquitted by the trial Court- held, in appeal that prosecution witnesses had admitted that there were residential houses near the place of incident- there was Indane Gas plant at a distance of 100 meters- however, no independent witness was associated- it was mentioned in the news item published in news paper that recovery was effected from the house of the accused, therefore, there is discrepancy regarding the place of recovery as well - prosecution case was not proved- in these circumstances, accused was rightly acquitted by the trial Court- appeal dismissed. (Para-12 to 18)

For the appellant: Mr. P.M.Negi, Dy. AG.
For the respondent: Mr. H.S.Rana, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 21.8.2012, rendered by the learned Special Judge (FTC), Una, H.P., in Sessions case No. 14/2011, whereby the respondent-accused (hereinafter referred to as the accused), who was charged with and tried for offence punishable under Section 18 of the Narcotic Drugs and Psychotropic Substances 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 23.4.2011, SI Harjeet Singh in his car No. HP-12B-6069 along with HHC Purshotam Lal and HC Albel Singh was on patrolling duty. They were going from Mehatpur to Raipur Sahoran side. At around 10:15 PM, ahead of railway crossing, police officials found one person coming from Santokhgarh side wearing brown colour pants-shirt holding an envelope in his hand. On suspicion, SI Harjeet Singh stopped his vehicle. On seeing the police party, the person became perplexed. He disclosed his identity. The polythene envelope which he was carrying was checked which was containing another polythene envelope in it of red, white and blue colours. On checking, it was found containing opium of brown colour. Memo of identification Ext. PW-8/A was signed by HC Albel Singh, HHC Purshotam Lal as well as by the accused. The charas weighed 3.200 kgms. The recovered contraband was put in blue colour polythene envelope and thereafter put in a cloth parcel and sealed with seven seals of impression "N" and specimen seal impression Ext. PW-8/D was also retained on a piece of cloth and seal after use was given to Purshotam Lal. IO filled in NCB form in triplicate vide Ext. PW-1/A and also put seal impression "N" on the same. No local witness was available on the spot. IO prepared the rukka Ext. PW-7/A and sent to the Police Station through HHC Purshotam Lal, on the basis of which FIR Ext. PW-7/B was registered. The case property was produced before SHO Una, who resealed the same with seal "A" by affixing five seals and he also filled in column Nos. 9 to 11 of NCB form. He handed over the case property to MHC Rajinder Kumar, who made entry in the malkhana register. The contraband was sent to FSL, Junga vide RC No. 70/2011. 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 10 witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. He examined two witnesses in defence. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. P.M.Negi, Dy. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. H.S.Rana, Advocate for the accused has supported the judgment of the learned trial Court dated 21.8.2012.

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

6. PW-1 HC Rajinder Singh deposed that he officiated as MHC of PS Una. SHO Ruldu Ram deposited with him sealed cloth parcel sealed with seal "A" affixing five seal impressions. The SHO also handed over to him two seals of samples "A" and "N", NCB forms in triplicate. He filled in column No. 12 of form Ext. PW-1/A. The parcels were stated to be

containing opium weighing 3-200 Kgs. He deposited and entered the case property in malkhana register No. 19 vide Ext. PW-1/B. On 25.4.2011, he sent the case property vide RC No. 70/2011 through HHC Anand Sindhu to FSL, Junga.

7. PW-2 HHC Anand Sidhu testified that on 25.4.2011 PW-1 HC Rajinder Singh handed over to him one parcel sealed with seals of "A" and "N" for depositing in FSL, Junga. He deposited the same vide RC No. 70/2011 under receipt.

8. PW-4 HC Ajaib Singh deposed that he was posted at Police Station Una. On 25.5.2011, Const. Surinder Kumar handed over to him case property Ext. P-1, FSL report Ext. PW-4/A along with case property sealed with seal impression FSL. He deposited the same in malkhana and handed over report of FSL to I.O. Entry in this regard was made in the malkhana at Sr. No. 1181.

9. PW-7 Insp. R.R. Thakur, testified that on 24.4.2011 at about 3:25 AM, SI Harjeet Singh, I.O. produced before him case property charas 3-200 Kgms in a sealed parcel sealed with seal impression "N", NCB form, sample seal alongwith the accused. He resealed the same by affixing seal impression "A" at five places. He also filled in columns No. 9 to 11 of the NCB form. He also took sample seal impressions on separate white cloth in three numbers. He prepared certificate under Section 55 of the Act regarding resealing of the contraband. He handed over the case property to HC Rajinder Kumar who entered the same in the malkhana register.

10. PW-8 HHC Purshotam Lal deposed that on 23.4.2011 at about 10:15 PM, he along with SI Harjeet Singh, and HC Albel Singh were on patrolling. When they were going from Mehatpur Bazar on the road to Santokhgarh, 100 meters ahead from railway crossing, one man was seen coming from Santokhgarh side. He was wearing brown colour pants and shirt. He was holding a polythene envelope in his hand. Harjeet Singh stopped the vehicle. The accused got perplexed. He disclosed his identity. He was carrying polythene envelope of blue colour was found containing another polythene envelope. The charas was recovered. It weighed 3.200 Kgs. The sampling proceedings were completed on the spot. The place of recovery was isolated, therefore, the independent witnesses could not be associated. The I.O. prepared rukka Ext. PW-7/A for registration of case. He took the same to the Police Station, on the basis of which FIR Ext. PW-7/B was registered. In his cross-examination, he admitted that the railway crossing was at a distance of 1 km. from Mehatpur bazaar. He admitted that another road leads to village Charatgarh from the railway crossing. There is Indane Gas filling plant near railway crossing. The distance of plant is 200 meters towards Santokhgarh side. He admitted that persons used to reside and sit in the dump during night hours. Accused did not try to run away from the spot.

11. PW-10 SI Harjeet Singh also testified the manner in which the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. He prepared rukka Ext. PW-7/A on the basis of which FIR Ext. PW-7/B was registered. He handed over the case property to SHO, who resealed the same with seal impression "A". He recorded the statements of the witnesses. In his cross-examination, he admitted that at a distance from the spot towards village Santokhgarh, there is Indane dump where employees remain present 24 hours. The Indane dump is about 200-250 km from the railway crossing. There were no houses opposite to Indane dump across the road. He had parked his car 100 meters away from the railway crossing. There is no abadi within the radius of 100 meters. He did not try to associate independent witnesses. The proceedings were conducted in the Indane dump light as well as with the help of car light and emergency light. He admitted in his cross-examination that the press notes are given on the basis of FIR by superior officers to the correspondents. He admitted that superior officers release press notes after

verification from the I.Os. He admitted that in this case, news was also published in the Amar Ujala newspaper. He did not remember if he had read this news.

12. The prosecution has not examined any independent witness at the time the accused was apprehended, search, seizure and sealing proceedings were completed on the spot. PW-8 HHC Purshotam Lal, as noticed hereinabove, has categorically admitted in his cross-examination that there are residential houses between Mehatpur bazaar and railway crossing. The accused was apprehended 100 meters ahead of railway crossing. He also admitted that there is Indane Gas filling plant near railway crossing. He admitted that persons used to reside and sit in the dump during night hours. PW-10 SI Harjeet Singh admitted in his cross-examination that at a distance from the spot towards village Santokhgarh, there is Indane dump where employees remain present 24 hours. It was neither secluded nor isolated place. The prosecution ought to have examined independent witnesses. PW-8 HHC Purshotam Lal has testified that the I.O. tried to arrange independent witnesses but PW-10 SI Harjeet Singh, I.O. has categorically stated that he did not try to associate independent witnesses. DW-2 Puran Singh has also deposed that there is old brick kiln opposite to Indian Oil dump. There is abadi opposite to Indian Oil dump of Mohan Lal, Kaku's cowshed as well as his greasing business. There are shops of Telu Ram and Seeta Ram. There is also shop of Ganju. There is house of son of Faquir Chand and Badri Nath. However, the fact of the matter is that despite the availability of witnesses, the prosecution has not associated any independent witnesses.

13. The case of the prosecution, precisely, is that accused was apprehended 100 meters ahead of railway crossing. News item published in the newspaper is Ext. DW-1/A. DW-1 Pawan Kumar has proved Ext. DW-1/A. He has admitted that this news item was published in the Amar Ujala. The news was published after due verification.

14. PW-10 SI Harjeet Singh in his cross-examination has admitted that the press notes are given on the basis of FIR by superior officers to the correspondents. He admitted that superior officers release press notes after verification from the I.Os. He also admitted that in this case, news was also published in the Amar Ujala newspaper. He did not remember if he had read this news. It is reiterated that there is variance in the version of the prosecution whether the contraband was recovered from the railway crossing or from the shop of accused.

15. Thus, the prosecution has failed to prove the case against the accused under Sections 18 of the ND & PS Act that the charas was recovered from the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 21.8.2012.

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

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

State of Himachal Pradesh ..... Appellant

Versus

Satish Kumar .....Respondent

Cr. Appeal No. 350/2010
Reserved on: April 12, 2016
Decided on: April 19, 2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.6 kg of charas- he was tried and acquitted by the trial Court- I.O. had kept the case property with him- he had not deposited the same with police post – no entry was also made regarding keeping the case property with I.O.- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- prosecution had not produced Malkhana Register - held, that in these circumstances prosecution case was not proved- accused acquitted. (Para-11 to 13)

For the appellant : Mr. Ramesh Thakur, Deputy Advocate General.
For the respondents : Mr. Rajesh Kumar, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 2.3.2010 rendered by the learned Special Judge, Chamba Division, Chamba, Himachal Pradesh in Sessions Case No. 16 of 1995, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for commission of offence under Section 20 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 on 12.3.1995, SI SHO Kishan Chand (PW-7) was present near Surgani on patrolling duty alongwith ASI Babu Ram, HC Mukesh Kumar, Constable Ashok Kumar (PW-3) and other police officials, where Budhi Singh met them and they proceeded on foot towards Manjeer. At some distance, accused was found sitting on a parapet on the side of the road alongwith his companion Chanan Singh. Accused and his companion Chanan Singh were carrying a bag each in their laps and on inquiry, the accused became perplexed, on which suspicion arose and search of the bag in possession of accused was carried out. Charas weighing 1.6 kg was recovered from the polythene bag. One sample weighing 20 grams was separated from the charas so recovered which was put in a parcel whereas the bulk of the charas was put in separate parcel alongwith the bag and clothes, and both the parcels were sealed with seal impression 'KS" and were taken into possession vide memo Ext. PA. Rukka Ext. PD was prepared and sent to Police Station, Kihar through Constable Ashok Kumar, on the basis of which FIR, Ext. PE was registered in Police Station, Kihar. Case property alongwith sample seal was deposited with Mr. Subhash Kumar (PW-4), the then MHC Police Station, Kihar, who on 28.3.1995 forwarded the sample parcel alongwith the specimen seal to Chemical Examiner at Kandaghat through Constable Sham Lal (PW-5) vide RC No. 26/95 and as per report of Chemical Examiner, Ext. PF, the sample, was found to be charas. Investigation was completed and Challan was put up in the Court after completing all codal formalities.

3. Prosecution has examined as many as 7 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. Ramesh Thakur, Deputy Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Rajesh Kumar, Advocate, has supported the judgment of acquittal dated 2.3.2010.

6. We have heard the learned counsel for the parties and also gone through the judgment and record carefully.

7. PW-1 Budhi Singh testified that he was on his way on 12.3.1995 from his village to Saili to supervise his work. On the way just below the police post, SI Kishan Chand, SHO-ASI Babu Ram and other police officials met him and they all started proceeding towards Manjeer. When they proceeded ahead, they found two persons sitting on the parapets of the road near Kandla Morh. These persons were not known to him. Both the persons were questioned by the SI. They disclosed their identify. Accused Satish Kumar upturned his bag. It contained Charas wrapped in the shape of balls. There were some clothes also. Charas weighed 1.6 kg. Sealing proceedings were completed at the spot.

8. PW-2 Shiv Kanya LHC, testified that on 13.3.1995, Babu Ram ASI handed over to her a special report. It was presented by her to the SP on 14.3.1995.

9. PW-4 Subhash Kumar deposed that on 13.3.1995, SHO deposited with him case property consisting of two parcels. Both were sealed with seal 'KS". Parcel containing sample of recovered charas was handed over by him to Constable Sham Lal No. 238 vide RC No. 26/95 on 28.3.1995 for being taken to the Chemical Examiner at Kandaghat. Sample seals were also sent alongwith. In his cross-examination, he deposed that he has not brought the register. He further admitted that the case property remained with him for three months as it was deposited in Malkhana after challan was presented in the Court. Case property was deposited by the SHO. SHO never took back the case property.

10. PW-5 Constable Sham Lal deposed that on 28.3.1995, MHC Subhash Kumar handed over to him a sealed sample parcel for being taken to Chemical Examiner, Kandaghat alongwith sample impression of seal vide RC No. 26/95. He deposited the same with chemical examiner on 31.3.1995.

11. PW-7 Inspector Kishan Chand is a material witness. He deposed the manner in which accused was apprehended, contraband was recovered from the bag. In his cross-examination, he deposed that the night intervening 12 and 13.3.1995, was spent in PP Surgani. He kept the case property with him on 12.3.1995. There was Malkhana in the police post but he had no faith in the officials posted there. He had put case property in the bag which was kept by him under his pillow under his head. He had not made entry in any document except Zimnis that the case property was kept by him in his custody on the said night. He started to Police Station, Kihar from Surgani at 11/12 PM. He had travelled on motor cycle. The motor cycle was brought there by rider Ashok Kumar. He did not know who has produced the case property in the Court.

12. PW-7 Kishan Chand has categorically admitted in his cross-examination that he has not deposited the case property in Malkhana in the police post since he had not faith in the officials posted there. He should have deposited the case property in the Malkhana instead of retaining the same with him. He has not made any entry in any documents except Zimnis that the case property was kept by him in his custody during the night. PW-4 Subhash Kumar has not brought the Malkhana Register. PW-7 Kishan Chand did not know who has produced the case property in the Court. PW-4 Subhash Kumar, in his examination-in-chief deposed that the parcel containing sample of recovered charas was handed over by him to Constable Sham Lal for being taken to Chemical Examiner. Sample seals were also sent alongwith. Similarly, PW-5 Constable Sham Lal testified that Subhash Kumar has handed over sample parcel for taking it to Kandaghat alongwith seal impression

vide RC No. 26/95. PW-5 Constable Sham Lal, in his cross-examination, admitted that he has not stated to IO that he has taken seal impressions alongwith parcels. Similarly, PW-4 Subhash Kumar admitted that he has not stated to IO that he has sent seal impression alongwith sample parcels. Statements were recorded under Section 161 CrPC. These witnesses i.e. PW-4 Subhash Kumar and PW-5 Sham Lal have made improvements. Prosecution has not produced Malkhana Register to prove that sample parcel was accompanied by specimen seal impression. Though, as per the chemical examiner report seals were found intact, unbroken. However, Chemical Examiner has nowhere mentioned how many seals were affixed and what was the impression of seal used on the sample parcel, which was examined by him chemically. Prosecution has failed to prove that specimen seal was sent separately to the chemical examiner. IO should have deposited the case property in the Malkhana instead of retaining it with him during the night. Thus the possibility of tampering with the sealed parcel can not be ruled out.

13. Prosecution has failed to prove case against the accused under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985. Hence, there is no occasion for us to interfere with the well reasoned judgment passed by the learned trial Court.

14. Thus, the appeal is without merits, which is accordingly dismissed. All pending applications, are also disposed of. Bail bonds of the accused are discharged.

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

Mannwar son of Sh Iqbal Hussain. .....Petitioner.

Vs.

State of Himachal Pradesh. ....Non-petitioner.

Cr.MP(M) No. 337 of 2016.
Order reserved on:13.4.2016.
Date of Order: April 20, 2016.

Code of Criminal Procedure, 1973- Section 439- An FIR was registered against the petitioner for the commission of offences punishable under Sections 341, 323, 324 and 307 read with Section 34 Indian Penal Code, 1860- petitioner pleaded that he was innocent and had not committed any offence, investigation is complete and he will abide by the terms and conditions which may be imposed by the Court- 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- investigation is complete- injured had been discharged from the hospital and the petitioner is a student – therefore, he is released on bail on conditions. (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. Anup Chitkara, Advocate.
For non-petitioner: Mr. M.L.Chauhan, and Mr.Rupinder Singh Thakur, Addl. Advocate General with Mr. R.K.Sharma, Deputy Advocate General.

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. 23 of 2016 dated 29.1.2016 registered under Sections 341, 323, 324 and 307 read with Section 34 IPC at Police Station Paonta Sahib District Sirmour HP.

2. It is pleaded that petitioner is innocent and petitioner did not commit any criminal offence as alleged by investigating agency. It is further pleaded that petitioner is pursuing his education B.A in economics. It is further pleaded that investigation is completed and any conditions imposed by Court will be binding upon petitioner. It is further pleaded that petitioner is not habitual offender and is not previously convicted. Prayer for acceptance of bail petition sought.

3. Per contra police report filed. As per police report on 29.1.2016 at about 4.30 PM upon road at place By-pass Mazra co-accused Mannwar inflicted injury upon body of Ankush with knife and other co-accused have also beaten injured Ankush. Medical examination of injured Ankush was conducted. As per MLC report injuries inflicted upon injured Ankush were dangerous to life. There is further recital in police report that during investigation site plan prepared and blood clotted clothes of injured Ankush took into possession vide seizure memo. There is further recital in police report that injured was discharged from hospital on 6.2.2016. During investigation weapon of attack i.e. knife recovered and blood clotted clothes of injured sent for chemical examination. There is further recital in police report that chemical analyst report is still awaited.

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 record carefully.

5. Following points arise for determination in present bail petition.

(1) Whether bail petition 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?.

(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 he has been falsely implicated in 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 parties to lead evidence in support of their case.

7. Submission of learned Advocate appearing on behalf of petitioner that petitioner is student of B.A and career of the petitioner is involved and investigation is completed and any conditions imposed by Court will be binding upon petitioner and on this ground bail petition 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 title Gurcharan Singh and others Vs. State (Delhi Administration**.** Also see AIR 1962 SC 253 title The State Vs. Captain Jagjit Singh. It was held in case reported in 2012 Cri.L.J 702 S.C title 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. Learned Additional Advocate General submits before the Court that investigation is completed in present case except chemical analyst report. In view of the fact that petitioner is student and in view of the fact that injured has been discharged from hospital on 6.2.2016 and in view of the fact that accused is presumed to be innocent till convicted by competent Court of law court is of the opinion that it is expedient in the ends of justice to release petitioner on bail. Court is of the opinion that if petitioner is released on bail at this stage then interest of general public and State will not be adversely effected.

9. Submission of learned Additional Advocate General appearing on behalf of non-petitioner that if the petitioner is released on bail then petitioner will induce and threat prosecution witnesses and on this ground bail petition be rejected is devoid of any force for the reasons hereinafter mentioned. It is held that conditional bail will be granted to petitioner. It is further held that if petitioner will flout terms and conditions of conditional bail order then prosecution agency or investigating agency will be at liberty to file application for cancellation of bail as provided under Section 439(2) of the Code of Criminal Procedure 1973 in accordance with law. In view of above stated facts point No.1 is answered in affirmative.

Point No.2 (Final order).

10. 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 he 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.

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

Mansa Devi & ors ...Appellants/Defendants

Versus

Saina Devi & ors ...Respondents/Plaintiffs.

RSA No. 498 of 2004
Decided on: 20.4.2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit pleading that suit land was owned and possessed by their father, defendants in collusion with the settlement staff got themselves recorded as owner in possession of the suit land- suit was dismissed by the trial Court- judgment was set aside in the appeal- trial court had held that in absence of mutation being challenged, same had attained finality- held, that mutation does not confer any title nor it does extinguish the same- owner of the land is not supposed to approach the Court unless his rights are actually infringed – judgment of trial Court was rightly set aside by the Appellate Court- appeal dismissed. (Para-7 to 15)

Cases referred:

Lekh Ram & ors Vs. Roop Ram & ors. RSA No.509 of 2001

Adya Sakti Dassi, AIR 1942 Cal 586

Premchand Manickchand Vs. Fort Gloster Jute Manufacturing Co.Ltd, 64 Cal WN 103= (AIR 1959 Cal 620)

Sales Tax Officer, Banaras Vs. Kanhaiyalal, AIR 1959 SC 135

Venkata Narasinha Naidu V. Bhasyakarlu Naidu, (1902) 6 Cal WN 641= 29 Ind App 76 (PC)

Mohammed Seraj Vs. Adibar Rahaman Sheikh & ors, AIR 1968 Cal.550 (V 55 C 99),

Taher Ali Khan V. Abdul Hakim & ors, AIR 2006 Cal 124

Ravi Kant V. Bhupender Kumar, AIR 2008 HP 31.

For the Appellants/Defendants : Mr. Bhuvnesh Sharma, Advocate

For the Respondents/Plaintiffs : Ms. Ranjana Chauhan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

The appellants (hereinafter referred to as 'Defendants') have preferred this Regular Second Appeal against the judgment and decree passed by learned District Judge, Kangra whereby he reversed the judgment and decree passed by learned Sub Judge, 1st Class, Dehra.

2. The respondents (hereinafter referred to as 'Plaintiffs') filed suit for declaration along with permanent injunction on the ground that the suit land measuring 0-05-53 hectares comprised in khasra No.1327 situate in mohal and mauza Chaplah Tappa Chanaur, Tehsil Dehra, District Kangra, was owned and possessed by their father late Subedar Partap Singh. Plaintiffs after the death of their father, inherited the land, but during the course of settlement, defendants in collusion with the settlement staff got mutation no. 884 sanctioned in their favour on 26.7.1978 showing them to be the owner in possession of the suit land. After attestation of mutation, respondents had been openly proclaiming themselves to be the owner and were interfering in the suit land, necessitating the filing of the suit.

3. Defendants contested the suit by filing written statement wherein preliminary objections regarding, maintainability, non joinder, locus standi, cause of action, jurisdiction, limitation and the suit being false and frivolous were raised. On merits, it was pleaded that the land in dispute was an abadi area and the same was owned by the defendants, and, therefore, mutation was rightly attested in their favour.

4. Plaintiffs filed replication to the written statement wherein they denied the allegations of the defendants and reiterated their claim which was set out in the plaint.

5. On the basis of the pleadings of the parties, learned trial court vide order dated 15.10.1999 and 27.1.2001 framed the following issues:

"1. Whether the plaintiff along with his brother are owner of the suit land, as alleged? OPP.
2. Whether the possession of defendant over the house is permissive, as alleged? OPP.
3. Whether the plaintiffs are entitled for the possession of the disputed house? OPP.
3(a) Whether the defendant has become owner of the suit land by operation of HP Tenancy and Land Reforms Act? OPD.
3(b) Whether in the alternative the defendant has become owner of the suit land by way of his adverse possession? OPD.
4. Whether the suit is not maintainable in the present form? OPD.
5. Whether this suit is bad for non joinder of necessary parties? OPD.
6. Whether this court has not jurisdiction to try the present suit? OPD.
7. Whether this suit is not properly valued? OPD.
8. Whether the plaintiff are estopped to file the present suit? OPD.
9. Relief."

6. The learned trial court dismissed the suit of the plaintiffs. However, on appeal having been carried to the court of learned District Judge, Kangra, the said judgment and decree was set aside and the suit of the plaintiffs/ respondents was ordered to be decreed.

7. Aggrieved by the judgment and decree passed by the learned lower appellate court, defendants/appellants has preferred the instant appeal which was admitted on 17.11.2004 on the following substantial question of law:

"1. Whether the findings of the learned first appellate court are dehors the evidence on record?"

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

8. It would be noticed that learned trial court has dismissed the suit of the respondents only on the basis of mutation No. 884 by concluding that in absence of the mutation being challenged, the same had attained finality. It was further held that since mutation was attested by a public servant in discharge of his official duties, therefore, presumption of truth was attached to such mutation.

9. What would be the evidentiary and legal value of the mutation, has been considered by me in RSA No.509 of 2001, titled ***Lekh Ram & ors Vs. Roop Ram & ors*** and it was held as under:

"26. Law is well settled that mutation does not create or extinguish the title nor Has any presumptive value on the title. The Hon'ble Supreme Court ***in Sawarni versus Inder Kaur and others (1996) 6 SCC 223*** *has held that:-*

> *"mutation of a property in the revenue records does not create or extinguish The title nor has any presumptive value on title. It only enables the person in whose favour the mutation is ordered to pay land revenue in question.*

27 It will be apposite here to refer ***to Baleshwar Tewari (Dead) by LRs. And others versus Sheojatan Tiwary and others (1997) 5 SCC 112*** *wherein the Hon'ble Supreme Court held:*

> *"15.....Entries in Revenue records is the paradise of the patwari and the tiller of the soil is rarely concerned with the same. So long as his possession and enjoyment is not interdicted by due process and course of law, he is least concerned with entries. It is common knowledge in rural India that a raiyat always regards the land he ploughs as his dominion and generally obeys, with moral fibre the command of the intermediary so long as his possession is not disturbed. Therefore, creation of records is a camouflage to defeat just and legal right or claim and interest of the raiyat, the tiller of the soil on whom the Act confers title to the land he tills."*

10. Sh.Bhuvnesh Sharma, learned counsel for the appellants would then argue that the learned lower appellate court has clearly ignored that the suit was barred by limitation inasmuch as the mutation ws attested on 26.7.1978 whereas the suit came to be filed only on 13.8.1993 and was thus time barred.

11. I do not find force in this contention of the appellants for the simple reason that firstly there is no issue framed to this effect. Secondly as has been held by the Hon'ble Supreme Court in *Baleshwar Tewari's* case (supra) that so long as the possession is not disturbed, there is no requirement of the actual tiller of the land to approach a court of law to have the mutation set aside, as it does not create and extinguish the title nor has any presumptive value on the title.

12. Sh.Bhuvnesh Sharma, learned counsel for the appellants would then argue that the appellants have become owner of the suit land by operation of HP Tenancy and Land Reforms Act and in the alternative had become owner of the suit land by way of adverse possession. In response to such preposition, Ms. Ranjana Chauhan, learned counsel for the respondents has vehemently argued that the plea now sought to be raised by the appellants are mutually destructive and self contradictory pleas as the former plea is based on lawful title, whereas the latter plea is based on hostile animus and possession.

13. This question, in my opinion, has been rendered totally academic in view of the specific issues 3(a) and (b) (supra) having been though framed but given up as non pressed before the learned trial court.

14. Now once an issue is not pressed before the trial court, it is not open to the party doing so to agitate it over again in the court of appeal. (Refer ***Prasanna Kumar V. Adya Sakti Dassi, AIR 1942 Cal 586; Premchand Manickchand Vs. Fort Gloster Jute Manufacturing Co.Ltd, 64 Cal WN 103= (AIR 1959 Cal 620); Sales Tax Officer, Banaras Vs. Kanhaiyalal, AIR 1959 SC 135 and Venkata Narasinha Naidu V. Bhasyakarlu Naidu, (1902) 6 Cal WN 641= 29 Ind App 76 (PC), Mohammed Seraj Vs. Adibar Rahaman Sheikh & ors, AIR 1968 Cal.550 (V 55 C 99), Taher Ali Khan V.***

Abdul Hakim & ors, AIR 2006 Cal 124, Ravi Kant V. Bhupender Kumar, AIR 2008 HP 31.

15. As already observed earlier, the trial court solely on the basis of the mutation decided the suit as if the mutation was a document of title. The learned lower appellate court, therefore, committed no illegality or irregularity in setting aside the judgment and decree passed by the trial court by observing that the mutation could not pass on any title of the suit land in favour of defendants/appellants. The substantial question of law is answered accordingly against the appellant.

Having said so, I find no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their own costs.

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

Dinesh Singh Thakur .....Appellant.

Versus

Prem Gazta .....Respondent.

RSA No. 120 of 2005.
Reserved on: 19.04.2016.
Decided on: 21.04.2016.

Code of Civil Procedure, 1908- Section 100- Plaintiff filed a suit pleading therein that he is a private contractor- he had carried out the construction of the building of the defendant- a sum of Rs. 62,965/- was due to the plaintiff from the defendant - defendant has paid Rs. 17,000/- only- suit was filed for recovery of remaining amount along with interest- defendant pleaded that he had agreed to pay for the construction at the rate of Rs. 11/- per square feet for laying slab and at the rate of Rs. 10/- per square feet for the construction of column and beams- he had already paid Rs. 18,500/- to the plaintiff on different occasions- plaintiff had also taken 20 bags of cement for which he is liable to pay Rs. 2,640/- to the defendant- suit was dismissed by the trial Court- appeal was preferred which was dismissed- appellant had offered to pay Rs. 60,000/- in lump sum before the Appellate Court but the respondent had not appeared and he was proceeded exparte- matter could have only been settled if the respondent had agreed to accept the amount- hence, no error was committed by the District Judge - there is no merit in this appeal and the same is dismissed. (Para-15 to 22)

Cases referred:

The West Bengal State Electricity Board and others vrs. M/S Shanti Conductors Pvt. Ltd., AIR 2004 Gauhati 70,

Salem Advocate Bar Association, Tamil Nadu vs. Union of India, AIR 2003 SC 189

For the appellant(s): Mr. Hamender Chandel, Advocate.

For the respondent: Mr. V.S.Chauhan, 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, Shimla, H.P., dated 31.12.2003, passed in Civil Appeal No. 69-S/13 of 2001.

2. "Key facts" necessary for the adjudication of this regular second appeal are that the appellant-plaintiff (hereinafter referred to as the plaintiff), has instituted a suit for recovery. The plaintiff is a private contractor. He has undertaken the construction work of the respondent-defendant (hereinafter referred to as the defendant). In the month of March, 1994, he has carried out some construction work of the building of the defendant till the month of August, 1994. He was engaged by the defendant at the instance of one Sh. S.S. Bhurji, architect. According to the plaintiff, at the time of entering into agreement, the defendant had agreed to pay him for the construction work at the rates prescribed by the H.P. PWD with 125% rise as per the cost index. A sum of Rs. 62,965/- was found due to the plaintiff from the defendant. The defendant has paid him Rs. 17,000/- only. He also claimed interest @ 18% per annum.

3. The suit was contested by the defendant by filing written statement. He has categorically denied that he had agreed to pay labour charges on PWD rates, as claimed by the plaintiff. The case set up by the defendant was that he agreed merely to pay for the construction work at the rate of Rs. 11/- per square feet for laying slab and at the rate of Rs. 10/- per square feet for the construction of column and beams. He had already paid Rs. 18,500/- to the plaintiff on different occasions. The plaintiff had also taken 20 bags of cement from the defendant for which he had failed to account for. The defendant claimed a sum of Rs. 2640/- against the plaintiff for 20 bags of cement at the rate of Rs. 120/- per bag. Thus, according to the defendant, a total sum of Rs. 21,140/- had already been paid to the plaintiff.

4. The learned Senior Sub Judge, Shimla on 27.10.1998 framed the issues. The suit was dismissed vide judgment dated 26.7.2001. The plaintiff, feeling aggrieved, preferred an appeal against the judgment and decree dated 26.7.2001. The learned District Judge, Shimla dismissed the same on 31.12.2003. Hence, this regular second appeal.

5. The regular second appeal was admitted on the following substantial questions of law on 24.8.2005:

> "1. Whether the Appellate Court below having once referred the parties to the suit to arrive at settlement of accounts, ought to have adopted the provisions of Section 89 CPC especially when the parties to the suit had expressed that the settlement has been arrived at?
>
> 2. Whether the judgment on merits could have been passed by the Lower Appellate Court without referring to order passed by earlier presiding officer who resorted to settlement between the parties?"

6. Mr. Hamender Chandel, Advocate, appearing on behalf of the appellant, on the basis of the substantial questions of law framed, has vehemently argued that once the first appellate Court has referred the parties to suit to arrive at settlement, he should have followed the provisions of Section 89 CPC. He also contended that learned first appellate Court below has passed the judgment without referring to the previous orders passed by the learned Presiding Officer. On the other hand, Mr. V.S.Chauhan, Advocate, has supported the judgments and decrees passed by both the 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 learned counsel for both the sides and have also gone through the judgments and records of the case carefully.

9. The plaintiff has appeared as PW-1. According to him, he was private contractor. The defendant had come to his house and told that he had been sent by Sh. S.S. Bhurji. He requested him to carry out the construction work of his house on a plot situated at B.C.S. Shimla. He was not having complete drawings of the house. Later on, he gave him the drawings of the construction work to be carried out. At that time, the rates were settled as per the HP PWD Schedule of rates allowing 125% rise as per the cost index. He started the work in the month of March and completed it in the month of August. Thereafter, he raised a bill. On different occasions the defendant had made payments to him in the sum of Rs. 17,000/-. He issued notice to him. The notice was not replied. He also sent copy of bill vide Ext. PW-1/D.

10. PW-2 Madho Ram deposed that the defendant came to the house of the plaintiff when he settled rates of construction work as per HP PWD Schedule of rates allowing 125% rise as per the cost index. He admitted that in his presence, no writing was executed.

11. Defendant has appeared as DW-1. He deposed that he owns a plot at New Shimla. Earlier, he had got the construction work done from one Sukh Dev and later on the same was given to the plaintiff on contract basis. Sh. S.S. Bhurji is the architect. The rates were Rs. 10/- per square feet for column and beams and Rs. 11/- per square feet for slab. The settlement of the rates had taken place in the presence of Sh. S.S. Bhurji. The plaintiff did not complete the entire work. A sum of Rs. 18,500/- was paid to him. The plaintiff has also taken 22 bags of cement from him worth Rs. 2640/-.

12. DW-2 S.S.Bhurji testified that he was an architect. He was working in this capacity since 1965. The building plan of the house of defendant was prepared by him. The construction of his house was carried under his supervision. The rates were also settled in his presence between the parties on the prevalent market rates. At that time, the construction rates were from Rs. 10/- to Rs. 12/- per square feet. On account of dispute between the parties, the final bill could not be prepared. He denied specifically that the rates were settled as per the HP PWD schedule of rates.

13. DW-3 Suresh Kumar testified that he got his house constructed at New Shimla in the year 1993-94 from a contractor hailing from the State of Bihar. At that time, the construction rates were Rs. 11/- per square feet for slab and Rs. 10/- per square feet for column and beams.

14. DW-4 Joginder Singh also deposed that he got his house constructed at New Shimla in the year 1993-94 from a contractor. He had paid the same rates which were paid by DW-3 Suresh Kumar. His house was adjacent to the house of the defendant.

15. The plaintiff has not led any tangible evidence to establish that the parties have actually agreed for the Public Works Department rates. DW-2 S.S.Bhurji, has specifically deposed that he has prepared the complete building plan of the defendant. According to him, the rates of construction work were Rs. 10 to 12/- per square feet. DW-3 Suresh Kumar and DW-4 Joginder Singh have also testified that they have constructed their houses in the same locality in the year 1994 and the rate paid by them were similar as were being paid by the defendant. The plaintiff has not examined any witness that the prevailing

market rates in the locality at the relevant time were different from the rates which the defendant has agreed to pay.

16. The first appellate Court has passed the following order on 7.11.2002:

> "Both the parties have been heard. As prayed for, let it be relisted on November, 12, 2002, for settlement of account between the parties."

17. Thereafter, the matter was listed on 6.12.2002 when the following order was passed:

> "The matter has been listed today for proper order. As prayed for, be it relisted on December 27, 2002 for settlement of account between the parties, in terms of order dated 7.11.2002."

18. The matter was listed on 27.12.2002 and the following order was passed:

> "It is stated at the bar that though the accounts have been settled to the satisfaction of both the parties. The respondent has not turned up today. Hence, be it relisted on January 8, 2003 for conciliation. Be it recorded here that the counsel for the appellant has offered to settle the matter subject to payment of Rs. 60,000/- in lump sum."

19. Thereafter, the order was passed on 8.1.2003. When the case was called out none appeared on behalf of the respondent. The respondent was proceeded against ex-parte and the matter was ordered to be listed for arguments on 21.2.2003. The ex-parte order dated 8.1.2003 was set aside on 8.5.2003 and the matter was ordered to be listed finally on 13.8.2003. It is true that the appellant has offered to settle the matter subject to payment of Rs. 60,000/- and thereafter arguments were heard on 27.12.2003. However, the fact of the matter is that defendant was proceeded ex-parte on 8.1.2003. The ex-parte order was set aside on 8.5.2003. Since the matter could not be settled between the parties, it was heard finally by the learned District Judge. It was not obligatory for the learned District Judge to force the parties to arrive at an amicable settlement, while exercising jurisdiction under Section 89 CPC.

20. The learned Single Judge of the Gauhati High Court in the case of ***The West Bengal State Electricity Board and others vrs. M/S Shanti Conductors Pvt. Ltd.,*** reported in ***AIR 2004 Gauhati 70,*** has held that when the plaintiff has right away rejected the offer and the Court has not made further efforts to help parties in reaching compromise, the Court cannot be considered to have failed in exercise of jurisdiction under Section 89 CPC. It has been held as follows:

> "16. In other words, if a defendant appears in a suit and others to compromise the claim raised by the plaintiff, one can say that an element of compromise exists; but if the plaintiff, reacting to such offer, right away rejects the offer of compromise and if he wants a decision in the suit on merit, the element of compromise can no longer be said to exist/survive. The present one is one of such cases. In such a situation, if the Court makes no further efforts to make the parties reach an amicable settlement of their dispute, the Court cannot be said to have failed to exercise its jurisdiction under Section 89. In a situation of this kind, the Court, which is in seisin of the matter, is the best Judge of the matter and even if the revisional Court happens to think that the trial Court should have pursued the offer of compromise, notwithstanding the resistance offered, the revisional Court will be slow to interfere, for, it is trite that if two equally reasonable views are

possible, the revisional Court will be slow to substitute its views in place of the views of the trial Court."

21. Their lordships of the Hon'ble Supreme Court in the case of ***Salem Advocate Bar Association, Tamil Nadu vs. Union of India,*** reported in ***AIR 2003 SC 189,*** have held that an effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial. It has been held as follows:

> "10. In certain countries of the world where ADR has been successful to the extent that over 90 per cent of the cases are settled out of court, there is a requirement that the parties to the suit must indicate the form of ADR which they would like to resort to during the pendency of the trial of the suit. If the parties agree to arbitration, then the provisions of the Arbitration and Conciliation Act, 1996 will apply and that case will go outside the stream of the court but resorting to conciliation or judicial settlement or mediation with a view to settle the dispute would not ipso facto take the case outside the judicial system. All that this means is that effort has to be made to bring about an amicable settlement between the parties but if conciliation or mediation or judicial settlement is not possible, despite efforts being made, the case will ultimately go to trial."

22. In the instant case, the learned District Judge has referred to the previous orders as well. There is no illegality or perversity in the procedure adopted by the learned District Judge. The substantial questions of law are answered accordingly.

23. Consequently, there is no merit in this appeal and the same is dismissed, so also the pending application(s), if any.

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

Kamlesh Kumari ...Petitioner
Versus
State of HP & Ors ...Respondents

CWP No. 3592 of 2015
Date of decision: 21.4.2016.

Constitution of India, 1950- Article 226- Petitioner was appointed as a Language Teacher by the Parent Teacher Association- petitioner denied grant-in-aid and the post was re-advertised- petitioner filed a writ petition which was disposed of with a direction to take a decision regarding the continuation of the petitioner- respondent claimed that petitioner did not possess the necessary qualification- she was engaged earlier to the promulgation of PTA Grant-in-Aid Rules, 2006- held, that petitioner had worked in the post for a fairly long period- her appointment cannot be held to stop-gap, fortuitous or purely on ad-hoc- petitioner had not only qualified Prabhakar but she was a Post Graduate in Hindi and thereafter had done B.Ed prior to her engagement- petitioner was appointed by PTA and PTA was competent to appoint the petitioner- she is eligible in terms of PTA Grant-in-Aid Rules, 2006 and cannot be denied grant-in-aid- respondent directed to release the grant-in-aid in

favour of the petitioner from the date of notification and to consider her case for regularization in terms of policy. (Para-15 to 23)

Cases referred:
Rudra Kumar Sain & ors Vs. Union of India & ors (2008) 8 SCC 25
Promila Devi Vs. State of HP & Ors, ILR 2015 (II) HP 1 (589)

For the Petitioner: Ms.Abhilasha Kaundal,Advocate.
For the Respondents: Mr. Vikram Thakur and Ms.Parul Negi, Deputy Advocate General.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J.

This writ petition has been filed with the following prayer.

"i) That an appropriate writ, order or directions may kindly be issued and the respondents may kindly be directed to release grant in aid in favour of petitioner from the date when grant in aid Rules were notified with all consequential benefits flowing thereafter to the petitioner with further directions to pay the entire arrears of such grant in aid along with an interest @ 12% pa in the interest of law and justice."

2. The petitioner's case in nut shell is that in the year 2002, she was appointed as a Language Teacher by the then Parent Teacher Association, which has now been replaced by the School Management Committee (hereinafter referred to as 'SMC'). Earlier to that, she had in 1985 qualified Prabhakar, thereafter in 1992 had passed MA (Hindi) and thereafter in the year 1994 had qualified B.Ed. The precise grievance of the petitioner is that after coming into force the Grant-in-Aid Rules 2006, despite her being fully eligible and entitled for the grant, the respondents have illegally denied her the same. Not only this, the respondents instead of providing grant-in-aid to the petitioner, on the basis of the recommendations of the School Management Committee, re-advertised the post, which constrained her to file CWP No.8853 of 2014. This court initially passed orders of status quo and eventually the petition was disposed of directing the respondents to take a decision with respect to continuance of the petitioner and such like teachers.

3. The petitioner claims herself to be working as a Language teacher and continuously teaching the students of classes 6th to 10th since June, 2002 and despite a passage of more than 13 years, is being paid a meager honorarium, only on the sheer strength of unequal bargaining power and claims to have been exploited, compelling her to approach this court.

4. The respondents have opposed claim of the petitioner by filing reply, wherein it is stated that the petitioner was engaged by the PTA committee of the school as against the post of Language teacher as a measure of "stop-gap" arrangement out of the PTA fund. She assumed her duties on 29.6.2002 and at that time, did not possess the qualification for the post of Language teacher, which in terms of R & P Rules prevalent at the time of her engagement, was Prabhakar (Honours in hindi) with Matric (Full) and LT training or JBT (Two years training) from recognized University/Institution. It is further averred that the petitioner was engaged much earlier to the promulgation of PTA Grant-in-Aid Rules, 2006 and she did not possess the requisite qualification for the post of Language Teacher at the time of her initial engagement.

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

5. The first and foremost question that arises for consideration is as to whether the appointment of the petitioner who has admittedly been continuously working since 29.6.2002, can be termed to be 'stop gap'.

6. The terms, "ad hoc", "stop-gap" and "fortuitous" are in frequent use in service jurisprudence. In the absence of definition of these terms in the rules, the court will have to look to the dictionary meaning of the words and the meaning commonly assigned to them in service matters.

7. The three terms "ad hoc", "stop gap" and "fortuitous'"are in frequent use in service jurisprudence. In the absence of definition of these terms in the rules in question we have to look to the dictionary meaning of the words and the meaning commonly assigned to them in service matters.

8. The meaning given to the expression 'fortuitous' in *Strouds Judicial Dictionary* is 'accident or fortuitous casualty'. This should obviously connote that if an appointment is made accidentally, because of a particular emergent situation and such appointment obviously would not continue for a fairly long period.

9. In *Blacks Law dictionary*, the expression 'fortuitous' means 'occurring by chance', 'a fortuitous event may be highly unfortunate'. It thus, indicates that it occurs only by chance or accident, which could not have been reasonably foreseen.

10. The expression 'ad hoc' in Blacks Law Dictionary, means 'something which is formed for a particular purpose'.

11. The expression 'stop-gap' as per *Oxford Dictionary*, means 'a temporary way of dealing with a problem or satisfying a need'.

12. In *Oxford Dictionary*, the word 'ad hoc' means for a particular purpose; specially. In the same Dictionary, the word 'fortuitous' means happening by accident or chance rather than design.

13. In *P. Ramanatha Aiyers Law Lexicon* (2nd Edition) the word 'ad hoc' is described as: "For particular purpose. Made, established, acting or concerned with a particular (sic) and or purpose." The meaning of word fortuitous event is given as 'an event which happens by a cause which we cannot resist; one which is unforeseen and caused by superior force, which it is impossible to resist; a term synonymous with Act of God'.

14. The meaning to be assigned to these terms while interpreting provisions of a Service Rule will depend on the provisions of that Rule and the context in and the purpose for which the expressions are used. The meaning of any of these terms in the context of computation of inter-se seniority of officers holding cadre post will depend on the facts and circumstances in which the appointment came to be made. For that purpose it will be necessary to look into the purpose for which the post was created and the nature of the appointment of the officer as stated in the appointment order. If the appointment order itself indicates that the post is created to meet a particular temporary contingency and for a period specified in the order, then the appointment to such a post can be aptly described as 'ad hoc' or 'stop-gap'. If a post is created to meet a situation which has suddenly arisen on account of happening of some event of a temporary nature then the appointment of such a post can aptly be described as 'fortuitous' in nature. If an appointment is made to meet the contingency arising on account of delay in completing the process of regular recruitment to

the post due to any reason and it is not possible to leave the post vacant till then, and to meet this contingency an appointment is made then it can appropriately be called as a 'stop-gap' arrangement and appointment in the post as 'ad hoc' appointment. It is not possible to lay down any straight-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stop-gap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the question of inter se seniority of officers in the cadre. (Refer ***Rudra Kumar Sain & ors Vs. Union of India & ors (2008) 8 SCC 25.***

15. Once the petitioner had continued in the post for a fairly long period, then such appointment cannot be held to be 'stop gap' 'fortuitous' or 'purely ad hoc'.

16. Insofar as qualification of the petitioner is concerned, I really fail to understand that on what basis, the respondents would claim that the petitioner was ineligible when admittedly the qualification for engagement of teachers on PTA basis came to be prescribed only in the year 2006 when the PTA Grant-in-Aid Rules, were promulgated.

17. That apart, as already observed earlier, petitioner has not only qualified Prabhakar but is a Post Graduate in Hindi and thereafter done her B.Ed that too prior to her engagement.

18. It is not in dispute that the petitioner was appointed by the then PTA Association who were competent to appoint the petitioner and has worked not only for a fairly long period, but for a very long period of more than 13 years and, therefore, under no circumstances can her appointment be held to be 'stop gap' or 'fortuitous' or 'purely ad hoc'.

19. Notably, it is not even the case of the respondents that the petitioner is not eligible in terms of PTA Grant-in-Aid Rules, 2006 and, therefore, being fully qualified she cannot be denied the grant-in-aid.

20. As observed earlier, the petitioner has put in nearly 14 years of service and is being paid an honorarium which would not even be sufficient for the petitioner to sustain herself, much less to lead a decent living and, therefore, this only amounts to exploitation.

21. This court was seized of somewhat similar issue in ***Promila Devi*** *Vs***. *State of HP & Ors, ILR 2015 (II) HP 1 (589)*** decided on 2.4.2015, wherein like the present case, petitioner had been engaged in the year 2005 and was being paid a meager remuneration of Rs.1,000/- and this court held as under:

> "6 At this stage, a wider issue arises for consideration as to whether the State as a model employer after having extracted nearly a decade of service from the petitioner can claim that she had not been regularly appointed. Further, can the State be permitted to argue that petitioner even in these days of high cost of living should remain content with the remuneration of Rs.1000/- more particularly when admittedly the petitioner has already been paid the salary out of PTA fund with effect from April 2010 to March 2013.
>
> 7 A learned Division Bench of this Court in LPA No. 132 of 2014 titled Dr. Lok Pal vs. State of Himachal Pradesh and other decided on 18.12.2014 was seized of a similar matter where the appointment of the person was though on a consolidated salary of Rs.43000/- per month but after his appointment he was actually paid Rs.21000/- per month and the learned

Division Bench held this to be exploitation on the sheer strength of the unequal bargaining power and it was held as under:

> *"7. This case reflects a sorry state of affairs where the respondents on the sheer strength of its bargaining power have taken advantage of their position and imposed wholly un-equitable and unreasonable condition of employment on their prospective employees, who did not have any other choice but to accept the employment on the terms and conditions offered by the respondents. This action of the respondents is violative of Article 14 of the Constitution. Here it is apt to reproduce relevant observations of the Hon'ble Supreme Court in the celebrated decision of Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly and another, (1986) 3 SCC 156,which reads as under:-*
>
> > *"88. As seen above, apart from judicial decisions, the United States and the United Kingdom have statutorily recognized, at least in certain areas of the law of contracts, that there can be unreasonableness (or lack of fairness, if one prefers that phrase) in a contract or a clause in a contract where there is inequality of bargaining power between the parties although arising out of circumstances not within their control or as a result of situations not of their creation. Other legal systems also permit judicial review of a contractual transaction entered into in similar circumstances. For example, section 138(2) of the German Civil Code provides that a transaction is void "when a person" exploits "the distressed situation, inexperience, lack of judgmental ability, or grave weakness of will of another to obtain the grant or promise of pecuniary advantages.....which are obviously disproportionate to the performance given in return." The position according to the French law is very much the same.*
> >
> > *89. Should then our courts not advance with the times? Should they still continue to cling to outmoded concepts and outworn ideologies? Should we not adjust our thinking caps to match the fashion of the day? Should all jurisprudential development pass us by, leaving us floundering in the sloughs of nineteenth-century theories? Should the strong be permitted to push the weak to the wall? Should they be allowed to ride roughshod over the weak? Should the courts sit back and watch supinely while the strong trample under-foot the rights of the weak? We have a Constitution for our country. Our judges are bound by their oath to "uphold the Constitution and the laws". The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and the equal protection of the laws. The principle deducible from the above discussions on this part of the case is in consonance with right and reason, intended to secure social and economic justice and conforms to the mandate of the great equality clause in Art. 14. This principle is that, the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair*

and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which the weaker party is in a position in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. In today's complex world of giant corporations with their vast infra-structural organizations and with the State through its instrumentalities and agencies entering into almost every branch of industry and commerce, there can be myriad situations which result in unfair and unreasonable bargains between parties possessing wholly disproportionate and unequal bargaining power. These cases can neither be enumerated nor fully illustrated. The court must judge each case on its, own facts and circumstances."

In terms of the aforesaid exposition of law, it is clear that this Court has the jurisdiction and power to strike or set aside the unfavourable term of contract of employment which purports to give effect to unreasonable bargain violating Article 14 of the Constitution.

8. The undertaking obtained from the appellant is so unfair and unreasonable that it shocks the conscious of this Court. It reflects the inequality of the bargaining power between the appellant and the respondents which emanates from the great disparity in the economic strength between the job seeker and job giver.

9. The appellant was compelled by circumstances to accept the offer made by the respondents, but then the mere acceptance of this offer would not give it a stamp of approval regarding its validity. It is an age old maxim that "necessity knows no law" and a person sometimes may have to succumb to pressure of the other party to bargain who is in stronger position. Although, it may not be strictly in place, but the Court cannot shut its eyes to this ground reality.

10. At this stage, it shall be apt to quote the following observations of the Hon'ble Supreme Court in ***Chairman and MD NTPC Ltd. Vs. Rashmi Construction Builders and Contractors (2004) 2 SCC 663***:-

> *"28. Further, necessitas non habet legem is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position."*

11. Notably the respondents herein are none other than the functionaries of the State who are expected to function like a model employer. A model employer is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit its employees and take advantage of their helplessness and misery. The conduct of the respondents falls short of expectation of a model employer.

12. The Hon'ble Supreme Court in its decision in **Bhupendra Nath Hazarika and another Vs. State of Assam and others, (2013) 2 SCC 516** has succinctly explained this position in the following terms:-

> *"61. Before parting with the case, we are compelled to reiterate the oft stated principle that the State is a model employer and it is required to act fairly giving due regard and respect to the rules framed by it. But in the present case, the State has atrophied the rules. Hence, the need for hammering the concept.*
>
> *62. Almost a quarter century back, this Court in Balram Gupta V. Union of India 1987 Supp SCC 228 had observed thus: (SCC p. 236, para 13)*
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> > *"13.... As a model employer the Government must conduct itself with high probity and candour with its employees."*
>
> In State of Haryana V. Piara Singh (1992) 4 SCC 118 the Court had clearly stated: (SCC p. 134, para 21).
>
> > *"21....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."*

63.In State of Karnataka V. Umadevi (3) (2006) 4 SCC 1 (SCC P. 18, para 6) the Constitution Bench, while discussing the role of State in recruitment procedure, stated that if rules have been made under Article 3089 of the Constitution, then the Government can make appointments only in accordance with the rules, for the State is meant to be a model employer.

> 64. In Mehar Chand Polytechnic V. Anu Lamba (2006) 7 SCC 161 (SCC p. 166, para 16) the Court observed that public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India and that the recruitment rules are framed with a view to give equal opportunity to al the citizens of India entitled for being considered for recruitment in the vacant posts.
>
> 65. We have stated the role of the State as a model employer with the fond hope that in future a deliberate disregard is not taken recourse to and deviancy of such magnitude is not adopted to frustrate the claims of the employees. It should always be borne in mind that legitimate aspirations of the employees are not guillotined and a situation is not created where hopes end in despair. Hope for everyone is gloriously precious and a model employer should not convert it to be deceitful and treacherous by playing a game of chess with their seniority. A sense of calm sensibility and concerned sincerity should be reflected in every step. An atmosphere of trust has to prevail and when the employees are absolutely sure that their trust shall not be betrayed and they shall be treated with dignified fairness then only the concept of good governance can be concretised. We say no more."

22. At this stage, I may also notice that it is not even the case of the respondents that the petitioner had not been discharging her duties diligently, honestly and faithfully so as to deprive her of the grant-in-aid. This aspect of the matter has also been considered in *Promila Devi's case* (supra), wherein this court held as under:

> "9. The matter can be looked from a different angle. Indisputably the petitioner had been appointed and assigned the duties to teach the students and such duties have been continuously performed by her. Then can the respondents, who are model employers, be permitted to act with total lack of sensitivity and indulge in "Begar", which is specifically prohibited under Article 23 of the Constitution of India.
>
> 10. The State government is expected to function like a model employer, who is under an obligation to conduct itself with high probity and expected candour and the employer, who is duty bound to act as a model employer has social obligation to treat an employee in an appropriate manner so that an employee is not condemned to feel totally subservient to the situation. A model employer should not exploit its employee and take advantage of their helplessness and misery. In the present case the conduct of the respondents falls short of expectation of a model employer.
>
> 11. It is not the case of the respondents that petitioner has not discharging her duties diligently, honestly and faithfully. Therefore, in such circumstances by claiming grant in aid on regular basis the petitioner has not asked for the moon. Not only is the petitioner entitled to regular grant in aid but having worked for nearly a decade, the petitioner can also not be denied her legitimate claim for regularization.

12. A similar question came upfor consideration before learned Division Bench of this Court in Pritam Singh versus State of Himachal Pradesh and others, CWP No.4098 of 2012 decided on 13.09.2012 and it is apt to reproduce Paras 2 to 4 of this judgment which reads thus:

> *"2.The admitted facts are that from 30thNovember, 1992 the petitioner was working as part time sweeper/water carrier at Govt. Senior Secondary School, Kalal, District Bilaspur. He was appointed by the Parents Teacher Association at Rs.200/- per month. In 2003 a certificate was issued by the Principal of the school that the petitioner has worked for more than 10 years. The salary of the petitioner in 2004 was increased from Rs.200/- to Rs.500/- . The petitioner had also applied for the post of water carrier but he was not selected.*
>
> *3. We called for the record and we find that the selection of respondent No.4 cannot be said to be invalid. At the same time we cannot be oblivious to the fact that the petitioner has worked as part -time worker for more than 20 years. It may be true that he has worked on part time basis and was employed by the Parents Teacher Association but the fact remains that he has worked for 20 years. An employee who worked for 20 years has genuine expectation that over a period of time he would be regularized.*
>
> *4. Without going into the merits of the case and without making this case a precedent, keeping in view the peculiar facts and circumstances of the case we direct that in case the work of sweeper or any other work of similar nature is available in the school then it is the petitioner alone who shall be offered appointment against the said post and such post shall not be given to any other person. The petition is disposed of accordingly. No costs."*

23. Taking cue from the aforesaid judgments and bearing in mind the peculiar facts and circumstances of the case, more particularly the fact that the petitioner has been working for the last almost 14 years (since 29.6.2002), this court is of the view that the following directions would sub-serve the ends of justice:-

(i) The respondents are directed to release the grant in aid in favour of the petitioner from the date when the grant in aid Rules were notified; and

(ii) The respondents are further directed to consider the case of the petitioner for regularization in accordance with the policy.

24. The aforesaid directions be complied with within three months, failing which respondents shall be liable to pay interest on the aforesaid amount @ 9% p.a. from the date when the amount(s) was due till the final payment thereof.

With these observations, the petition is disposed of in the aforesaid terms, leaving the parties to bear their costs.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Nand Lal ..... Appellant

Versus

State of Himachal Pradesh .....Respondent

Cr. Appeal No. 70/2015
Reserved on: April 20, 2016
Decided on: April 21, 2016

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2 kg. of charas- he was tried and convicted by the trial Court- held, in appeal that police had not joined any independent witnes- PW-2 had specifically admitted that vehicles frequently ply on the road towards Kihar and Salooni – houses were situated at a distance of 10-15 minutes from the spot- there was difference of 12 hours in the case of the prosecution and entries in the NCB form, which was not explained- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- held, that in these circumstances prosecution case was not proved- accused acquitted- appeal accepted. (Para-14 to 23)

For the appellant : Mr. Rakesh Manta, Legal Aid Counsel
For the Respondent : Mr. Parmod Thakur, Additional Advocate General.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The instant appeal has been filed against Judgment dated 15.12.2014 rendered by the learned Special Judge, Chamba, Division Chamba, HP in Sessions Trial No. 13/2014, 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 a period of 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 one year.

2. Case of the prosecution, in a nutshell, is that on 31.1.2014, Head Constable Virender Singh, Investigating Officer, of SIU Chamba alongwith other police officials i.e. HHC Mohammad Aslam, Constable Sunil Kumar and Constable Yog Raj was present at Chakoli within the jurisdiction of Police Station, Kihar at about 6.15 AM, for patrolling. In the meantime, a person holding a carry bag in his right hand came from Diur side. On seeing the police, he turned back and tried to escape towards Diur side. He was chased and overpowered by Head Constable Virender Singh with the help of other police officials. He disclosed his identity. Carry bag of the accused was checked. It contained one yellow bag. The said yellow bag contained black substance in the shape of sticks and bundles of sticks. It was checked and found to be Charas/cannabis. It weighed 2 kg. Recovered charas was

put in the same carry bag and packed in a cloth parcel and it was sealed with 5 seal impressions of 'K'. NCB form in triplicate was filled in and seal impression 'K' was embossed thereon. Seal after use was handed over to Constable Yog Raj. IO Virender Singh prepared Rukka and sent the same to the Police Station, Kihar for registration of FIR through Constable Yog Raj. FIR was registered. Site plan was prepared. Case property was produced before SI Darshan Singh for resealing. He resealed the same with 5 seal impressions of 'H' and also affixed impression of seal 'H' on the NCB form. SHO Darshan Singh also prepared reseal memo in this regard. Case property alongwith specimen seal impressions, NCB form etc. was deposited with the MHC. Recovered Charas was sent to the FSL Junga for chemical examination. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 11 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Learned trial Court convicted the accused as noticed herein above. Hence, this appeal.

4. Mr. Rakesh Manta, learned Legal Aid Counsel, has vehemently argued that the prosecution has failed to prove its case against the accused person.

5. Mr. Parmod Thakur, Additional Advocate General, has supported the Judgment dated 15.12.2014.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Constable Yog Raj deposed that on 31.1.2014, he alongwith Constable Sunil Kumar, HHC Mohammad Aslam, accompanied HC Varinder Singh for patrolling and Nakabandi and was present at Chakoli Pul. A person came from Diur side. He was carrying a bag in his right hand. He tried to escape towards Diur side. He was nabbed. He was carrying a green coloured carry bag. He disclosed his identity. Bag carried by the accused was checked. Another carry bag, yellow in colour, was recovered. It contained black coloured substance in the shape of sticks and bundles. On checking, it was found to be charas. It weighed 2 kg. Recovered charas was put back in the same yellow carry bag and said carry bag was put in same green carry bag and packed in parcel and sealed with 5 seals of 'K'. Sample of seal 'K' was taken separately on cloth piece. IO filled in NCB form. Impression of seal 'K' was taken on NCB form. Recovered charas was taken into possession vide memo Ext. PW-1/B. Seal was handed over to him. IO prepared the Rukka and sent the same to the Police Station through him. He handed over the Rukka to MHC Police Station, Kihar. Case property was produced before the court while recording the statement of PW-1. In his cross-examination, he has admitted that he has not brought the seal as the same was lost. No FIR was registered in this behalf by him.

8. PW-2 Mohammad Aslam deposed the manner in which accused was apprehended. Search, seizure and sampling proceedings were completed at the spot. In his cross-examination, he has admitted that the vehicles frequently ply on the road towards Kihar and Salooni. He also admitted that at a walk of 10-15 minutes from Chakoli Pul, there were houses of people.

9. PW-4 Constable Ravinder Kumar, deposed that on 2.3.2014 (sic. 2.3.2013), MHC Police Station, Kihar called him to the Police Station, Kihar. On 3.3.2014 (sic. 3.3.2013), he deputed him to bring the result of FSL and case property from FSL Junga. He received the result on 5.3.2014 (sic. 5.3.2013) and deposited the same with MHC Police Station on 7.3.2014 (sic. 7.3.2013).

10. PW-5 Satish Kumar deposed that on 31.1.2014, at about 9.15 AM, HC Varinder Singh IO, SIU, Chamba produced one cloth parcel containing 2 kg charas, sealed with five seals of 'K' alongwith NCB form, sample seal before SHO/SI Darshan Singh for resealing, who resealed the same with five seals of seal 'H' and filled in relevant columns of NCB form and took the specimen of seal 'H' on a cloth piece.

11. PW-6 Darshan Singh deposed that on 31.1.2014, Constable Yog Raj brought Rukka Ext. PW-6/A to the Police Station, on the basis of which FIR Ext. PW-6/B was recorded. On the same day, at about 9.15 AM, HC Varinder Singh produced accused alongwith case property i.e. one parcel stated to be containing 2 kg charas, sealed with five seals of 'K' alongwith NCB form, sample seals, for resealing. He resealed the same with five seals of seal 'H' and filled in NCB form and took specimen of seal 'H' on separate cloth piece. He prepared reseal memo Ext. PW-5/B. In his cross-examination, he has admitted that seal 'H' was of lead and square in shape. Its colour was silver.

12. PW-7 Constable Prabhat Nahar deposed that SI Darshan Singh deposited with him one parcel stated to be containing 2 kg charas, sealed with seal impressions 'K' and 'H' alongwith NCB form, seizure memo and reseal memo. He entered the same in Malkhana Register at Sr. No. 131. On the same day, he sent the same to FSL Junga through Constable Raj Singh vide RC No. 14/14. He brought original Malkhana Register Ext. PW-7/A.

13. PW-10 HC Varinder Singh was the Investigating Officer. He also testified the manner in which accused was apprehended on the spot. Search, seizure and sampling proceedings were completed at the spot. In his cross-examination, he has admitted that they have checked 30-35 vehicles at Ballu bridge near Ayurvedic Hospital. At Koti they checked about 5-6 vehicles. He admitted that vehicular traffic crosses through the road i.e. Chakoli Bridge towards Kihar, Diur and Chamba side.

14. Police has not joined any independent witness at the time when the accused was apprehended, search, seizure and sampling proceedings were completed at the spot. PW-2 Mohammad Aslam has admitted specifically that vehicles frequently ply through the road towards Kihar and Salooni. He admitted that at a walk of 10-15 minutes, from Chakoli Pul, there were houses. Accused was apprehended at 6.15 AM on 31.1.2014. PW-10 Varinder Singh has also admitted that vehicular traffic plies through the road i.e. Chakoli Bridge towards Kiha, Diur and Chamba side. It was neither a secluded place nor an isolated place. Police could join independent witnesses by asking the owners/occupiers of the vehicles plying on the road and also by asking the residents of the houses situate at a distance of 10-15 minutes walk from the spot.

15. Case of the prosecution, precisely, is that the accused was apprehended at Chakoli Bridge on 31.1.2014 at 6.15 AM. Search, seizure and sampling proceedings were completed in the morning hours. However, as per Ext. PW-6/D, form NCB-I, charas was recovered on 31.1.2014 at 6.45 PM at Chakoli. There is a difference of almost 12 hours, which has not been explained by the prosecution. It casts serious doubt whether the accused was apprehended at all and the contraband was recovered from his conscious and exclusive possession.

16. The case property was produced during the examination of PW-1 Constable Yog Raj. 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.

17. In Punjab Police Rules, also applicable to the State of Himachal Pradesh, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

18. 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.

19. Sub-rule (2) Rule 22.18 of Punjab Police Rules, reads as under:

> (2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.
>
> Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles shall be given on the label and in the store-room register.
>
> The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so.

20. Rule 27.18 of Punjab Police Rules, reads as under:

> 27.18. Safe custody of property.-
>
> (1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).
>
> Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.
>
> (2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate,

Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable.

21. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with

unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

22. In this case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

23. Accordingly, the present appeal is allowed. Judgment dated 15.12.2014 rendered by the learned Special Judge, Chamba, Division Chamba, HP in Sessions Trial No. 13/2014 is set aside. Accused is acquitted of the offence under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 by giving benefit of doubt. He is ordered to be released if not required in any other case. Fine amount, if any deposited by the accused, is also ordered to be refunded to him.

24. The Registry is directed to prepare and send the release warrants of the accused to the concerned, Superintendent of Jail, forthwith. All pending applications are also disposed of.

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

State of Himachal Pradesh and another .....Petitioners

Versus

Narinder Chand and others .....Respondents

CMPMO No. 174/2012
Reserved on: April 5, 2016
Decided on: April 21, 2016

Code of Civil Procedure, 1908- Order 39 Rules 1 and 2- Plaintiff claimed right of passage over the suit land and that defendants were causing obstruction to the same- hence, relief of the injunction was sought- defendants denied the claim of the plaintiff and pleaded that boundary wall was constructed in the year 2009- application for seeking injunction was also filed which was dismissed by the trial Court- appeal was preferred which was allowed- held, in revision that plaintiff has no right over the Government land- he cannot be permitted to enter inside the school as safety of the girls would be prejudiced - Appellate Court had wrongly allowed the application- application dismissed. (Para-5 to 7)

For the Petitioners : Mr. Parmod Thakur, Additional Advocate General.

For the Respondents : Mr.B.C. Verma, Advocate, for respondent No. 3.
None for respondents No.1 and 2.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral**)**

This petition has been filed by the State against the Judgment dated 8.2.2011 rendered by the learned District Judge, Hamirpur, Himachal Pradesh in Civil Misc. Appeal No. 34 of 2010.

2. “Key facts" necessary for the adjudication of the present petition are that an application under Order 39 Rules 1 and 2 CPC alongwith a suit for permanent prohibitory and mandatory injunction was filed by the respondents-plaintiffs (hereinafter referred to as 'plaintiffs' for convenience sake). According to the plaintiffs, they have a right of passage shown as ABCD through land comprising Khasra Nos. 455 and 456 in Khata No. 120 min, Khatauni No. 166 min, area 0-22-19, as per Jamabandi for the year 1999-2000 situate in Tikka Dhaneta, Tappa Hathol, Tehsil & District Hamirpur. Plaintiffs’ land is situate over Khasra No. 454 in Tikka Dhaneta. Petitioners-defendants (hereinafter referred to as 'defendants' for convenience sake) have no right to cause obstruction to path marked ABCD.

3. Application was contested by the defendants. According to them, no passage exists on the spot or over any portion of the suit land and also that a boundary wall in Government Girls School Dhaneta was constructed in the year 2008. This school is situate over Khasra No. 456, which alongwith other land in Khasra No. 455 of suit land is owned and possessed by the State of Himachal Pradesh. Plaintiffs, thus, could not be granted any passage through the suit land.

4. Trial Court dismissed the application on 31.7.2010. Plaintiffs filed an appeal before the District Judge, Hamirpur, against order dated 31.7.2010. He allowed the application on 8.2.2011. Hence, this petition.

5. According to the plaintiffs, there was a passage shown in the site plan marked ABCD, about 2 metres in width, which was being used by them since the time of their predecessors-in-interest for the purpose of cultivation of their land in Khasra No. 454 and other adjoining fields. Plaintiffs approached the District Education Officer and requested him not to create any hindrance in the passage which was used by the plaintiffs. On the application, even the Headmaster issued letter No.2903 dated 20.10.1993 and right of passage was duly recognized. However, now the defendants have started raising construction and have forcibly raised certain construction in spite of objections.

6. School is situate on Khasra No. 456. Khasra No. 455 is owned by State government. Plaintiffs have no right to have passage through the Government Girls High School, Dhaneta and there is nothing on record to suggest that State Government has authorised the Headmaster to issue letter dated 20.10.1993. Government have also constructed boundary wall of Government Girls High School, Dhaneta to secure the school premises. It was also necessary for the school to construct gate to restrict the ingress and egress to the school. The learned appellate Court below has erred in law by ordering opening of gate from 7 AM to 7 PM. It has also come on record that the Headmaster of the School who was present in the appellate Court has specifically stated that the plaintiffs have alternative path available to them. School gate was constructed on AB and there was a toilet on the other side. Learned District Judge committed error of law by ordering demolition of boundary wall to the extent of two metres on the basis of letter dated 20.10.1993. Letter dated 20.10.1993 has no force of law since the Headmaster was never authorised by the competent authority to issue said letter. Moreover, whether the conditions imposed in letter dated 20.10.1993 are to be complied or not by the parties, is subject matter of trial. The safety of girl students is of paramount consideration. Plaintiffs have neither made out any prima facie case in their favour, nor any balance of convenience is in their favour.

7. The present petition is allowed. Judgment dated 8.2.2011 rendered by the learned District Judge, Hamirpur, Himachal Pradesh in Civil Misc. Appeal No. 34 of 2010 is set aside. Order dated 31.7.2010 passed by the Civil Judge (Senior Division), Nadaun, District Hamirpur in CMA No. 414/2009 is upheld. Since the civil suit was instituted in the year 2009, learned trial Court is directed to decide the same within six months from today.

Pending applications, if any, are disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh .....Appellant.

Versus

Poshu Ram .....Respondent.

Cr. Appeal No. 122 of 2009.
Reserved on: April 20, 2016.
Decided on: April 21, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 2.650 kg. of charas- accused was tried and acquitted by the trial Court- held, in appeal that prosecution had failed to link the bag which was lying in the rack with the accused- only one occupant of the bus was cited as witness, even driver and conductor were not associated- the person who brought the case property was not examined - entry in the malkhana register regarding the person who had taken the case property to the Court is necessary- similar entry is required to be made when the case property is re-deposited in the malkhana – absence of the entry casts doubt whether case property is the same which was recovered from the accused and was sent to FSL- Punjab Police Rules have been framed to ensure that case property remains safe/intact and is restored to store room in the presence of senior police officer- in these circumstances, prosecution case was not proved- trial Court had rightly acquitted the accused- appeal dismissed. (Para-15 to 23)

For the appellant: Mr. Parmod Thakur, Addl. AG with Mr. P.M.Negi, Dy. AG.
For the respondent: Mr. B.R.Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 30.9.2008, rendered by the learned Sessions Judge, Solan, H.P., in case No. 4-S/7 of 2008, whereby the respondent-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 acquitted.

2. The case of the prosecution, in a nut shell, is that on 9.12.2007 at around 10:50 PM, Dharampur police had laid nakka in front of the Police Station for checking of the vehicles. The Nakka party comprised of Insp./SHO Brijesh Sood, SI Mehar Chand, ASI Ram Chand and others. At about 12:15 AM, one HRTC Karsog Delhi bus arrived at the spot. It was signaled to stop. SI Mehar Singh entered the bus for checking from the front window and ASI Ram Chand entered the bus from the rear window along with SHO Brijesh Sood. The other police officials remained on the road. These officials started cheking the belongings of the passengers. A bag was found in the rack about seat No. 9 which was not claimed by anyone. On seat No. 9, the accused was found sitting. On seat No. 7 PW-1 and on seat No. 8 his contractor were sitting. When no one claimed the bag ASI Mehar Singh

called the SHO inside the bus. He made inquiry from the accused. The accused told that he was going to meet his sister at Samlkhana. Suspecting the accused of not telling the truth, the SHO asked the accused and the occupants sitting on seat Nos. 7 & 8 to accompany him to the Police Station. While getting down from the bus, the accused pushed the police officials who were standing near the door of the bus and jumped below the road into the bushes and escaped in the darkness. The police, passengers and the driver and conductor of the bus tried to search for the accused in the bus lights but he could not be traced. The SHO along with the police officials, driver and conductor then returned to the bus and checked the bag. It was found having two yellow plastic packets containing charas in it. The bag was then carried to the Police Station. The bus passengers were also taken to the Police Station. The charas was weighed. It weighed 2 kg. 650 grams. Two samples of 50 grams were taken after mixing the charas of both the packets. The samples were put in separate cloth parcel and sealed with seal "D". The remaining charas along with the bag and packets was also sealed in a separate cloth parcel with the same seal. The SHO filled in the NCB form. On 12.2.2008, the police searched the accused and he was arrested on 13.2.2008. The samples were sent to FSL, Junga for chemical examination. 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. According to him, he was falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Parmod Thakur, learned Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. B.R.Sharma, Advocate for the accused has supported the judgment of the learned trial Court dated 30.9.2008.

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

6. PW-1 Liaq Ram testified that he along with his contractor Soni were occupying seats No. 7 & 8 in Karsog-Delhi bound bus. The accused was sitting on seat No. 9. At about 12:15 Am, the bus was stopped at Dharampur by the police. Two police officials entered the bus, one from the front window and another from the rear window. They started checking the belongings. One bag which was kept above seat No. 9 in the rack was not claimed by anyone. Then the accused was asked about his belongings. The accused was interrogated. The accused was taken out of the bus by the police officials. While the accused was being taken out from the bus, the accused pushed the police and ran away by jumping into the bushes below the road. He was not traced despite the attempt made by the police with the help of the bus light. The bag was opened. It contained some substance in the form of balls. It was found to be charas. It weighed 2 kg. 650 grams. Two samples of 50 grams each were taken out and sealed in separate parcels in an empty dhoop packet. The parcels were sealed with seal "D". The remaining charas was also sealed in a cloth parcel with the same seal. The case property was produced while examining this witness in the Court. In his cross-examination, he deposed that when nobody claimed the bag, then SHO was called from the Police Station and he came inside the bus. He did not know the SHO earlier. The police officials were in uniform. However, the SHO was not in the uniform.

7. PW-2 Chand Kishore deposed that Const. Kamal Nath came to his shop to fetch weights and scale. He gave the same to him.

8. PW-3 HC Kamal Chand deposed that on 9.12.2007 at 11:00 PM, he was deputed on Nakka duty. At about 12:15 AM, Karsog Delhi bound HRTC bus arrived on the spot. It was stopped. He remained standing outside the bus near the front window. SI Mehar Singh entered the bus for checking from the front window to check it. When he was checking seat No. 9 inside the bus he asked him to call the SHO. SHO also entered the bus and they started making inquiry from the occupants of seat Nos. 8 & 9 with respect to one bag kept about seat No. 9. The occupants of seats No. 8 & 9 were brought down from the bus. The occupant of seat No. 9 came down and ran away from the spot. He was sent to fetch weighing scale and weights.

9. PW-4 HC Bhagi Rath testified that on 10.12.2007 at 10:45 AM, SHO Brijesh Sood deposited with him three sealed parcels sealed with seal D along with NCB form, copy of recovery memo and sample seal impression. These were entered by him at Sr. No. 467 in malkhana register vide Ext. PW-4/A. He sent the same along with docket, copy of FIR and recovery memo vide RC No. 122/07 through Const. Kamal Kumar to FSL Junga.

10. PW-8 Const. Kamal Kumar deposed that on 11.12.2007 MHC of the Police Station Dharampur handed over to him parcel sealed with seal D alongwith related documents for taking the same to FSL, Junga vide RC No. 122/07. He deposited the same at FSL, Junga under receipt.

11. PW-9 HC Dharmesh Dutt testified that the bus was enroute from Karsog to Delhi. It was stopped at Dharampur. SI Mehar Singh entered the bus for checking from the front window and ASI Ram Chand entered the bus from the rear window for checking it. He was standing in front of front window with HHC Kamal Chand. SI Mehar Chand asked Kamal Chand to call the SHO who was also on the road. He called the SHO, who entered the bus. When the occupant of seat No. 9 was asked about his belongings, he told that he had no belongings. The SHO then brought the accused down from the bus along with the occupants of the adjoining seat Nos. 7 & 8. As soon as the occupant of the seat No. 9 got down from the bus, he pushed him and ran away towards railway line by jumping into the bushes below the road. The bag was searched. It contained charas. It weighed 2 kg. 650 grams. The accused was arrested by them. In his cross-examination, he admitted that after the arrest he did not record the statement of any witness. No identification parade of the accused was carried out. According to him, he along with SHO and HHC Kamal were in the nakka party from the very beginning.

12. PW-10 SHO Brijesh Sood testified that on 9.12.2007 at 10:50 PM, he along with SI Mehar Chand, ASI Ram Chand, ASI Narain Singh, HC Dharmesh, HHC Kamal and HHC Ravinder had put up nakka in front of the Police Station for checking of the vehicles vide rapat Ext. PW-10/A. At 12:15 AM, one HRTC Karsog Delhi bound bus came on the spot. SI Mehar Singh entered the bus for checking from front window and ASI Ram Chand entered the bus from rear window. He along with other staff remained standing on the road near the bus. After about 10 minutes, he was called by SI Mehar Singh inside the bus. He went inside the bus. A bag was kept over seat No. 9, which was not claimed by anyone, including the occupant of seat No. 9. All the passengers, except occupant of seat No. 9 were having one or the other kind of belongings. The occupant of seat No. 9 could not reply to the questions put to him. The accused was made to get down from the bus. Thereafter, he ran away. He could not be apprehended. Then he came back to the bus along with driver and conductor of the bus and took out the unclaimed bag from the rack above seat No. 9. The bag was checked. It contained charas. In his cross-examination, he admitted that the place where they had put nakka was National Highway and it was a busy place. However, during night hours, the flow of traffic and public was less. They had checked 14 vehicles and the bus was the 15th. He did not associate occupant of seat No. 7 in the investigation as a

witness. However, he made inquiry from him as to his name and from where he had come and where he was going. In his further cross-examination, he deposed that except seat No. 9, other passengers had belongings and they accounted for the same. He admitted that during investigation, no passengers had told him that this bag had been kept at the place by the accused. He also admitted that he did not find any mark etc. which could link the bag to the accused. After arrest of the accused, driver, conductor and PW-1 Liaq Ram were not associated to establish the identity of the accused. No identification parade of the accused was got conducted. They had checked the bus for about 15 minutes.

13. PW-10 SHO Brijesh Sood has deposed that the police had set up a nakka on 9.12.2007 at 10:50 PM. SI Mehar Chand, ASI Ram Chand, ASI Narain Singh, HC Dharmesh, HHC Kamal and HHC Ravinder were with him in the nakka in front of the Police Station for checking of the vehicles. At 12:15 AM, one HRTC Karsog Delhi bound bus came on the spot. He along with other staff remained standing on the road near the bus. SI Mehar Singh entered the bus for checking from front window and ASI Ram Chand entered the bus from rear window. However, PW-1 Liaq Ram, in his cross-examination has specifically deposed that the accused ran away after pushing the police officials and when nobody claimed the bag, SHO was called from the Police Station and he came inside the bus. Thus, according to PW-1 Liaq Ram, SHO was called from the Police Station, but PW-10 SHO Brijesh Sood has deposed that he was standing on the road along with other police officials.

14. PW-9 HC Dharmesh Dutt deposed that he was standing in front of front door with HHC Kamal Chand. SI Mehar Chand asked Kamal Chand to call the SHO who was also on the road. The place where the nakka was put up was in front of the Police Station. PW-10 SHO Brijesh Sood, in his cross-examination, has admitted that the place where they had put up the nakka was National Highway and it was a busy place. However, during night hours, the flow of traffic and public was less. They had checked 14 vehicles and the bus was the 15th. The police ought to have examined independent witnesses either from the bus or from the nearby houses/shops, including the occupants/owners of the vehicles which crossed the road at the moment. PW-10 SHO Brijesh Sood has also admitted in his cross-examination that during the investigation, no passenger had informed him that the bag was kept by the accused on the rack. He also admitted that he did not find any mark etc. which could link the bag to the accused. He did not know the accused before that date. After arrest of the accused, driver, conductor and PW-1 Liaq Ram were not associated to establish the identity of the accused. No identification parade of the accused was got conducted. PW-9 HC Dharmesh Dutt has also admitted that they had checked 14 vehicles on 9.12.2007. He also admitted that after the arrest he did not record the statement of any witness. No identification parade of the accused was carried out. He was not aware of the number of the vehicle in which they had gone. They had paid Rs. 500/- but no receipt was obtained.

15. The prosecution has failed to link the bag which was lying in the rack with the accused. The police ought to have made the inventory of the entire luggage carried by the passengers in order to fasten the liability to establish that except accused others had their belongings and they accounted for the same. The accused was not carrying bag on his person but it was lying on the rack above seat No. 9. Only one occupant of the bus i.e. PW-1 Liaq Ram has been cited as a witness. The person accompanying PW-1 Liaq Ram who was sitting on seat No. 8 was not associated as a witness by the prosecution. The prosecution could at least associate driver and conductor of the bus as witnesses to give authenticity to the search and seizure proceedings on the spot.

16. The case property was produced while recording the statement of PW-1 Liaq 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)."

17. 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 re-deposited 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 re-deposited 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.

18. Sub-rule (2) Rule 22.18 of Punjab Police Rules, reads as under:

> "(2) All case property and unclaimed property, other than cattle, of which the police have taken possession shall, if capable of being so treated, be kept in the store-room. Otherwise the officer in charge of the police station shall make other suitable arrangements for its safe custody until such time as it can be dealt with under sub-rule (1) above.
>
> Each article shall be entered in the store-room register and labelled. The label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a

detail of the articles shall be given on the label and in the store-room register.

The officer in charge of the police station shall examine Government and other property in the store-room at least twice a month and shall make an entry in the station diary on the Money following the examination to the effect that he has done so."

19. Rule 27.18 of Punjab Police Rules, reads as under:

"27.18. Safe custody of property.-

(1) Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. See Rule 22.18. When required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1).

Animals sent in connection with cases shall be kept in the pound attached to the police station at the place to which they have been sent, and the cost of their keep shall be recovered from the District Magistrate in accordance with Rule 25.48.

(2) In all cases in which the property consists of bullion, cash, negotiable securities, currency notes or jewellery, exceeding in value Rs. 500 the Superintendent shall obtain the permission of the District Magistrate, Additional District Magistrate or Sub-Divisional Officer to make it over to the Treasury Officer for safe custody in the treasury.

(3) All cash, jewellery and other valuable property of small bulk, which is not required under sub-rule (2) above to be sent to the treasury, shall be kept in a locked strong box in the store-room. Each court orderly shall be provided with a strong lock-up box in which he shall keep all case property while it is in his custody in the court to which he is attached. Case property shall invariably be kept locked-up in such box except when it is actually produced as an exhibit in the course of proceedings. After being so produced it shall be immediately replaced in the lock-up box. Boxes shall be provided from funds at the disposal of the District Magistrate.

(4) Property taken out of the main store-room for production in court shall be signed for by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

(5) Every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. Animals brought from the pound shall be repounded under the supervision of a head constable."

20. Thus, it is evident from rule 22.18 that the case property is required to be kept in store room and each article is to be entered in store room, registered and labelled and label shall contain a reference to the entry in the store-room register and a description of the article itself and, in the case of articles of case property, a reference to the case number. If several articles are contained in a parcel, a detail of the articles is required to be given on the label and in the store-room register. Similarly, it is provided in Rule 27.18 that Weapons, articles and property sent in connection with cases shall on receipt be entered in register No. 1 and shall (excluding livestock) be properly stored in the store-room of the head of the prosecuting agency, or the police station. The case property when required for production in court such articles shall, at headquarters, be taken out in the presence and under the personal order of an officer of rank not less than prosecuting sub-inspector (now APP/PP) and an entry made in the register of issue from and return to the prosecuting agency's store-room, which register shall be maintained in Form 27.18(1). Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal shall initial this entry. Such officer similarly, after personal check, is required to initial the entry of return of the property to the main store-room on the closing of the courts. It is further provided in this Rule that every day, when the courts close, an officer of the prosecuting branch of rank not less that of sub-inspector shall personally see that the articles produced in court are returned to the store-room, restored to their proper places in the shelves, cup-boards or strong box and registered as required by sub-rule (4) above. The opening of the storeroom in the morning and its closing in the evening shall invariably be in the presence of the police officials named in this rule. In case property is required to be committed to the higher Court, then under Rule 27.19, the parcel shall be sealed with the seal of the court and made over to the head of the police prosecuting agency, who shall produce it with unbroken seals before the superior court, or, if so ordered by competent authority, shall make it over to some other officer authorized so to produce it.

21. In Punjab Police Rules, also applicable to the State of Himachal Pradesh, Malkhana register is assigned serial number-19. It is in a tabular form. There are different columns like who has deposited the case property and when it was taken out and deposited back. These details are very material and every deposit made in the Malkhana /Store Room is to be recorded and also at the time when it is re-deposited.

22. In the instant case, there is nothing on record to suggest that these Rules were followed while producing case property in the Court and on returning the same. These Rules have been framed to ensure that case property from its initial stage of seizure till production in the Court remains safe/intact and is restored to store room in the presence of senior police officer. Property taken out of the main store-room for production in court is required to be signed by the court orderly concerned in register No. 2 and the prosecuting officer authorizing the removal is required to initial this entry. Such officer shall similarly, after personal check, initial the entry of return of the property to the main store-room on the closing of the courts.

23. Thus, the prosecution has failed to prove the case against the accused under Sections 20 of the ND & PS Act that the charas was recovered from the conscious and exclusive possession of the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 30.9.2008.

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

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

State of Himachal Pradesh ..... Appellant
Versus
Rajeev Kumar @ Lovely ..... Respondent

Cr. Appeal No. 120/2009
Reserved on: April 20, 2016
Decided on: April 21, 2016

Indian Penal Code, 1860- Section 380- Door of the computer room was found open in the morning and computer was found missing- accused was arrested and he made a disclosure statement- accused was tried and convicted by the trial Court- judgment was set aside by the Sessions Court- held, in appeal that recovery was not satisfactorily proved- police had gone to the shop and had recovered the computers- making of the disclosure statement was also not established satisfactorily- no local witness was associated- the findings arrived at by the trial Court cannot be said to be perverse- appeal dismissed. (Para-15 and 16)

For the appellant : Mr. Parmod Thakur, Additional Advocate General.
For the Respondent : Mr. Adarsh K. Vashista, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 1.10.2008 rendered by the learned Sessions Judge, Hamirpur, Himachal Pradesh in Criminal Appeal No. 47 of 2008.

2. Case of the prosecution, in a nutshell, is that PW-1 Rajinder Kumar was the Principal of Aryan Public School. The School was locked on 24.1.2006. There were holidays on 25.1.2006 and 26.1.2006. When the School was opened on the morning of 27.1.2006, it was found that the door of the computer room was open and the computer was missing. Somebody had committed theft of the computer during the vacation. It was suspected that the accused had committed the theft of the computer. Matter was reported to the Police. FIR Ext. PW-12/B was registered. Investigation was carried out. Site plan Ext. PW-13/A was prepared. Accused was interrogated and he made a disclosure statement Ext. PW-13/B that he had kept the computer in the Dhaba of Jagdish Chand at Tihra. Earlier PW-3 Gian Chand had seen the accused carrying the bundle on 26.1.2006 and Arun Kumar had taken the accused to Tihra in a taxi bearing registration No. HP-14-0209. Lock Ext. P1 was produced by Bhure Lal, which was identified by the complainant. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 13 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Trial Court convicted the accused on 2.6.2008 for committing offence under Section 457 IPC to undergo rigorous imprisonment for two years and to pay fine of Rs.5,000/-, in default of payment of fine, to further undergo simple imprisonment for one month. Accused was also convicted under Section 380 IPC and was sentenced to undergo rigorous imprisonment for two years and to pay a fine of Rs.5,000/-, in default of payment of fine, to further undergo simple imprisonment, for one month. Accused filed an appeal against the Judgment dated

2.6.2008, before the learned Sessions Judge. He allowed the appeal vide Judgment dated 1.10.2008. Hence, this appeal by the State.

4. Mr. Parmod Thakur, Additional Advocate General, has vehemently argued that the prosecution has proved its case against the accused person.

5. Mr. Adarsh K. Vashista, Advocate, has supported the Judgment passed by the learned Sessions Judge dated 1.10.2008.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-2 Meena Kumari testified that she was posted as a Teacher in the Aryan Public School. She reached the school at 8.30 AM on 27.1.2006. Nirmala Devi told that computer room was open and computer was missing. She found that that the articles lying inside the room were missing. She narrated this incident to the Principal. She was working in the school for the last 2-3 years.

8. PW-3 Gian Chand has stated that he was sitting in shop on 26.1.2006, when he saw accused carrying a dish antenna and some other articles which were tied by him in a bundle. Accused was going towards the shop of Jayoti Tyre and the owner of shop told him that the accused had brought a dish antenna.

9. PW-4 Jayoti Parkash stated that accused had kept a dish antenna outside his shop. When he made inquiry from the accused, accused told that he was the owner of the dish antenna.

10. PW-5 Arun Kumar testified that he was owner of taxi No. HP-14-0209. He had carried the accused to Tihra.

11. PW-6 Lakhvir Singh testified that accused disclosed that he had kept computer in the Dhaba. Dhaba was owned by Jagdish. Articles were recovered by the police in his presence. He admitted that he was related to the complainant. He was associated by the police only on one day i.e. 29.1.2006.

12. PW-6/A Ashwani Kumar has testified that the computer was recovered in his presence by the police.

13. PW-10 Nirmala Devi deposed that she was working in the School. When she tried to open the lock of the school, it was not locked. Computer was missing.

14. PW-13 Jagdish Chand has not supported the case of the prosecution. He deposed that the accused has not kept any belongings with him. He was declared hostile and cross-examined by the learned Public Prosecutor.

15. PW-6 Lakhvir Singh, in his cross-examination deposed that the accused remained sitting in the jeep. He was caught by the constables. Only the police personnel have gone to the shop of Jagdish. Jagdish opened the lock. Police collected the computer from the shop. PW-6/A Ashwani Kumar has testified only to the extent that computer was recovered in his presence by the police. They have not stated that the accused has made a specific disclosure statement that he had concealed the computer at a particular place and only he knew about it and he could get the same recovered. PW-13 SI Jagdish Chand, in his cross-examination, admitted that there were many shops in Tihra Bazaar, however, no local witnesses were associated by the police for recovery. The view taken by the learned Sessions Judge, thus, cannot be termed to be perverse.

16. Thus, the prosecution has failed to prove its case against the accused beyond all reasonable doubt.

17. Accordingly, we find no occasion to interfere with the well reasoned judgment passed by the learned Sessions Judge. The appeal is thus dismissed. All pending applications, are also disposed of. Bail bonds of the accused person are discharged.

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

Mrs. Surindra Devi & ors. .....Petitioners.

Versus

Parkash Chand .....Respondent.

CMPMO No. 478 of 2015.
Reserved on: 19.04.2016.
Decided on: 21.04.2016.

Code of Civil Procedure, 1908- Order 6 Rule 17- Defendant filed an application seeking amendment of the written statement for taking a plea that suit was not maintainable and in case the court concludes that defendant was a licencee, licence being permanent cannot be revoked- application was allowed by the trial Court- held, that plea sought to be raised by the defendant was available to him at the time of filing the written statement- defendant has failed to show as to why the proposed amendment could not be incorporated earlier despite due diligence- application was filed when the defendant was leading evidence- allowing the application will delay the decision of the suit and will cause prejudice to the plaintiff- trial Court had wrongly allowed the application- application dismissed. (Para-5 to 8)

Cases referred:

State of Madhya Pradesh vrs. Union of India and another, (2011) 12 SCC 268

J.Samuel and others vrs. Gattu Mahesh and others, (2012) 2 SCC 300

For the petitioners: Mr. Y.P.Sood, Advocate.

For the respondent: Mr. R.K.Bawa, Sr. Advocate, with Mr. Jeevesh Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This petition is directed against the order dated 10.8.2015, rendered by the learned Civil Judge (Sr. Divn.), Shimla, H.P., in CMA No. 13/6 of 2015 in Civil Suit No. 165/1 of 2013/2009.

2. Key facts, necessary for the adjudication of this petition are that the petitioners-plaintiffs (hereinafter referred to as the plaintiffs) have filed a suit for possession of the land comprised in Khewat No. 7, Khatoni No. 15 min, Kh. Nos. 51, 52, 54, 55, 56, 65 and 70 kite-7 measuring 0-08-54 hectares, situated in Mohal Dhasholi, Tehsil Chopal, Distt. Shimla, H.P., against the respondent-defendant (hereinafter referred to as the defendant) on the ground that he was licensee over the suit property and after the expiry of the licence, he was required to hand over the suit land to the plaintiffs. The defendant filed written

statement. The defendant also moved an application under Order 6 Rule 17 CPC, whereby he sought amendment of the written statement by taking plea that the suit was not maintainable and alternative plea was sought to be taken that in case the Court comes to the conclusion that defendant was licensee, in that event, licence being permanent cannot be revoked. The application was contested by the plaintiffs. The learned Civil Judge (Sr. Divn.), Shimla, allowed the application vide order dated 10.8.2015. Hence, this petition.

3. I have heard learned counsel for the parties and gone through the impugned order dated 10.8.2015, carefully.

4. The issues were framed by the learned trial Court on 10.6.2010. The plaintiffs have already closed the evidence on 7.9.2012. The case was listed for the evidence of the defendant. The defendant has also led part of his evidence.

5. The application under Order 6 Rule 17 CPC has been filed belatedly by the defendant. A new plea tried to be raised by the defendant was always available to him at the time of filing the written statement. The defendant has failed to show as to why the proposed amendment could not be incorporated despite due diligence. The learned trial Court has come to the wrong conclusion that no prejudice would be caused to the plaintiffs by allowing the amendment. Filing of the application at this belated stage, when the defendant was leading his evidence, would certainly cause prejudice to the plaintiffs. The allowing of the application at this belated stage would also delay the decision of the suit which was instituted far back in the year 2009. Order dated 10.8.2015 is neither speaking nor detailed. The pleas raised by the plaintiffs while opposing the application ought to have been addressed specifically by the learned trial Court.

6. Their lordships of the Hon'ble Supreme Court in the case of ***State of Madhya Pradesh vrs. Union of India and another,*** reported in ***(2011) 12 SCC 268***, have held that when application is filed after the commencement of the trial, it must be shown that inspite of due diligence, such amendment could not have been sought earlier. Their lordships have held as under:

> "7). The above provision deals with amendment of pleadings. By Amendment Act 46 of 1999, this provision was deleted. It has again been restored by Amendment Act 22 of 2002 but with an added proviso to prevent application for amendment being 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. The proviso, to some extent, curtails absolute discretion to allow amendment at any stage. Now, if application is filed after commencement of trial, it must be shown that in spite of due diligence, such amendment could not have been sought earlier.
>
> 8). The purpose and object of Order VI Rule 17 of the Code is to allow either party to alter or amend his pleadings in such manner and on such terms as may be just. Amendment cannot be claimed as a matter of right and under all circumstances, but the Courts while deciding such prayers should not adopt a hyper-technical approach. Liberal approach should be the general rule particularly, in cases where the other side can be compensated with costs. Normally, amendments are allowed in the pleadings to avoid multiplicity of litigations.
>
> 9) Inasmuch as the plaintiff-State of Madhya Pradesh has approached this Court invoking the original jurisdiction under Article 131 of the Constitution of India, the Rules framed by this Court, i.e., The Supreme Court Rules,

1966 (in short `the Rules) have to be applied to the case on hand. Order XXVI speaks about "Pleadings Generally". Among various rules, we are concerned about Rule 8 which reads as under:

> "8. The Court may, at any stage of the proceedings, allow either party to amend his pleading in such manner and on such terms as may be just, but only such amendments shall be made as may be necessary for the purpose of determining the real question in controversy between the parties."

The above provision, which is similar to Order VI Rule 17 of the Code prescribes that at any stage of the proceedings, the Court may allow either party to amend his pleadings. However, it must be established that the proposed amendment is necessary for the purpose of determining the real question in controversy between the parties.

10) This Court, while considering Order VI Rule 17 of the Code, in several judgments has laid down the principles to be applicable in the case of amendment of plaint which are as follows:

(i) Surender Kumar Sharma v. Makhan Singh, (2009) 10 SCC 626, at para 5:

> "5. As noted hereinearlier, the prayer for amendment was refused by the High Court on two grounds. So far as the first ground is concerned i.e. the prayer for amendment was a belated one, we are of the view that even if it was belated, then also, the question that needs to be decided is to see whether by allowing the amendment, the real controversy between the parties may be resolved. It is well settled that under Order 6 Rule 17 of the Code of Civil Procedure, wide powers and unfettered discretion have been conferred on the court to allow amendment of the pleadings to a party in such a manner and on such terms as it appears to the court just and proper. Even if, such an application for amendment of the plaint was filed belatedly, such belated amendment cannot be refused if it is found that for deciding the real controversy between the parties, it can be allowed on payment of costs. Therefore, in our view, mere delay and laches in making the application for amendment cannot be a ground to refuse the amendment."

(ii) North Eastern Railway Administration, Gorakhpur v.

Bhagwan Das (dead) by LRS, (2008) 8 SCC 511, at para16:

> "16. Insofar as the principles which govern the question of granting or disallowing amendments under Order 6 Rule 17 CPC (as it stood at the relevant time) are concerned, these are also well settled. Order 6 Rule 17 CPC postulates amendment of pleadings at any stage of the proceedings. In Pirgonda Hongonda Patil v. Kalgonda Shidgonda Patil which still holds the field, it was held that all amendments ought to be allowed which satisfy the two conditions: (a) of not working injustice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties. Amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs."

(iii) Usha Devi v. Rijwan Ahamd and Others, (2008) 3 SCC 717, at para 13:

> "13. Mr Bharuka, on the other hand, invited our attention to another decision of this Court in Baldev Singh v. Manohar Singh. In para 17 of the decision, it was held and observed as follows: (SCC pp. 504-05) "17. Before we part with this order, we may also notice that proviso to Order 6 Rule 17 CPC provides that amendment of pleadings shall not be allowed when the trial of the suit has already commenced. For this reason, we have examined the records and find that, in fact, the trial has not yet commenced. It appears from the records that the parties have yet to file their documentary evidence in the suit. From the record, it also appears that the suit was not on the verge of conclusion as found by the High Court and the trial court. That apart, commencement of trial as used in proviso to Order 6 Rule 17 in the Code of Civil Procedure must be understood in the limited sense as meaning the final hearing of the suit, examination of witnesses, filing of documents and addressing of arguments. As noted hereinbefore, parties are yet to file their documents, we do not find any reason to reject the application for amendment of the written statement in view of proviso to Order 6 Rule 17 CPC which confers wide power and unfettered discretion on the court to allow an amendment of the written statement at any stage of the proceedings."

(iv) Rajesh Kumar Aggarwal and Others v. K.K. Modi and Others, (2006) 4 SCC 385, at paras 15 & 16:

> "15. The object of the rule 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.
>
> 16. Order 6 Rule 17 consists 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."

(v) Revajeetu Builders and Developers v. Narayanaswamy and Sons and Others, (2009) 10 SCC 84, at para 63:

"63. On critically analysing both the English and Indian cases, some basic principles emerge which ought to be taken into consideration while allowing or rejecting the application for amendment:

> (1) whether the amendment sought is imperative for proper and effective adjudication of the case;
>
> (2) whether the application for amendment is bona fide or mala fide;
>
> (3) the amendment should not cause such prejudice to the other side which cannot be compensated adequately in terms of money;
>
> (4) refusing amendment would in fact lead to injustice or lead to multiple litigation;
>
> (5) whether the proposed amendment constitutionally or fundamentally changes the nature and character of the case;

> and (6) as a general rule, the court should decline amendments if a fresh suit on the amended claims would be barred by limitation on the date of application.
>
> These are some of the important factors which may be kept in mind while dealing with application filed under Order 6 Rule 17. These are only illustrative and not exhaustive."
>
> The above principles make it clear that Courts have ample power to allow the application for amendment of the plaint. However, it must be satisfied that the same is required in the interest of justice and for the purpose of determination of real question in controversy between the parties."

7. Their lordships in the case of ***J.Samuel and others vrs. Gattu Mahesh and others,*** reported in ***(2012) 2 SCC 300,*** have held that omission of specific plea that inspite of due diligence the party could not have raised the matter before the commencement of the trial, mandatorily amounts to negligence and lack of due diligence. Their lordships have explained the term "due diligence". It has been held as under:

> "15) In this legal background, we have to once again recapitulate the factual details. In the case on hand, Suit O.S. No. 9 of 2004 after prolonged trial came to an end in September, 2010. The application for amendment under Order VI Rule 17 CPC was filed on 24.09.2010 that is after the arguments were concluded on 22.09.2010 and the matter was posted for judgment on 04.10.2010. We have already mentioned that Section 16(c) of the Specific Relief Act contemplates that specific averments have to be made in the plaint that he has performed and has always been willing to perform the essential terms of the Act which have to be performed by him. This is an essential ingredient of Section 16(c) and the form prescribes for the due performance. The proviso inserted in Rule 17 clearly states that no amendment shall be allowed after the trial has commenced except when the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of the trial.
>
> 18) The primary aim of the court is to try the case on its merits and ensure that the rule of justice prevails. For this the need is for the true facts of the case to be placed before the court so that the court has access to all the relevant information in coming to its decision. Therefore, at times it is required to permit parties to amend their plaints. The Court's discretion to grant permission for a party to amend his pleading lies on two conditions, firstly, no injustice must be done to the other side and secondly, the amendment must be necessary for the purpose of determining the real question in controversy between the parties. However to balance the interests of the parties in pursuit of doing justice, the proviso has been added which clearly states 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."
>
> 19) Due diligence is the idea that reasonable investigation is necessary before certain kinds of relief are requested. Duly diligent efforts are a requirement for a party seeking to use the adjudicatory mechanism to attain an anticipated relief. An advocate representing someone must engage in due diligence to determine that the representations made are factually accurate

and sufficient. The term `Due diligence' is specifically used in the Code so as to provide a test for determining whether to exercise the discretion in situations of requested amendment after the commencement of trial.

20) A party requesting a relief stemming out of a claim is required to exercise due diligence and is a requirement which cannot be dispensed with. The term "due diligence" determines the scope of a party's constructive knowledge, claim and is very critical to the outcome of the suit."

8. Consequently, the petition is allowed. Order dated 10.8.2015 is set aside. In the interest of justice, the parties through their counsel, are directed to appear before the learned trial Court on 12.5.2016. The learned trial Court is directed to decide the suit within a period of three months. No costs.

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

Pankaj Thakur .....Petitioner.
Versus
State of Himachal Pradesh ..... Respondent.

Cr.MMO No.18 of 2016.
Date of decision: 22.04.2016.

Code of Criminal Procedure, 1973- Section 385- Appellate Court had dismissed the appeal in default for non prosecution- held, that criminal appeal cannot be dismissed in default for non-prosecution. (Para-2 to 7)

Cases referred:
Parasuram Patel and another versus State of Orissa (1994) 4 SCC 664
Bani Singh and others versus State of U.P. (1996) 4 SCC 720
K.S.Panduranga versus State of Karnataka (2013) 3 SCC 721
Surya Baksh Singh versus State of Uttar Pradesh (2014) 14 SCC 222.

For the Petitioner : Mr.Rajesh Mandhotra, Advocate.
For the Respondent : Ms.Parul Negi and Mr.Vikram Thakur, Deputy Advocate Generals.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge .

The short question raised in this petition under Section 482 Cr.P.C. is whether a criminal appeal can be dismissed in default for non prosecution. The impugned order reads thus:-

"20.3.14. Present :- None for the appellant.
Sh.S.P.Garg, Ld. PP for State.

Learned counsel for the appellant has not appeared despite service of notice for today. It is 3.45 p.m. It is further evident from notice

issued to appellant that his address was not correct. Since counsel for appellant has not appeared and whereabouts of accused/appellant are not known, appeal so filed by him is hereby dismissed in default for non prosecution. Let copy of this order alongwith record of lower Court be sent forthwith and record of this Court after its due completion be consigned to record room."

2. Though the position of law is well settled that a criminal appeal cannot be dismissed in default for non prosecution, yet the learned Court ventured to pass the aforesaid order.

3. In ***Parasuram Patel and another*** *versus* ***State of Orissa (1994) 4 SCC 664***, it was held by the Hon'ble Supreme Court that the criminal appeal cannot be dismissed for default in appearance and the Court must decide the matter on merit even in the absence of the appellant or his counsel.

4. In ***Bani Singh and others*** *versus* ***State of U.P. (1996) 4 SCC 720***, it was held by the Hon'ble three Judges Bench of the Hon'ble Supreme Court that dismissal of appeal for default or non prosecution without going into merits of the case is illegal. It was further held that that the appellate Court must dispose of the appeal on merits after perusal and scrutiny of the record. It is apt to reproduce paragraphs 14 and 15 of the judgment which read thus:-

> *"14. We have carefully considered the view expressed in the said two decisions of this Court and, we may state that the view taken in Shyam Deo's case appears to be sound except for a minor clarification which we consider necessary to mention. The plain language of Section 385 makes it clear that if the Appellate Court does not consider the appeal fit for summary dismissal, it 'must' call for the record and Section 386 mandates that after the record is received, the Appellate Court may dispose of the appeal after hearing the accused or his counsel. Therefore, the plain language of Sections 385-386 does not contemplate dismissal of the appeal for non-prosecution simpliciter. On the contrary, the Code envisages disposal of the appeal on merits after perusal and scrutiny of the record. The law clearly expects the Appellate Court to dispose of the appeal on merits, not merely by perusing the reasoning of the trial court in the judgment, but by cross-checking the reasoning with the evidence on record with a view to satisfying itself that the reasoning and findings recorded by the trial court are consistent with the material on record. The law, therefore, does not envisage the dismissal of the appeal for default or non-prosecution but only contemplates disposal on merits after perusal of the record. Therefore, with respect, we find it difficult to agree with the suggestion in Ram Naresh Yadav's case that if the appellant or his pleader is not present, the proper course would be to dismiss an appeal for non-prosecution.*
>
> *15. Secondly, the law expects the Appellate Court to give a hearing to the appellant or his counsel, if he is present, and to the public prosecutor, if he is present, before disposal of the appeal on merits. Section 385 posits that if the appeal is not dismissed summarily, the Appellate Court shall cause notice of the time and place at which the appeal will be heard to be given to the appellant or his pleader. Section 386 then provides that the Appellate Court shall, after perusing the record, hear the appellant or his pleader, if he appears. It will be noticed that Section 385 provides for a notice of the time and place of hearing of the appeal to be given to either the appellant or his pleader and not to both presumably because notice to the pleader was also*

considered sufficient since he was representing the appellant. So also Section 386 provides for a hearing to be given to the appellant or his lawyer, if he is present, and both need not be heard. It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Sections 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused/appellant if his lawyer is not present. If the lawyer is absent, and the court deems it appropriate to appoint a lawyer at State expense to assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case did not apply the provisions of Sections 385-386 of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent."

5. In ***K.S.Panduranga*** *versus* ***State of Karnataka (2013) 3 SCC 721***, the legal position that the appeal cannot be dismissed for non prosecution simpliciter without examining the merits was reiterated in the following manner :-

"15. On a studied perusal of the said decision, it is noticeable that the Court has stated about the role of the lawyer and the role of the Bar Association in the backdrop of professional ethics and norms of the Constitution. It has been categorically held therein that the professional ethics require that a lawyer cannot refuse a brief, provided a client is willing to pay his fee and the lawyer is not otherwise engaged and, therefore, no Bar Association can pass a resolution to the effect that none of its members will appear for a particular accused whether on the ground that he is a policeman or on the ground that he is a suspected terrorist. We are disposed to think that in Mohd. Sukur Ali (supra), the aforesaid case was cited only to highlight the role of the Bar and the ethicality of the lawyers. It does not flow from the said pronouncement that it is obligatory on the part of the Appellate Court in all circumstances to engage amicus curiae in a criminal appeal to argue on behalf of the accused failing which the judgment rendered by the High Court would be absolutely unsustainable.

16. At this juncture, it is apt to survey the earlier decisions of this Court in the field. In Shyam Deo Pandey and others v. The State of Bihar(1971) 1 SCC 855, a two-Judge Bench of this Court was dealing with a criminal appeal which had arisen from the order of the High Court whereby the High Court, on perusal of the judgment under appeal, had dismissed the criminal appeal challenging the conviction. The Court referred to Section 423 of the Old Code and came to hold that the criminal appeal could not be dismissed for default of appearance of the appellants or their counsel. The Court has either to adjourn the hearing of the appeal or it should consider the appeal on merits and pass final orders. It is further observed that: (SCC p.861, para 19)

"19……The consideration of the appeal on merits at the stage of final hearing and to arrive at a decision on merits and pass final orders will

not be possible unless the reasoning and findings recorded in the judgment under appeal is tested in the light of the record of the case."

The Court referred to the earlier Section 421 of the Code which dealt with dismissal of an appeal summarily and was different from an appeal that had been admitted and required to be dealt with under Section 423 of the Code. It is worth noting that reliance was placed on Challappa Ramaswami v. State of Maharashtra(1970) 2 SCC 426 wherein reliance was placed on Siddanna Apparao Patil v. State of Maharashtra (1970) 1 SCC 547 and Govinda Kadtuji Kadam v. The State of Maharashtra (1970) 1 SCC 469.

17. In Ram Naresh Yadav and others v. State of Bihar AIR 1987 SC 1500, a different note was struck by expressing the view in the following terms: (AIR p.1500, para 2)

"2....It is no doubt true that if counsel do not appear when criminal appeals are called out it would hamper the working of the court and create a serious problem for the court. And if this happens often the working of the court would become well nigh impossible. We are fully conscious of this dimension of the matter but in criminal matters the convicts must be heard before their mattes are decided on merits. The court can dismiss the appeal for non-prosecution and enforce discipline or refer the matter to the Bar Council with this end in view. But the matter can be disposed of on merits only after hearing the appellant or his counsel. The court might as well appoint a counsel at State cost to argue on behalf of the appellants."

18. In Bani Singh and others v. State of U.P.(1996) 4 SCC 720, a three-Judge Bench was called upon to decide whether the High Court was justified in dismissing the appeal filed by the accused-appellants therein against the order of conviction and sentence issued by the trial court for non- prosecution. The High Court had referred to the pronouncement in Ram Naresh Yadav (supra) and passed the order. The three-Judge Bench referred to the scheme of the Code, especially, the relevant provisions, namely, Section 384 and opined that since the High Court had already admitted the appeal following the procedure laid down in Section 385 of the Code, Section 384 which enables the High Court to summarily dismiss the appeal was not applicable. The view expressed in Sham Deo's case (supra) was approved with slight clarification but the judgment in Ram Naresh Yadav's case (supra) was over-ruled. The three-Judge Bench proceeded to lay down as follows: (Bani Singh case[13] , SCC pp. 726-27, paras 15-16)

"15.....It is the duty of the appellant and his lawyer to remain present on the appointed day, time and place when the appeal is posted for hearing. This is the requirement of the Code on a plain reading of Ss. 385-386 of the Code. The law does not enjoin that the Court shall adjourn the case if both the appellant and his lawyer are absent. If the Court does so as a matter of prudence or indulgence, it is a different matter, but it is not bound to adjourn the matter. It can dispose of the appeal after perusing the record and the judgment of the trial Court. We would, however, hasten to add that if the accused is in jail and cannot, on his own, come to Court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present. If the lawyer is absent, and the Court deems it appropriate to appoint a lawyer at State expense to

assist it, there is nothing in the law to preclude it from doing so. We are, therefore, of the opinion and we say so with respect, that the Division Bench which decided Ram Naresh Yadav's case (AIR 1987 SC 1500) did not apply the provisions of Ss. 385-386 of the Code correctly when it indicated that the Appellate Court was under an obligation to adjourn the case to another date if the appellant or his lawyer remained absent.

16. Such a view can bring about a stalemate situation. The appellant and his lawyer can remain absent with impunity, not once but again and again till the Court issues a warrant for the appellant's presence. A complaint to the Bar Council against the lawyer for non-appearance cannot result in the progress of the appeal. If another lawyer is appointed at State cost, he too would need the presence of the appellant for instructions and that would place the court in the same situation. Such a procedure can, therefore, prove cumbersome and can promote indiscipline. Even if a case is decided on merits in the absence of the appellant, the higher Court can remedy the situation if there has been a failure of justice. This would apply equally if the accused is the respondent for the obvious reason that if the appeal cannot be disposed of without hearing the respondent or his lawyer, the progress of the appeal would be halted." (Emphasis supplied)

19. From the aforesaid decision in Bani Singh[13], the principles that can be culled out are:

19.1 That the High Court cannot dismiss an appeal for non- prosecution simpliciter without examining the merits;

19.2. That the court is not bound to adjourn the matter if both the appellant or his counsel/lawyer are absent;

19.3. That the court may, as a matter of prudence or indulgence, adjourn the matter but it is not bound to do so;

19.4. That it can dispose of the appeal after perusing the record and judgment of the trial court;

19.5. That if the accused is in jail and cannot, on his own, come to court, it would be advisable to adjourn the case and fix another date to facilitate the appearance of the accused-appellant if his lawyer is not present, and if the lawyer is absent and the court deems it appropriate to appoint a lawyer at the State expense to assist it, nothing in law would preclude the court from doing so; and

19.6. That if the case is decided on merits in the absence of the appellant, the higher court can remedy the situation."

6. Similar reiteration of law can be found in ***Surya Baksh Singh*** *versus* ***State of Uttar Pradesh (2014) 14 SCC 222.***

7. In view of the aforesaid exposition of law, I fail to understand how and why the learned Court below took such a stiff stand and passed the impugned order. The petition is accordingly allowed and impugned order passed by the learned Additional Sessions Judge (II), Kangra at Dharamshala (Circuit Court at Dehra) on 20.03.2014 is set aside. The learned Sessions Judge, Kangra at Dharamshala is directed to restore the appeal on its original number and thereafter decide the same in accordance with law.

8. With these observations, the petition stands disposed of in the aforesaid terms, so also the pending application, if any.

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

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

Cr. Appeal No. 85 of 2015.
Reserved on: April 20, 2016.
Decided on: April 22, 2016.

Indian Penal Code, 1860- Section 363, 366A, 376, 506- **Protection of Children From Sexual Offences Act, 2012-** Section 4- Accused came to the house of prosecutrix with a proposal to marry her - her family members refused their marriage as she was under age- accused subsequently kidnapped the prosecutrix- father of the prosecutrix moved an application before the Dy. S.P. Paonta Sahib on which FIR was registered- accused was tried and convicted by the trial Court- held, in appeal that prosecutrix had stated that she was taken to the house of the accused twice, but her mother stated that prosecutrix was taken only once- prosecutrix had not raised any alarm when she was being forcibly taken away- original parivar register was not brought on record- prosecutrix had filed an application against her father that he was demanding Rs.10,000/- from the family of the accused- all these circumstances, create doubt regarding the prosecution version- trial Court had wrongly convicted the accused- appeal accepted- accused acquitted. (Para-17 to 21)

For the appellant: Mr. Sunil Chauhan Sharma, Advocate.
For the respondent: Mr. Parmod Thakur, Addl. AG.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted against the judgment and order dated 19.1.2015 and 21.1.2015, respectively, rendered by the learned Special Judge, Sirmaur District at Nahan, H.P., in Sessions Trial No. 23-ST/7 of 2014, whereby the appellant-accused (hereinafter referred to as the accused), who was charged with and tried for offences punishable under Sections 363, 366A, 376, 506 IPC and Section 4 of the Protection of Children From Sexual Offences Act, 2012 (hereinafter referred to as the POCSO Act), has been convicted and sentenced as under:

> "i) to undergo rigorous imprisonment for three years and to pay fine of Rs. 5000/- and in default of payment of fine, to undergo simple imprisonment for three months under Section 363 IPC;
>
> ii) to undergo rigorous imprisonment for three years and to pay fine of Rs. 5000/- and in default of payment of fine, to undergo simple imprisonment for three months under Section 366-A IPC;

iii) to undergo rigorous imprisonment for seven years and to pay fine of Rs. 25000/- and in default of payment of fine, to undergo simple imprisonment for six months under Section 376 IPC;

iv) to undergo rigorous imprisonment for seven and to pay fine of Rs. 25000/- and in default of payment of fine, to undergo simple imprisonment for six months under Section 4 of the POCSO Act, 2012; and

v) to undergo rigorous imprisonment for one year and to pay fine of Rs. 1000/- and in default of payment of fine, to undergo simple imprisonment for one month under Section 506 IPC."

All the sentences were ordered to run concurrently.

2. The case of the prosecution, in a nut shell, is that PW-6 prosecutrix (name withheld) made a complaint to S.P. Sirmaur, vide Ext. PW-6/A. According to the averments made in the complaint, the accused came to her house with a proposal to marry her. However, her family members refused their marriage as she was under age. The accused came to her house on 23.8.2013 in the absence of her family members. He kidnapped her. Her father moved an application before the Dy. S.P. Paonta Sahib. The accused was called to Dy. S.P. Paonta Sahib office. The accused used to threaten the prosecutrix and her family members. She gave statement before the Dy. S.P. Paonta Sahib under pressure from the accused and therefore, the father of the accused brought her back to his house where accused continuously mal treated her. She fell ill. The accused dropped her at her parents' house. After 15-20 days, the accused again brought her to his house and kept her in his house like a prisoner. The accused also forced her to make complaint against her father. The FIR was registered. She was medically examined. The statement of the prosecutrix was also recorded under Section 164 Cr.P.C. The investigation was completed and the challan was put up in the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as 12 witnesses. The accused was also examined under Section 313 Cr.P.C. He pleaded innocence. He examined four witnesses in defence. The learned trial Court convicted and sentenced the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. Sunil Chauhan, Advocate, has vehemently argued that the prosecution has failed to prove its case against the accused. On the other hand, Mr. Parmod Thakur, Addl. Advocate General for the State has supported the judgment of the learned trial Court dated 19/21.1.2015.

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

6. PW-1 Inder Singh testified that he was posted as Panchayat Secretary in Gram Panchayat Thontha Jakhal from September, 2008. The certificates Ext. PW-1/A and PW-1/B were prepared by him from the original records. In his cross-examination, he admitted that he has not brought the original pariwar register. The entry in the birth register was not made by him. Volunteered that he had issued certificates on the basis of original death and birth register.

7. PW-2 Ravinder Kumar deposed that on receipt of application Ext. PW-2/A, he had issued the date of birth certificate of the prosecutrix vide Ext. PW-2/B on the basis of the school records. As per the school records, the date of birth of the prosecutrix was 20.12.1999. In his cross-examination, he deposed that the date of birth is entered in the records of Middle School on the basis of certificate issued by Primary School.

8. PW-6 is the prosecutrix. She deposed that on 23.8.2013, accused kidnapped her from her house. No family member was present in the house at the relevant time. The accused kept her in his house for three months forcibly. During these three months, the accused committed rape with her without her consent. The accused also threatened her with dire consequences. The accused also forced her to make complaint against her father and he demanded Rs. 10,000/-. Her father was arrested by Paonta police. Thereafter, she made complaint to the police Ext. PW-6/A, on the basis of which FIR was registered. She fell sick. The accused left her in the house of her parents. The accused again took her to his house after about 15-20 days. The accused used to treat her like his wife. The accused shunted her out from his house on 20.1.2014. She approached SDPO Paonta Sahib. She was medically examined. She signed the MLC Ext. PW-6/B. Her statement was also recorded by the learned JMIC Paonta Sahib on 5.5.2014. In her cross-examination, she admitted that the accused has come on 23.8.2013 and forced her to accompany him. He gagged the mouth of the prosecutrix. There were 3-4 houses adjoining to her house. The accused took her to his village on foot. 3-4 persons met them on the way to the house of the accused.

9. PW-7 Dinesh Kumar deposed that the prosecutrix is his sister. The accused on 23.8.2013 cajoled his sister with the intention to solemnize marriage. The accused kept his sister for three months and thereafter he left her in their house. Accused committed rape with the prosecutrix. A false complaint was lodged against his father. His sister was medically examined and MLC is Ext. PW-6/B. The police also visited the spot.

10. PW-8 Nazro Devi is the mother of the prosecutrix. She deposed that her daughter was 15 years old and she had studied up to 8th standard. They had gone to cut the grass and the prosecutrix was cajoled by the accused. He took her to his house. The prosecutrix disclosed that the accused had committed rape with her. The accused took her daughter to his house only once. He never came to their house after three months. The father of the accused had left her daughter in their house after three months, since she was not feeling well. Her husband was also arrested in a false complaint of the accused. She was declared hostile and cross-examined by the learned Public Prosecutor. She denied the suggestion that after three months accused had again come to their house and took away her daughter forcibly to his house. According to her, portion "A" to A" of her statement Mark-A was not correctly recorded by the police. In her cross-examination by the learned Advocate appearing on behalf of the accused, she could not narrate the age of her son. She could not tell the difference in the age of her children. She admitted her thumb impression(s) over Ext. D-3 & D-4. Her thumb impression(s) on Ext. D-3 and D-4 were obtained under pressure by the father of the accused.

11. PW-10 Dr. Daljeet Kaur has medically examined the prosecutrix. According to her opinion, the prosecutrix was capable of doing sexual intercourse. She was habitual according to the clinical findings, however, it could not be ascertained when the last intercourse had taken place. There was no injury mark anywhere on any part of the body.

12. PW-11 Jogi Ram is the father of the prosecutrix. He deposed that the accused allured the prosecutrix and kidnapped her. He made complaint to Dy. S.P. Paonta Sahib. Thereafter, her custody was handed over to him. After some days, accused again allured his daughter. In his cross-examination, he admitted that the house of the accused was at a distance of 30 kms by road and 10 kms by shortcut path. He also admitted that he knew that the prosecutrix was living in the house of the accused for about three months. He could not do anything and the matter was reported to the police.

13. PW-12 SI Mohar Singh was the I.O. He obtained the birth certificate of the prosecutrix from Gram Panchayat Thontha Jakhal vide Ext. PW-1/A. He also obtained copy of pariwar register vide Ext. PW-1/B. He recorded the statement of the prosecutrix and PW-8 Nazro Devi. The medical examination of the accused as well as the prosecutrix was got conducted. The statement of the prosecutrix was got recorded under Section 164 Cr.P.C. He also obtained birth certificate Ext. PW-2/B. In his cross-examination, he admitted that it has come during the course of the investigation that the prosecutrix was praying for protection from her father. The house of the prosecutrix was about 28 kms by road from the house of the accused, though there is a short cut which is 5 kms from the house of the accused. The houses in the village are at a distance of 20-25 feet away from the house of the prosecutrix.

14. The case of the prosecution, precisely, is that the accused had visited the house of the prosecutrix on 23.8.2013 and has allured her to marriage. He took her to his house. He kept her with him for three months. Thereafter, he dropped her in her parents' house and then he again took her to his house. She was thrown out from his house by him on 20.1.2014.

15. PW-6 prosecutrix deposed that on 23.8.2013, accused kidnapped her from her house. He took her forcibly to his house. The accused left her in the house of her parents when she fell ill. The accused again took her to his house after 15-20 days. PW-8 Nazro Devi is the mother of the prosecutrix. She categorically deposed that the accused took her daughter to his house only once. He never came to their house after three months. According to the prosecutrix, she was taken forcibly, as discussed hereinabove, by the accused. The distance between the house of the prosecutrix and the house of the accused, as per the statement of the father of the prosecutrix PW-11 Jogi Ram is 30 kms by road and 10 km. by short cut. PW-12 SI Mohar Singh has also deposed that the house of the prosecutrix was about 28 kms by road from the house of the accused, though there is a short cut which is 5 kms from the house of the accused. The houses in the village are at a distance of 20-25 feet away from the house of the prosecutrix. There were houses in the vicinity of the house of the prosecutrix. The prosecutrix should have raised alarm if she had been forcibly taken by the accused to his house which was at a distance of 25 kms. from her house. It is not believable that the accused had gagged her mouth for 25 kms.

16. PW-10 Dr. Daljeet Kaur has deposed that she has not seen any injury marks on the part of the body of the prosecutrix. The prosecutrix was capable of doing sexual intercourse. She was habitual according to the clinical findings, however, it could not be ascertained when the last intercourse had taken place. According to the FSL report PW-12/H, blood and semen was not detected on the clothes, sample pubic hair and vaginal smear slides of the prosecutrix.

17. PW-1 Inder Singh, in his cross-examination, has admitted that he has not brought the original pariwar register. The entry in the birth register was not made by him. PW-2 Ravinder Kumar deposed that on receipt of application Ext. PW-2/A, he had issued the date of birth certificate of the prosecutrix vide Ext. PW-2/B on the basis of the school records. In his cross-examination, he deposed that the date of birth was entered in the records of Middle School on the basis of certificate issued by Primary School.

18. PW-6 prosecutrix has deposed that the accused treated her like his wife in his house. PW-11 Jogi Ram, father of the prosecutrix, deposed that the accused had approached him to solemnize marriage with the prosecutrix. He declined as his daughter was minor and studying. The prosecutrix remained in the house of the accused for about three months. However, no complaint was lodged despite the fact that PW-11 Jogi Ram

admitted in his cross-examination that he knew that the prosecutrix was living in the house of the accused for three months.

19. The mother of the prosecutrix was declared hostile and cross-examined by the learned Public Prosecutor. She has denied that after three months, accused again came to their house and took her daughter forcibly. She denied portion "A" to "A" of her statement Mark-A. In her cross-examination by the learned Advocate appearing on behalf of the accused, she could not narrate the age of her son. She could not tell the difference in the age of her children. The mother is supposed to know the age difference of her children.

20. DW-1 R.S.Chauhan, deposed that Smt. Nazro Devi, wife of Jogi Ram, came to him for correction of date of birth of the prosecutrix. He attested documents Ext. D-3 and D-4. PW-8 Nazro Devi has sworn in affidavit Ext. D-3 to the effect that the date of birth of her daughter was 5.5.1995 and the entry made in the pariwar register of her daughter in Gram Panchayat Thontha Jakhal as 20.12.1999 was wrong. She has admitted her thumb impression on Ext. D-3. Similarly, she has moved an application before the SDM, Paonta Sahib seeking correction of date of birth of her daughter from 20.12.1999 to 5.5.1995, vide Ext.D-4. She has admitted her thumb impression on Ext. D-4.

21. DW-4 Tara Devi of Gram Panchayat Ashyadi deposed that the prosecutrix had come to her and disclosed that her father was harassing her and demanding money for marriage from the father of the accused. The prosecutrix has also submitted an application vide Ext. DA to the effect that her father was demanding Rs. 10,000/- from the family of the accused. Though, as per the birth certificate and copies of pariwar register, the date of birth of the prosecutrix is mentioned as 20.12.1999 but in view of Ext. D-3 and D-4, the mother of the prosecutrix had sought the date of birth to be changed from 20.12.1999 to 5.5.1995. PW-8 Nazro Devi, the mother of the prosecutrix has admitted her thumb impression on Ext. D-3 and Ext. D-4. Thus, the prosecution has failed to prove the case against the accused under Sections 363, 366-A, 376, 506 IPC and Section 4 of the POCSO Act, 2012.

22. Accordingly, in view of the analysis and discussion made hereinabove, the appeal is allowed. Judgment of conviction and sentence dated 19/21.1.2015, rendered by the learned Special Judge, Sirmaur District at Nahan, H.P., in Sessions trial No. 23-ST/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.

23. 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.

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

Shyam Lal Chauhan ...Appellant

Versus

Baldev Singh ...Respondent.

Cr. Appeal No. 119 of 2016

Date of decision : 22.4. 2016.

Code of Criminal Procedure, 1973- Section 378 (4)- Appellant was convicted by the trial Court- appeal was preferred against the conviction before the High Court- held, that only an appeal lies against the acquittal and no appeal lies against the conviction- further, the plea that convict should have been sentenced to undergo simple imprisonment for a period of two years is not acceptable as purpose of Section 138 is not retributory but compensatory- Magistrate had directed the convict to pay twice the amount of cheque, which is sufficient to meet ends of justice- appeal dismissed. (Para-2 to 11)

Cases referred:
Damodar S. Prabhu vs. Sayed Babalal H. (2010) 5 SCC 663
Kaushalya Devi Massand vs. Roopkishore Khore (2011) 4 SCC 593

For the Appellant : Mr. Rupinder Singh and Ms. Shashi Kiran, Advocates.
For the Respondent : Mr. Mukesh Sharma and Mr. NimishGupta, Advocates.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge (oral)

This appeal under Section 378 (4) of the Criminal Procedure Code has been preferred against the judgment dated 25.6.2014 passed by learned Judicial Magistrate 1st Class, Nahan, District Sirmaur, H.P. in Cr. Complaint No. 87/3 of 2011 whereby the respondent was convicted and sentenced to undergo imprisonment till rising of the Court for an offence punishable under Section 138 of the Negotiable Instruments Act (for short 'Act') and also to pay compensation of Rs.6,00,000/-, double of the cheque amount to be paid within thirty days with a prayer that the judgment passed by the learned Court below be set-aside and the respondent/accused be sentenced with actual imprisonment for commission of an offence under Section 138 of the Act.

2. The first and foremost question that arises for consideration is as to whether this appeal, that too, under Section 378(4) of the Criminal Procedure Code (for short 'Code') is legally maintainable in view of the fact that the respondent has not been acquitted but has been convicted and sentenced as aforesaid.

3. Section 378 (4) of the Code reads thus:

"*378.* ***Appeal in case of acquittal****.*

(1) to (3) xx x xxx xxx

(4) If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court".

4. It would be evident from the aforesaid provision that an appeal under Section 378(4) of the Code can only be filed against an order of acquittal and not against an order of conviction or for seeking enhancement of sentence. Therefore, the appeal is not maintainable.

5. That apart, it would be seen that the appellant himself had approached the Court of learned Sessions Judge by filing an appeal under Section 372 Cr.P.C. but the same was voluntarily withdrawn on the ground that the same is not maintainable as would be

evident from the order passed by the learned Sessions Judge on 10.9.2014, which reads thus:

> *"The learned counsel for the appellant has stated that the appeal is not maintainable and he has instructions to withdraw the present appeal. Learned counsel for the appellant has prayed that certified copy of the judgment be returned to him. Prayer allowed. Let certified copy of judgment be returned to the learned counsel for the appellant after retaining one photocopy of judgment on record. File be completed and consigned to the record room."*

6. Now, adverting to the merits of the case, it is vehemently argued by Mr. Rupinder Singh, learned counsel for the appellant that the learned Court below has erred in imposing a flea-bite sentence upon the respondent and should have convicted the respondent to undergo actual and substantive two years imprisonment in terms of the mandate of Section 138 of the Act.

7. Section 138 of the Negotiable Instruments Act, reads thus:

> *"**138 Dishonour of cheque for insufficiency, etc., of funds in the account.** —Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or in part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provisions of this Act, be punished with imprisonment for a term which may be extended to two years, or with fine which may extend to twice the amount of the cheque, or with both:*
>
> *Provided that nothing contained in this section shall apply unless—*
>
> *(a) the cheque has been presented to the bank within a period of six months from the date on which it is drawn or within the period of its validity, whichever is earlier;*
>
> *(b) the payee or the holder in due course of the cheque, as the case may be, makes a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, [within thirty days] of the receipt of information by him from the bank regarding the return of the cheque as unpaid; and*
>
> *(c) the drawer of such cheque fails to make the payment of the said amount of money to the payee or, as the case may be, to the holder in due course of the cheque, within fifteen days of the receipt of the said notice.*
>
> *Explanation.— For the purposes of this section, "debt or other liability" means a legally enforceable debt or other liability.]"*

8. It is evidently clear from the aforesaid provision that while sentencing the accused, the Magistrate can punish the accused with imprisonment for a term which may extend upto two years or with fine which may extend to twice the amount of the cheque, or with both. But nowhere is it mandatory for the Magistrate to punish the accused with actual imprisonment even in case where he has already imposed a fine of twice the amount of the cheque.

9. That apart, unlike that for other forms of crime, the punishment under Section 138 is not a means of seeking retribution, but is more a means to ensure payment of money. This is because the complainant's interest lies primarily in recovering the money rather than seeking the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery as would be evident from the following observations made by the Hon'ble Supreme Court in ***Damodar S. Prabhu*** vs**. *Sayed Babalal H. (2010) 5 SCC 663,*** which reads thus :

> *"4. It may be noted that when the offence was inserted in the statute in 1988, it carried the provision for imprisonment up to one year, which was revised to two years following the amendment to the Act in 2002. It is quite evident that the legislative intent was to provide a strong criminal remedy in order to deter the worryingly high incidence of dishonour of cheques. While the possibility of imprisonment up to two years provides a remedy of a punitive nature, the provision for imposing a `fine which may extent to twice the amount of the cheque' serves a compensatory purpose. What must be remembered is that the dishonour of a cheque can be best described as a regulatory offence that has been created to serve the public interest in ensuring the reliability of these instruments. The impact of this offence is usually confined to the private parties involved in commercial transactions.*
>
> *5. Invariably, the provision of a strong criminal remedy has encouraged the institution of a large number of cases that are relatable to the offence contemplated by Section 138 of the Act. So much so, that at present a disproportionately large number of cases involving the dishonour of cheques is choking our criminal justice system, especially at the level of Magistrates' Courts. As per the 213th Report of the Law Commission of India, more than 38 lakh cheque bouncing cases were pending before various courts in the country as of October 2008. This is putting an unprecedented strain on our judicial system.*
>
> *17. In a recently published commentary, the following observations have been made with regard to the offence punishable under Section 138 of the Act [Cited from: Arun Mohan, Some thoughts towards law reforms on the topic of Section 138, Negotiable Instruments Act - Tackling an avalanche of cases (New Delhi: Universal Law Publishing Co. Pvt. Ltd., 2009) at p. 5] :*
>
> > *"... Unlike that for other forms of crime, the punishment here (in so far as the complainant is concerned) is not a means of seeking retribution, but is more a means to ensure payment of money. The complainant's interest lies primarily in recovering the money rather than seeing the drawer of the cheque in jail. The threat of jail is only a mode to ensure recovery. As against the accused who is willing to undergo a jail term, there is little available as remedy for the holder of the cheque.*
> >
> > *If we were to examine the number of complaints filed which were `compromised' or `settled' before the final judgment on one side and the cases which proceeded to judgment and conviction on the other, we will find that the bulk was settled and only a miniscule number continued."*

10. In ***Kaushalya Devi Massand*** vs. ***Roopkishore Khore (2011) 4 SCC 593,*** the Hon'ble Supreme Court again reiterated that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences, rather offence under Section 138 of the

Negotiable Instruments Act, is almost in the nature of civil wrong which has been given criminal overtones as would be evident from the following observations:

> *"11. Having considered the submissions made on behalf of the parties, we are of the view that the gravity of a complaint under the Negotiable Instruments Act cannot be equated with an offence under the provisions of the Penal Code, 1860 or other criminal offences. An offence under Section 138 of the Negotiable Instruments Act, 1881, is almost in the nature of a civil wrong which has been given criminal overtones."*

11. The learned Magistrate in its wisdom has imposed a fine twice the amount of the cheque, which in my considered view is sufficient to meet the ends of justice. Moreover, there are no special circumstances carved out by the appellant so as to call for any interference with the order of the Magistrate so as to alter and impose a more stringent sentence.

Having said so, there is no merit in this appeal and the same is accordingly dismissed.

****

BEFORE THE HON'BLE MR. JUSTICE SANJAY KAROL, J AND HON'BLE MR. JUSTICE P.S.RANA, J.

State of Himachal Pradesh ....Appellant.

Vs.

Ravi Kant son of Surya Kant & others ....Respondents

Cr. Appeal No. 732 of 2008.
Judgment reserved on: 15.3.2016.
Date of Judgment: April 22, 2016

Indian Penal Code, 1860- Section 452, 376, 354 and 323 read with Section 34- Accused entered inside the house of the prosecutrix and raped her- they also intended to rape the daughter of prosecutrix - matter was reported to the police- accused were tried and convicted by the trial Court- Medical Officer had not found any mark of injury on the person of the prosecutrix- according to Medical officer no forcible sexual intercourse had taken place – disclosure statements were not proved satisfactorily- PW-2 stated that accused R had not dragged her nor he had raped her which casts doubt on the prosecution version- view taken by the trial Court was probable one and does not require interference- appeal dismissed. (Para-11 to 25)

Cases referred:

Anjlus Dungdung Vs. State of Jharkhand, (2005) 9 SCC 765
Nanhar Vs. State of Haryana, (2010) (3) Recent Criminal report 549 (SC)
Balak Ram and another Vs. State of UP AIR 1974 SC 2165
Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57
Raghunath Vs. State of Haryana (2003) 1 SCC 398
State of U.P Vs. Ram Veer Singh and others AIR 2007 SC 3075
S.Rama Krishna Vs. S.Rami Raddy (D) by his LRs. & others AIR 2008 SC 2066
Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, (2008) 11 SCC 186

Arulvelu and another Vs. State (2009) 10 SCC 206
Perla Somasekhara Reddy and others Vs. State of A.P (2009) 16 SCC 98
Ram Singh @ Chhaju Vs. State of Himachal Pradesh) (2010) 2 SCC 445
State Vs. Gulzarilal, 1979 SC 1382
Bhagdomal Vs. State of Gujarat, AIR 1983 SC 906

For the Appellant :Mr. V.S. Chauhan Additional Advocate General with Mr. Kush Sharma Deputy Advocate General and Mr.J.S.Guleria Assistant Advocate General.
For the Respondents :Mr. Anup Chitkara Advocate.

The following judgment of the Court was delivered:

P.S.Rana, Judge

Present appeal is filed against the judgment passed by learned Sessions Judge Kinnaur Sessions Division at Rampur Bushehr in sessions trial No. 16 of 2005 title State of H.P. versus Ravi Kant and another.

Brief facts of the case.

2. It is alleged by prosecution that on 12.5.2004 at 1.30 AM night at Ketra (Sangla) accused persons in furtherance of common intention trespassed into the house of prosecutrix and committed rape upon the prosecutrix. It is alleged by prosecution that accused persons in furtherance of common intention also attempted to commit rape upon another prosecutrix. It is alleged by prosecution that at the same time date and place accused persons in furtherance of common intention outraged the modesty of prosecutrix. It is alleged by prosecution that accused persons in furtherance of common intention voluntarily caused beatings to both prosecutrix and caused simple hurt to both prosecutrix. It is alleged by prosecution that FIR Ext.PW1/A was recorded and both prosecutrix identified accused persons and photographs Ext.PW19/A-1 to Ext.PW19/A-5 also obtained and site plan Ext.PW20/A also prepared. It is alleged by prosecution that one cap Ext.P2 also recovered at the spot and took into possession vide seizure memo. It is alleged by prosecution that MLC of co-accused persons namely Ravi Kant, Shiv Dev and Raj Kumar and MLC of both prosecutrix obtained. It is alleged by prosecution that co-accused Shiv Dev medically examined by PW5 Dr. Atul Sood and as per MLC Ext.PW5/A accused was found capable of performing sexual intercourse and sample of semen of accused took into possession by medical officer and handed over to investigating agency. It is alleged by prosecution that PW6 Dr. Ashish conducted medico legal examination of prosecutrix and found six injuries upon body of prosecutrix in the shape of abrasions,bruise and nature of injuries were simple in nature. It is alleged by prosecution that MLC of prosecutrix is Ext.PW6/A. It is alleged by prosecution that PW6 Dr. Ashish also conducted medical examination of co-accused Ravi Kant and he issued MLC Ext.PW6/B and accused was found capable of performing sexual intercourse. It is alleged by prosecution that PW7 Dr. Parveen Singh conducted medico legal examination of accused Raj Kumar and issued MLC Ext.PW7/A. It is alleged by prosecution that disclosure statement of co-accused Shiv Dev Ext.PW8/A under Section 27 of Indian Evidence Act recorded and disclosure statement of co-accused Raj Kumar Ext.PW2/A was also recorded under Section 27 of Indian Evidence Act. It is alleged by prosecution that disclosure statement of co-accused Ravi Kant under Section 27 of Indian Evidence Act Ext.PW17/A was also recorded. It is alleged by prosecution that chemical analyst reports Ext.PA and Ext.PB also obtained.

3. Charge framed by learned Sessions Judge Kinnaur at Rampur Bushehr against accused persons under Sections 452 read with section 34 IPC, 376 read with section 34 IPC and under section 376 IPC read with section 511 IPC, 354 and 323 IPC read with Section 34 IPC on dated 28.4.2007. Accused persons did not plead guilty and claimed trial.

4. Prosecution examined twenty oral witnesses in support of its case and also tendered documentary evidence.

5. Learned trial Court acquitted all accused persons. Feeling aggrieved against the judgment passed by learned trial Court State of H.P. filed present appeal.

6. Court heard learned Additional Advocate General appearing on behalf of the appellant and learned Advocate appearing on behalf of the respondents and also perused the entire record carefully.

7. Following points arises for determination in the present appeal:-

Point No. 1

Whether judgment of learned Trial Court is perverse and based upon non appreciation of oral and documentary evidence properly as mentioned in memorandum of grounds of appeal?

Point No. 2

Final Order**.**

***Findings on point No.1 with reasons*.**

8.1. PW1 prosecutrix aged 50 years has stated that she lived in village Gangarang along with her daughter and three grandsons who are minors aged about 6/7 years. She has stated that her husband is living in U.P. and further stated that there was temporary electricity connection in Dhara (Residential room). She has stated that she is illiterate and about three years back she and her family members slept at about 9 PM. She has stated that at about 11/11.30 PM when she was sleeping on the ground and when her daughter was sleeping on the cot then two persons came and one of them entered into the Dhara (Residential room) through door and other person remained standing just at the entrance door of residential room. She has stated that she woke up and her daughter tried to switch on the electric bulb. She has stated that in the light she saw co-accused. She has stated that co-accused Shiv Dev caught hold her daughter and threw her daughter outside the Dhara (Residential room). She has stated that co-accused caught hold of her from neck and made her to lay on the ground and thereafter raped her forcibly. She has stated that co-accused who committed rape upon her in the room is co-accused Ravi Kant. She has stated that co-accused who was standing at the entrance of door was co-accused Shiv Dev. She has stated that she saw that co-accused Shiv Dev caught hold of her daughter from throat and forced her to lay on ground. She has stated that she caught hairs of co-accused Shiv Dev and pulled him. She has stated that co-accused Shiv Dev was attempting to commit rape upon her daughter. She has stated that co-accused Shiv Dev had given her fist blow which hit her and by that time her daughter ran away from the place for help to the house of Basant Ram. She has stated that thereafter she went in search of her daughter and thereafter co-accused Shiv Dev caught hold of her and committed rape upon her. She has stated that she received injuries upon whole body and her daughter also received injuries on whole body. PW1 also identified co-accused Shiv Dev in Court. She has stated that broken bangles and cap took into possession vide memos Ext.PW1/B and Ext.PW1/C. She has stated that thereafter she was also medically examined in District Hospital Rekong Peo. She has stated that investigating agency took into possession one woolen shirt and trouser. She has stated that photographs also took into possession by investigating agency. She has

denied suggestion that she does not know the names of accused persons. She has denied suggestion that cap Ext.P2 is belonging to her son-in-law. She has denied suggestion that co-accused Ravi Kant and co-accused Shiv Dev did not commit any sexual intercourse with her.

8.2 PW2 co-prosecutrix aged 28 years has stated that on 11.5.2004 she was living in house of her mother along with her three sons. She has stated that she and her family members slept at about 9 PM. She has stated that at 11/11.30 PM during night there was sound of door opening. She has stated that she immediately woke up and tried to switch on the electric light. She has stated that when light was on then in light she saw that one co-accused was standing at the door and another co-accused entered into residential room. She has stated that co-accused who entered into the room caught hold her and threw her outside the residential room. She has stated that co-accused Ravi Kant pounced upon her mother and caught hold her from her neck inside the Dhara (Residential room). She has stated that co-accused Shiv Dev tried to strangulate her. She has stated that co-accused Shiv Dev intended to commit rape upon her and tried to remove her clothes. She has stated that after 5-10 minutes her mother came and caught hold of co-accused Shiv Dev. She has stated that thereafter co-accused Shiv Dev had given fist blow to her mother and in the meantime she rescued herself from clutches of co-accused Shiv Dev and ran towards the house of Basant Ram and knocked the door of Basant Ram but he did not open the door. She has stated that thereafter co-accused Shiv Dev came and tried to drag her and she sustained injuries in her hand. She has stated that thereafter co-accused Shiv Dev dragged her upto field. She has stated that thereafter co-accused Shiv Dev had placed his hands in her mouth and was trying to commit the criminal offence but in the meanwhile his hands slipped from her mouth and she cried and thereafter her mother had scuffled with co-accused Shiv Dev and thereafter she was rescued and thereafter she went to the house of Lama. She has stated that thereafter she knocked the door of Lama and told the Lama to open the door and thereafter Lama opened the door and she told Lama about incident and also told Lama that her mother was caught by accused. She has stated that thereafter she searched her mother and found her mother in field and further stated that thereafter accused left the place. She has stated that she sustained injuries upon her knee and other parts of body. She has stated that co-accused Shiv Dev told that he would murder her. She has stated that she identified co-accused Shiv Dev from his face, clothes and voice. She has stated that co-accused Shiv Dev intended to commit rape upon her person. She has stated that her mother disclosed that first co-accused Ravi Kant had committed rape upon her mother in Dhara (Residential room) and thereafter co-accused Shiv Dev committed rape upon her mother. She has stated that investigating agency visited the Dhara (Residential room) and broken bangles and cap were found inside Dhara (Residential room). She has stated that cap was worn by co-accused Ravi Kant at the relevant time. She has stated that there were also hairs in cap and same were took into possession by police vide seizure memos Ext.PW1/B and Ext.PW1/C which bears her signatures. She has stated that cap Ext.P2, hair Ext.P1 and broken bangles Ext.P3 were took into possession by police. She has denied suggestion that co-accused Raj Kumar had also dragged her. She has denied suggestion that co-accused Raj Kumar had tried to commit rape upon her person. She has denied suggestion that she intended to save co-accused Raj Kumar. She has denied suggestion that cap Ext.P2 belongs to her husband. She has denied suggestion that accused did not come to her house. She has denied suggestion that she had scuffled with her husband in the house of her mother on the date of incident. She has denied suggestion that no rape was committed upon her mother and her mother had received injuries by way of fall in courtyard.

8.3 PW3 Basant Ram has stated that in the year 2004 at about 1.30 AM he was sleeping in his house and he could not open the door immediately. He has stated that when he opened the door then he saw PW1 prosecutrix near the door. He has stated that PW1 told that her daughter was taken away by some persons. He has stated that thereafter he told PW1 that who would search her daughter in night. He has stated that he did not see any injury upon body of PW1 due to darkness. PW3 Basant Ram was declared hostile. He has denied suggestion that PW1 told him that accused persons have raped her. He has denied suggestion that he has deposed falsely in order to save accused persons.

8.4 PW4 Rajinder has stated that in the year 2004 he remained associated in investigation of case. He has stated that investigating agency took into possession from the room pieces of bangles, one cap and one hair. He has stated that investigating officer told that bangles were of PW1 and cap was of co-accused Ravi Kant. He has denied suggestion that he did not visit the spot. He has denied suggestion that he has deposed falsely. He has stated that PW1 told that bangles belonged to her and cap belonged to co-accused Ravi Kant.

8.5 PW5 Dr. Atal Sood has stated that he was working as medical officer in CHC Sangla in 2004. He has stated that he medically examined co-accused Shiv Dev and observed as follows. He has stated that co-accused who was medically examined was conscious, cooperative and well oriented to time place and person. He has further stated that pulse of co-accused Shiv Dev was 70 per minutes and respiratory rate was 14 per minute and pupils bilaterally reacting to light. He has stated that co-accused was capable of performing sexual intercourse as both testis and penis appeared grossly normal and well developed. He has stated that genital organs were physically well developed. He has also stated that semen sample of accused was obtained and handed over to investigating agency and hair sample of co-accused also obtained and handed over to investigating agency. He has stated that as per chemical analyst report the semen and hair samples were that of human being. He has stated that he has issued MLC Ext.PW5/A which bears his signatures and writing.

8.6 PW6 Dr. Ashish Chaba has stated that he remained posted as medical officer in CHC Sangla w.e.f. 1996 to April 2007. He has stated that on 13.5.2004 at 3 PM he medically examined co-prosecutrix and observed. (1) Abrasion of the skin of right third terminal phalanx. (2) Abrasion on the dorsal aspect of the right hand about 1 cm in length. (3) Abrasion on the left wrist planter aspect.(4) Abrasion multiple on the sacral region. (5) Bruise on the coccyx (sacral region) about 3 inches in length and 4 inches in breadth. (6) Bruise on the right thigh about 6 CM in length. Shape of bruise was linear. Length was about 6 cm. (7) Abrasion on the right knee joint. He has stated that nature of injuries was simple. He has stated that probable duration was less than 72 hours from examination. He has stated that he issued MLC Ext PW6/A which bears his signature. He has stated that above stated injuries could be caused in scuffle or by fall. He has stated that on the same day he also medically examined co-accused Ravi Kant. He has stated that co-accused Ravi Kant was conscious, cooperative and oriented to time place and pulse was 80 per minute. He has stated that genital organs were well developed and both testis were normal in size and penis was normal. He has stated that from physical development of genital organs it could be presumed that co-accused Ravi Kant was capable of performing sexual act. He has stated that pubic hairs were present and specimen of pubic hair preserved and handed over to police official for chemical analysis. He has stated that there was no injury visible on the body of co-accused Ravi Kant. He has stated that there was no smegma present on the cornel sulcus. He has stated that he issued MLC Ext PW6/B which bears his signature. He

has stated that injuries mentioned in Ext PW6/A could be caused by way of fall or while performing agriculture work.

8.7 PW7 Dr.Praveen Singh has stated that he was posted as medical officer in CHC Sangla since 2003. He has stated that on 3.9.2004 at 9.30 PM on the request of police and with the consent of co-accused Raj Kumar he medically examined co-accused Raj Kumar. He has stated that co-accused Raj Kumar was conscious, cooperative and well oriented to time place. He has stated that penis of co-accused Raj Kumar was well developed. He has stated that testis were normal and secondary sexual characters were well developed. He has stated that pubic hair of co-accused Raj Kumar preserved and handed over to police for chemical analysis. He has stated that semen of co-accused Raj Kumar preserved and handed over to police. He has stated that no evidence of any injury was seen on the body of co-accused Raj Kumar. He has stated that he issued MLC Ext PW7/A which bears his signature.

8.8 PW8 Sh Tanzin Dorje has stated that about two years ago he was associated in the investigation by SHO police station Sangla. He has stated that in his presence co-accused Shiv Dev located path leading to the house and door of prosecutrix and investigating officer prepared memo Ext PW8/A which bears his signature. He has stated that co-accused Shiv Dev has not given any statement under section 27 of Evidence Act in his presence.

8.9 PW9 Sh Shishi Ram has stated that on 16.5.2004 he was on patrolling duty. He has stated that co-accused Ravi Kant has not given any disclosure statement in his presence. Witness was declared hostile. He has denied suggestion that co-accused Ravi Kant has given disclosure statement in his presence. He has stated that he signed disclosure statement in police station. He has stated that he does not know what was written in written statement.

8.10 PW10 Vinay Singh has stated that he remained posted as constable in police station Sangla w.e.f. 2002 to 2005. He has stated that on 14.11.2004 he took report of FSL Junga to Sangla police station bearing No. 3156 dated 17.11.2004.

8.11 PW11 Constable Rakesh Kumar has stated that during year 2004 he was posted in police station Sangla. He has stated that he brought report of FSL Junga to police station Sangla in a sealed cover.

8.12 PW12 Hans Raj has stated that during year 2004 he was posted as MHC police station Sangla. He has stated that on 13.5.2004 constable Kuldeep Kumar and constable Naresh Kumar deposited nine parcels sealed with seal 'MO'. He has stated that on 14.5.2004 LC Shanti Devi deposited five parcels sealed with seal 'MO'. He has stated that on 25.7.2004 SI Chander Singh deposited three parcels sealed with seal 'T' with him and on 4.9.2004 constable Rajesh Kumar deposited two sealed parcels sealed with seal 'MO'. He has stated that he entered these parcels in his register No. 19 and on 16.8.2004 he sent parcels to constable Sanjay Kumar to FSL Junga for analysis vide RC No. 20/2004. He has stated that on 2.10.2004 he sent two sealed parcels sealed with seal 'MO' to FSL Junga through constable Rakesh Kumar vide RC No. 39/2004. He has stated that case property remained intact in his custody.

8.13 PW13 Tanzin Thille has stated that on 11.5.2004 at late night he heard some cries and after 5-10 minutes his door was knocked. He has stated that when he opened door he saw that PW2 prosecutrix was standing in front of his door and she was weeping. He has stated that prosecutrix PW2 told that someone entered in her house and she asked to save her. He has stated that PW2 prosecutrix requested him to accompany her but he refused as

there was darkness and her house was at a distance of 18-20 metres away from his house. He has stated that PW2 did not disclose name of any person. He has stated that PW2 is living with her mother and children in her house. He has denied suggestion that PW2 did not come to his house in the night period.

8.14 PW14 Constable Sanjay Kumar has stated that on 16.8.2004 he was posted at police station Sangla. He has stated that MHC Hans Raj handed over to him eighteen sealed parcels to be deposited in FSL Junga vide RC No. 30/2004. He has stated that he took parcels and deposited same in the office of FSL Junga. He has stated that parcels remained intact during his custody. He has stated that receipt was handed over to MHC on return.

8.15 PW15 SI Bhim Singh has stated that he remained posted as SHO in police station Sangla since November 2004 to September 2005 and conducted part of investigation of present case. He has stated that he recorded the statements of constable Vinay Kumar, Rakesh Kumar and Tanzin Thilley and prepared charge-sheet and presented the same in Court.

8.16 PW16 Dr.Anita Negi has stated that she remained posted as medical officer at District hospital Reckong Peo w.e.f. January 1994 to May 2004. She has stated that on 12.5.2004 police moved application for conducting medical examination of prosecutrix. She has stated that she conducted medical examination of PW1 prosecutrix. She has stated that there were no marks of struggle and there was no injury on any part of abdomen. She has stated that there was no injury on any part of thigh and there was no scratch marks on left side of knee joint. She has stated that there was no injury on labia majora and labia minora. She has stated that there was no external injury. She has stated that vagina admitted two fingers. She has stated that no spermatozoa was seen. She has stated that as per chemical analyst report there was no spermatozoa on vaginal smear and there was no semen on clothes. She has stated that there was nothing to suggest that recent sexual intercourse was took place. She has stated that injury mentioned in MLC could be caused while performing agriculture work.

8.17 PW17 Mohan Lal has stated that he remained posted as investigating officer in police post Karchham in the year 2004. He has stated that he conducted part of investigation of present case. He has stated that he recorded statement of co-accused Ravi Kant under section 27 of Evidence Act. He has stated that statement is Ext PW17/A which bears his signature. He has stated that on the basis of disclosure statement co-accused Ravi Kant took investigating agency where incident took place. He has stated that he recorded statements of witnesses under Section 161 Cr.PC. He has stated that after recording statements of Chaman Lal and prosecutrix he handed over case file to SI Chander Lal for further investigation.

8.18 PW18 constable Rakesh Kumar has stated that he remained posted as constable in police station Sangla w.e.f. June 2002 to 2005. He has stated that he was deputed by investigating officer to take accused persons to hospital for medical examination. He has stated that four sealed parcels were handed over to him by medical officer which he deposited with MHC. He has stated that case property remained intact in his custody.

8.19 PW19. Kishori Lal has stated that he is photographer by profession. He has stated that on 12.5.2004 he visited the spot at the instruction of investigating officer and took five photographs of the spot from different angles. He has stated that photographs are Ext PW19/A1 to Ext PW19/A5 and its negatives are Ext PW19/A6 containing five negatives.

8.20 PW20 Chander Singh has stated that he remained posted as SHO in police station Sangla during year 2003 to November 2004. He has stated that on 12.5.2004 prosecutrix along with her daughter came to police station Sangla to report matter that rape committed upon her. He has stated that he recorded FIR as per version of complainant. He has stated that FIR is Ext PW1/A. He has stated that thereafter he moved an application Ext PW6/A for medical examination of prosecutrix and obtained MLC Ext PW16/B. He has stated that he visited the spot. He has stated that he inspected the spot and prepared site plan Ext PW20/A. He has stated that photographs Ext PW19/A1 to Ext PW19/A5 took at the spot. He has stated that he recovered one cap Ext P2 from spot which was lying on cot. He has stated that cap was identified by daughter of prosecutrix which was of co-accused Ravi Kant. He has stated that pieces of bangle were took into possession. He has stated that co-accused Ravi Kant was medically examined and MLC Ext PW20/C obtained. He has stated that prosecutrix and her daughter were medically examined and MLC obtained. He has stated that co-accused Shiv Dev has given disclosure statement Ext PW8/A under Section 27 of Evidence Act. He has stated that co-accused Raj Kumar was arrested and he has given disclosure statement Ext PW2/A under section 27 of Evidence Act. He has admitted that no recovery was effected from accused persons. He has denied suggestion that no disclosure statement given by accused persons. He has stated that as per investigation all three accused persons attempted to commit rape upon prosecutrix. He has denied suggestion that he has filed a false case against accused persons in collusion with prosecutrix. He has denied suggestion that he had fabricated false documents in police station.

9. Following documentary evidence produced by prosecution. (1) Ext PW1/A is FIR No. 7 of 2004 dated 12.5.2004 registered under sections 452, 376, 323 and 34 IPC.(2) Ext PW1/B is recovery memo of two bangles. (3) Ext PW1/C is recovery memo of cap. (4) Ext PW2/A is disclosure statement of co-accused Raj Kumar. (5) Ext PW2/B is disclosure statement of co-accused Shiv Dev (6) Ext PW2/C is disclosure statement of co-accused Ravi Kant under Section 27 of Evidence Act. (7) Ext PW5/A is MLC of co-accused Shiv Dev (8) Ext PW6/A is MLC of Bishmma Devi (9) Ext PW6/B is MLC of co-accused Ravi Kant (10) Ext PW7/A is MLC of co-accused Raj Kumar. (11) Ext PW8/A is disclosure statement of co-accused Shiv Dev under Section 27 of Evidence Act. (12) Ext PW16/A is application filed by police official for medical examination of prosecutrix. (13) Ext PW16/B is MLC of prosecutrix aged 50 years. (14) Ext PX1 is disclosure statement of co-accused Ravi Kant under Section 27 of Evidence Act. (15) Ext PW19/A-1 to Ext PW19/A-5 are photographs along with negatives. (16) Ext PW20/A is site plan (21) Ext PW20/B is information relating to arrest of accused. (22) Ext PW20/C is application filed by investigating officer before medical officer for medical examination of co-accused Ravi Kant. (23) Ext PW20/D is application filed by I.O for medical examination of prosecutrix. (24) Ext PW20/E is disclosure statement given by co-accused Raj Kumar. (25) Ext PA and Ext PB chemical analyst reports.

10. Statement of accused persons recorded under Section 313 Cr.PC. Accused persons have stated that they have been falsely implicated in present case. Accused persons did not adduce any defence evidence.

11. Submission of learned Additional Advocate General appearing on behalf of appellant that judgment of learned trial Court is perverse and based upon non-appreciation of oral as well as documentary evidence is rejected being devoid of any force for the reasons hereinafter mentioned. It is the case of prosecution that co-accused Ravi Kant and co-accused Shiv Dev have raped prosecutrix on dated 12.5.2004 during night period at 1.30 AM at place Ketra (Sangla) District Kinnaur HP. It is proved on record that prosecutrix was medically examined immediately on the day of incident by medical officer i.e. PW16 Dr. Anita

Negi. PW16 has specifically stated that there were no marks of struggle and no injury found on the part of abdomen of prosecutrix. PW16 has stated in positive manner that there was no injury upon any parts of thigh of prosecutrix. PW16 Dr. Anita Negi has specifically stated in positive manner that there was no injury on labia majora and labia minora. PW16 has stated in positive manner that there was no injury on vaginal walls. PW16 has stated in positive manner that there was no spermatozoa on vaginal smear. PW16 has stated in positive manner that there was no semen upon clothes of prosecutrix. PW16 has stated in positive manner that no recent sexual intercourse took place. PW16 has specifically stated in positive manner that injuries mentioned in MLC could be caused while performing agriculture work. In the present case oral testimony of prosecutrix and opinion of medical officer placed on record contradicts each other. In view of contradiction between the testimony of prosecutrix and medical officer we are of the opinion that it is not expedient in the ends of justice to convict accused persons.

12. Submission of learned Additional Advocate General appearing on behalf of State that testimonies of PW1 and PW2 prosecutrix inspire confidence and there is no reasons to disbelieve the testimonies of PW1 prosecutrix and PW2 co-prosecutrix and on this ground appeal filed by State be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that testimonies of PW1 and PW2 prosecutrix are not corroborated by medical evidence. It is proved on record that prosecutrix was examined immediately on the day of incident and medical officer has given opinion that there was no recent sexual intercourse with prosecutrix. In view of the testimony of PW16 Dr. Anita Negi placed on record doubt is created in the mind of Court. It is well settled law that when two views are possible then view favourable to accused should be adopted.

13. Submission of learned Additional Advocate General appearing on behalf of State that both prosecutrix PW1 and PW2 are victims of criminal offence of rape, molestation and beatings and on this ground appeal filed by State be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. In view of the opinion of PW16 Dr. Anita Negi that no recent sexual intercourse committed upon prosecutrix we are of the opinion that it is not expedient in the ends of justice to convict accused persons in present case.

14. Submission of learned Additional Advocate General appearing on behalf of State that prosecutrix have identified accused persons namely co-accused Ravi Kant and co-accused Shiv Dev and on this ground appeal filed by State be accepted is rejected being devoid of any force in view of the opinion of PW16 Dr. Anita Negi that no recent sexual intercourse was committed upon prosecutrix.

15. Submission of learned Additional Advocate General appearing on behalf of State that in view of disclosure statement given by accused persons appeal filed by State be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused disclosure statement of accused persons. As per prosecution case co-accused Shiv Dev has given disclosure statement Ext PW8/A in the presence of PW8 Tanzin Dorje and one Chand Dev. PW8 Tanzin Dorje has specifically stated that co-accused Shiv Dev did not give disclosure statement in his presence. PW8 Tanzin Dorje did not support prosecution case relating to disclosure statement of co-accused Shiv Dev as alleged by prosecution. Testimony of PW8 has created doubt in the mind of Court relating to disclosure statement Ext PW8/A given by co-accused Shiv Dev placed on record. Prosecution did not examine another marginal witness namely Chand Dev in present case when PW8 Tanzin Dorje was declared hostile by prosecution.

16. As per prosecution case disclosure statement Ext PW17/A of co-accused Ravi Kant was recorded. As per Ext PW17/A marginal witness of disclosure statements are

Shishi Ram and Chaman Lal. Sh Shishi Ram appeared in witness box as PW9 who has stated in positive manner that co-accused Ravi Kant did not give any disclosure statement in his presence. PW9 Shishi Ram was declared hostile by prosecution. Prosecution did not examine another marginal witness of disclosure statement Sh Chaman Lal in the present case. In view of the testimony of PW9 Shishi Ram doubt is created in the mind of Court in present case qua disclosure statement of co-accused Ravi Kant recorded under Section 27 of Evidence Act.

17. Submission of learned Additional Advocate General appearing on behalf of State that cap along with hairs of co-accused Ravi Kant found in the residential house of prosecutrix proved beyond reasonable doubt and on this ground appeal filed by State be accepted is rejected being devoid of any force for reasons hereinafter mentioned. We have carefully perused chemical analyst report Ext PB placed on record. As per chemical analyst report Ext PB placed on record hairs found upon the cap of co-accused Ravi Kant were insufficient for analysis purpose. As per chemical analyst report Ext PB placed on record it is not proved on record that hairs found on the cap was of co-accused Ravi Kant. Hence it is held that co-accused Ravi Kant is not connected with the hairs found in the cap recovered from residential house of prosecutrix.

18. Submission of learned Additional Advocate General appearing on behalf of State that as per chemical analyst report Ext PB placed on record and other corroborative evidence proved beyond reasonable doubt that accused persons have committed offence as alleged by prosecution is rejected being devoid of any force for the reasons hereinafter mentioned. As per chemical analyst report blood clots found in the vaginal slide of prosecutrix were not sufficient for chemical examination and as per chemical analyst report no blood and semen found upon pubic hairs of prosecutrix, upon shirt of prosecutrix, upon penis of co-accused Ravi Kant and upon pubic hairs of co-accused Ravi Kant. As per chemical analyst report no semen was found on the salwar of prosecutrix. As per chemical analyst report five small hairs were of animal and two long hairs found were of human but they were not sufficient for comparison with other hairs. In view of above stated chemical analyst report we are of the opinion that it is not expedient in the ends of justice to convict accused persons in the present case.

19. As per prosecution story co-accused Raj Kumar has also participated in the commission of offence. PW2 prosecutrix has stated in positive manner that co-accused Raj Kumar did not drag her and co-accused Raj Kumar did not try to commit rape upon her. In view of the testimony of PW2 prosecutrix doubt is created in the mind of Court and it is not expedient in the ends of justice to convict accused persons.

20. Submission of learned Additional Advocate General appearing on behalf of State that prosecutrix immediately narrated the incident to PW3 Basant Ram who was her neighbour and on this ground appeal filed by State be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. We have carefully perused testimony of PW3 Basant Ram. PW3 Basant Ram did not support prosecution case as alleged by prosecution. PW3 Basant Ram has specifically stated that prosecutrix did not inform him that she was raped by accused persons. PW3 Basant Ram has stated in positive manner that he did not see accused persons running away. PW3 Basant Ram has stated in positive manner that he did not give any statement from portion 'A' to 'A of mark PY. The house of PW3 Basant Ram is situated at a distance of twenty five feet away from the residential house of prosecutrix. PW3 has stated that house of one Lama is fifty feet away from his house and there is also a house of Zair Singh. PW3 did not support prosecution case as alleged by prosecution. In view of testimony of PW3 Basant Ram doubt is created in the mind of Court.

21. Submission of learned Additional Advocate General appearing on behalf of State that in view of corroborative testimony of other oral witnesses appeal filed by State be allowed is rejected being devoid of any force for the reasons hereinafter mentioned. We are of the opinion that corroborative witnesses are not eye witness of the incident. Testimonies of other witnesses are only corroborative in nature. In view of the fact that corroborative witnesses are not eye witness of the incident and in view of the fact that there is contradiction between the testimonies of PW1 and PW2 prosecutrix and medical evidence placed on record it is held that doubt is created in the mind of Court and it is not expedient in the ends of justice to convict accused persons solely on the testimonies of PW1 and PW2. Testimonies of PW1 and PW2 are contradictory to testimony of PW16 medical officer Dr. Anita Negi relating to commission of criminal offence of rape.

22. It is well settled law that rape is not only a crime against the victim but it is a crime against entire society which destroys the entire psychology of woman and pushes the woman into deep emotional crisis. It is crime against basic human right and it is also violative of victim fundamental right granted under Article 21 of Constitution of India. See AIR 1996 S.C. 922 title Bodhisattwa Gautam Vs. Miss Subhra Chakraborty.

23. It was held in case reported (2005) 9 SCC 765 title Anjlus Dungdung Vs. State of Jharkhand that suspicion however strong cannot take place of proof. It was held in case reported in (2010) (3) Recent Criminal report 549 (SC) title Nanhar Vs. State of Haryana that prosecution must stand or fall on its own leg and it cannot derive any strength from the weakness of the defense.

24. It is well settled principle of law (i) That appellate Court should not ordinarily set aside a judgment of acquittal in a case where two views are possible. (ii) That while dealing with a judgment of acquittal the appellate Court must consider entire evidence on record so as to arrive at a finding as to whether views of learned trial Court are perverse or otherwise unsustainable (iii) That appellate Court is entitled to consider whether in arriving at a finding of fact, learned trial Court failed to take into consideration any admissible fact (iv) That learned trial court took into consideration inadmissible evidence. See Balak Ram and another Vs. State of UP AIR 1974 SC 2165, See Allarakha K. Mansuri Vs. State of Gujarat (2002) 3 SCC 57, See Raghunath Vs. State of Haryana (2003) 1 SCC 398, See State of U.P Vs. Ram Veer Singh and others AIR 2007 SC 3075, See S.Rama Krishna Vs. S.Rami Raddy (D) by his LRs. & others AIR 2008 SC 2066. See Sambhaji Hindurao Deshmukh and others Vs. State of Maharashtra, (2008) 11 SCC 186, See Arulvelu and another Vs. State (2009) 10 SCC 206, see Perla Somasekhara Reddy and others Vs. State of A.P (2009) 16 SCC 98, see Ram Singh @ Chhaju Vs. State of Himachal Pradesh) (2010) 2 SCC 445 .

25. It is well settled law that moral conviction however strong or genuine cannot amount to legal conviction under criminal law. See 1979 SC 1382 title State Vs. Gulzarilal. See AIR 1983 SC 906 title Bhagdomal Vs. State of Gujarat. It is held that testimonies of PW1 and PW2 require corroboration in present case. It is held that it is not expedient in the ends of justice to convict accused persons in present case on sole testimonies of PW1 and PW2 prosecutrix. In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final order)

26. In view of the above stated findings appeal filed by State of HP is dismissed. Benefit of doubt is given to accused persons. Records of learned trial Court along with certified copy of judgment be sent back forthwith. Appeal is disposed of. Pending application(s) if any are also disposed of.

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

The State of Himachal Pradesh through Secretary (IPH) to Govt. of H.P. Shimla and another.
....Petitioners

Versus

Kailash Chand son of Shri Rijhu Ram ....Non-petitioner

Civil Writ Petition No. 1161 of 2013
Order Reserved on 6th April 2015
Date of Order 22nd April 2016

Constitution of India, 1950- Article 226- K was working on daily wages- his services were terminated- an industrial dispute was raised- award was passed and State was directed to re-engage the employee forthwith- aggrieved from the award, writ petition was filed- held, that no limitation is prescribed for seeking the reference- workman had worked for 254 days in the year 1996- therefore, he is entitled for regularization- no show cause notice was served upon the workman- Tribunal had rightly passed the award- writ petition dismissed. (Para-6 to 9)

Cases referred:

Ajaib Singh vs. Sirhind Cooperative Marketing-cum-Processing Service Society Limited and another , (1999)6 SCC 82

Mool Raj Upadhyaya vs. State of H.P. , 1994 (Supp) 2 SCC 316

Mohammad Ali vs. State of H.P., Latest HLJ 2015 HP 93

For the Petitioners: Mr.M.L.Chauhan, Mr.R.S.Thakur Additional Advocates General and Mr.Rajinder Kumar Sharma Deputy Advocate General.

For the Non-petitioner: Mr. Sandeep K. Sharma Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present petition is filed under Article 226 and 227 of Constitution of India against the award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala in reference case No. 499 of 2009 decided on 1.8.2012 title Kailash Chand vs. Executive Engineer IPH Division Dalhousie.

Brief facts of the case

2. It is pleaded that Kailash Chand was working on daily waged basis with Executive Engineer IPH Division Dalhousie w.e.f. Janaury 1996 and he had worked for 254 days in 1996, for 239½ days in 1997, for 135 days in 1998 and 196 days in 2000. It is pleaded that thereafter he abandoned his job at his own volition. It is further pleaded that Kailash Chand raised industrial dispute and reference was sent to learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala to adjudicate the said dispute. It is pleaded that learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala H.P. passed the award on 1.8.2012 and directed the petitioner i.e. State of H.P. to re-engage the respondent forthwith. It is further pleaded that learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala also directed that Shri Kailash Chand would be

entitled for seniority and continuity in service from the date of illegal terminal w.e.f. 26.11.2000 except back wages.

3. Feeling aggrieved against the award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala State of H.P. filed present civil writ petition.

4. Court heard learned Additional Advocate General appearing on behalf of the petitioners and learned Advocate appearing on behalf of the non-petitioner and also perused the entire record carefully.

5. Following points arise for determination in present bail application:-

1. Whether civil writ petition filed by petitioners is liable to be accepted as mentioned in memorandum of grounds of civil writ petition?

2. Final Order.

Findings on Point No.1 with reasons

6. Submission of learned Additional Advocate General appearing on behalf of petitioners that impugned award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala be quashed on the point of limitation because Shri Kailash Chand lastly worked in the year 2000 for 196 days and thereafter he approached the Government for reference and reference No. 499 of 2009 was sent after about eight years is rejected being devoid of any force for the reasons hereinafter mentioned. Reference of dispute to Court of Tribunal was sent by appropriate Government under Section 10 of Industrial Dispute Act 1947. As per Section 10 of Industrial Dispute Act 1947 there is no limitation prescribed and word "At any time" mentioned under Section 10 of Industrial Disputes Act 1947. It was held in case reported in ***(1999)6 SCC 82 title Ajaib Singh vs. Sirhind Cooperative Marketing-cum-Processing Service Society Limited and another*** that Section 10 is not subjected to limitation under Article 137 of Limitation Act 1963.

7. Submission of learned Additional Advocate General appearing on behalf of petitioner that reinstatement of respondent along with continuity be quashed is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that in the year 1996 respondent has worked for 254 days and in the year 1997 respondent had worked for 239½ days and in 1998 respondent had worked for 135 days and in 2000 respondent had worked for 196 days as per Annexure R-1 placed on record issued by Assistant Engineer Irrigation-cum-PH Sub Division Banikhet and Executive Engineer Irrigation-cum-PH Division Dalbousie which is quoted in toto:-

Jan		Feb		Mar		Apr		May		Jun		Jul		Aug		Sep		Oct	
o	Days	M/roll	Days	M/roll	Days	M/roll	Days	M/roll	Days	M/roll	Days	M/roll	Days	M/roll	Days	M/roll	Days	M/roll	D
9	15	1234	29	1346	28	--	--	--	--	329	29	444	28	567	9	684	30	811	26
	---	1321	20	1452	28	25	29	153	22	333	24	457	29	580	26/1-2	702	16	822	25
9	29	1297	22	1417	27	---	---	72	30	190	27	---	---	---	---	---	---	---	--
	---	---	---	---	---	---	---	---	---	---	----	----	---	---	---	---	---	---	--
								175	28	264	30	354	31	443	31	481	30	556	31

Sd/-
Assisgant Engineer
Irrig.cum-PH-Sub Division
Banikhet

Sd/-
Executive Engineer
Irrig.cum-PH-Sub Division
Dalhousie

8. It is proved on record that in the year 1996 respondent had worked for 254 days. It was held in case reported in ***1994 (Supp) 2 SCC 316 title Mool Raj Upadhyaya vs. State of H.P.*** that if employee had worked for 240 days in a calender year then he would legally entitle for regularisation as per availability of vacancy. Also see ***Latest HLJ 2015 HP 93 title Mohammad Ali vs. State of H.P.*** In present case it is proved on record that as per certificate issued by Assistant Engineer Irrigation-cum-PH Sub Division Banikhet and Executive Engineer Irrigation-cum-PH Division Dalbousie that in the year 1996 respondent Kailash Chand had worked for 254 days it is held that Kailash Chand is legally entitled for continuation of service after expiry of 240 days.

9. Submission of learned Additional Advocate General appearing on behalf of petitioners that respondent is not entitled for seniority in service because after 2000 respondent voluntarily did not attend his duty and voluntarily left the job is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that respondent had worked in the department in the year 1996 for 254 days, in the year 1997 for 239½ days, in 1998 for 135 days and in 2000 for 196 days. It is also proved on record that in the month of December 2000 or after 2000 no notice was given to respondent by Assistant Engineer Irrigation-cum-PH Sub Division Banikhet or Executive Engineer

Irrigation-cum-PH Division Dalbousie relating to non-attendance of his duty. It is also proved on record that no show cause notice as per service Rules was given to respondent at any point of time in the month of December 2000 or thereafter. It is also proved on record that no departmental proceedings initiated against the respondent under service Rules for non-attendance. It is well settled law that in public departments relating to public utility service service of employee should be terminated strictly in accordance with law. Shri Sunil Dutt Chaudhary Executive Engineer IPH Dalhousie appeared as RW1 and in cross examination Executive Engineer IPH Dalhousie has admitted that no notice was served upon the respondent regarding his willful absence from his duty w.e.f. 26.11.2000. RW1 has also admitted that no notice was given to respondent and no retrenchment compensation was paid to him. RW1 has also admitted that in seniority list name of respondent is figured at Sr. No. 41 and RW1 has admitted that Surinder, Gandho Ram, Amar Singh, Karam Chand and Gula Ram are juniors to the respondent. It is proved on record that respondent has also approached the Administrive Tribunal and interim order dated 23.3.2000 was passed by Administrative Tribunal in OA No. 590 of 1999. It is also proved on record that as per direction of Administrative Tribunal respondent has submitted the joining report on 29.3.2000. In view of the fact that respondent has also approached the Administrative Tribunal and obtained the interim order dated 23.3.2000 and in view of the fact that respondent has also submitted the joining report on 29.3.2000 Court is of the opinion that it is not expedient in the ends of justice to interfere in award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala. 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 petition is dismissed. Award passed by learned Presiding Judge Labour Court-cum-Industrial Tribunal Dharamshala is affirmed. No order as to costs. Petition is disposed of. Pending miscellaneous application(s) if any also stands disposed of.

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

Hamid Mohammad S/o Sh. Sarif Mohammad ....Revisionist

Versus

Jaimal, S/o Sh. Hari Dass & another ....Non-revisionists.

Cr. Revision No. 262 of 2014
Order reserved on 6.4.2016
Date of Order 23.4.2016

Negotiable Instruments Act, 1881- Section 138- Accused issued a cheque of Rs. 1,08,000/- for repayment of loan but the cheque was dishonoured with the endorsement 'insufficient funds'- accused was tried and convicted by the trial Court- he filed an appeal which was dismissed- held, in revision that there was no recital in the cheque that it was issued as security cheque- otherwise also cheque issued as security would fall within the purview of Section 138 of N.I. Act- there is a presumption regarding the cheque having been issued for consideration- accused had not rebutted the presumption- trial Court had rightly convicted the accused- appeal was rightly dismissed- revision dismissed. (Para-9 to 12)

Cases referred:

Don Ayengia vs. State of Assam & another, 2016 (3) SCC page 1
Anil Hada vs. Indian Acrylic Ltd. AIR 2000 Apex Court page 145

For the revisionist:	Mr. Suneel Awasthi, Advocate.
For Non-revisionist No.1:	Mr. R.K. Gautam, Sr. Advocate with Mr. Gaurav Gautam, Advocate.
For Non-revisionist No.2.:	Mr. M.L. Chauhan, Additional Advocate General.

The following order of the Court was delivered:

P.S. Rana, Judge.

Present revision petition is filed against judgment of learned Sessions Judge Solan District Solan H.P. announced in Criminal Appeal No. 12-NL/10 of 2012 title Hamid Mohammad vs. Jaimal wherein learned Appellate Court affirmed judgment and sentence passed by learned Trial Court.

Brief facts of the case:

2. Jaimal son of Hari Dass filed complaint under Section 138 of Negotiable Instruments Act 1881 pleaded therein that complainant obtained loan from bank for his personal use and after obtaining loan from bank accused approached complainant and told complainant that accused was in dire need of money. It is pleaded that complainant granted loan to accused to the tune of Rs. 93,000/- (Rupees ninety three thousand) and accused promised that he would pay back the loan amount along with interest within a period of one year. It is further pleaded that complainant approached the accused many times to repay the amount of loan but accused did not pay the amount of loan to complainant. Thereafter complainant convened a Panchayat in which accused acknowledged his liability to repay the loan amount and accused issued cheque No. 0005449 dated 30.10.2008 to the tune of Rs. 1,08,000/- (Rupees one lac eight thousand) in favour of complainant which was payable at Bank of India Branch Panjehra. It is further pleaded that complainant presented the cheque for encashment but the cheque was dishonored on account of insufficient fund. It is further pleaded that thereafter complainant issued demand notice to accused under Section 138 of Negotiable Instruments Act 1881 and notice was sent through registered AD and under postal certificate. It is further pleaded that after receipt of demand notice accused did not pay loan amount. Punishment of accused under Section 138 of the Negotiable Instruments Act 1881 sought.

3. Learned Trial Court after recording preliminary evidence of complainant summoned accused and thereafter notice of accusation was issued to complainant by learned trial Court under Section 138 of the Negotiable Instruments Act 1881. Accused person did not plead guilty and claimed trial. Complainant examined two witnesses CW-1 and CW-2. Statement of accused recorded under Section 313 Code of Criminal Procedure. Accused did not lead any defense evidence.

4. Learned Trial Court on 16.10.2012 convicted and sentenced the revisionist for simple imprisonment for a period of six months. Learned Trial Court further directed that convict would pay compensation to complainant amounting to Rs. 1,20,000/- (Rupees one lac twenty thousand). Feeling aggrieved against judgment and sentence passed by learned Trial Court accused filed appeal before learned Sessions Judge Solan and learned Sessions Judge Solan on dated 17.4.2014 dismissed the appeal filed by the revisionist.

Feeling aggrieved against the aforesaid judgment of learned Trial Court and learned Appellate Court revisionist has filed the present revision petition.

5. Court heard learned Advocates appearing on behalf of revisionist and non-revisionists and Court also perused entire record carefully.

6. Following points arise for determination:

1) Whether judgment and sentence passed by learned Trial Court and affirmed by learned first Appellate Court are perverse and based upon non appreciation of oral as well as documentary evidence and whether learned Trial Court and learned Appellate Court have committed illegality as mentioned in memorandum of criminal revision petition?

2. Final order.

7. **Findings upon point No.1 with reasons:**

7.1 CW-1 Kripa Shankar Saran Manager Bank of India Panjehra District Solan H.P. stated that Ext. C-3 is issued by Bank of India. He has stated that statement of accounts of accused is Ext. C-A which is prepared as per Bank Book Evidence Act which is correct as per original record. He has admitted that complainant Jaimal took loan from Bank of India Panjehra Branch. He has stated that accused Hamid Mohammad was guarantor and he has signed many documents as guarantor.

7.2 CW-2 Jaimal stated that he tendered into evidence affidavit Ext. CW-1/A. There is recital in the affidavit that complainant obtained loan from bank to the tune of Rs. 93,000/- (Rupees ninety three thousand). There is further recital in the affidavit that accused requested complainant for loan and thereafter complainant granted loan to accused to the tune of Rs. 93,000/- (Ninety three thousand). There is further recital in the affidavit that accused assured complainant that he would return loan amount within a period of one year. There is further recital in the affidavit that despite several requests of complainant accused did not return the loan amount and thereafter a Panchayat was convened. There is further recital in the affidavit that accused agreed the liability of loan amount and thereafter issued cheque No. 0005449 dated 30.10.2008 to the tune of Rs. 1,08,000/- (Rupees one lac eight thousand). There is further recital in the affidavit that cheque was presented for encashment but same was returned back by the bank with remarks of insufficient fund. There is further recital in the affidavit that thereafter complainant issued demand notice to accused through registered letter but despite demand notice accused did not return the loan amount.

8. Following documentary evidence produced. (i) Ext. C-1 is original cheque to the tune of Rs. 1,08,000/- dated 30.10.2008. (ii) Ext. C-2 is registered letter. (iii) Ext. C-3 is cheque return memo issued by Bank of India Panjehra Branch. (iv) Ext. C-4 is demand notice. (v) Ext. C-5 is postal receipt. (vi) Ext. C-6 is UPC. (vii) Ext. C-A is statement of accounts w.e.f. 1.10.2008 to 13.11.2008 relating to accused wherein total balance of Rs. 637/- shown in the name of accused in the bank account.

9. Submission of learned Advocate appearing on behalf of the revisionist that cheque in question was issued to the complainant as security and on this ground criminal revision petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. As per Section 138 of Negotiable Instruments Act 1881 if any cheque is issued on account of other liability then provisions of Section 138 of Negotiable Instruments Act 1881 would be attracted. Court has perused original cheque Ext. C-1 dated 30.10.2008 placed on record. There is no recital in cheque Ext. C-1 that cheque was issued as security

cheque. It is well settled law that cheque issued as security would also come under provision of Section 138 of Negotiable Instruments Act 1881. ***See 2016 (3) SCC page 1 title Don Ayengia vs. State of Assam & another.*** It is well settled law that where there is conflict between former law and subsequent law then subsequent law always prevail.

10. Submission of learned Advocate appearing on behalf of the revisionist that legal notice issued to the revisionist was not served properly and on this ground revision petition be accepted is also rejected being devoid of any force for the reasons hereinafter mentioned. It is proved on record that registered notice Ext. C-4 was issued to revisionist vide postal receipt No. 9762 placed on record. Revisionist did not examine the Postman in order to prove that Postman did not visit the residential house of revisionist. There is report of Postman that Postman had visited the residential house of revisionist four times i.e. on 2.12.2008, 3.12.2008, 4.12.2008 and 5.12.2008.

11. Submission of learned Advocate appearing on behalf of the revisionist that oral as well as documentary evidence adduced by the non-revisionists is contradictory and self-destructive is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused oral as well as documentary evidence adduced by the complainant. There is no material contradiction in the evidence adduced by the complainant which goes to the root of the case.

12. Submission of learned Advocate appearing on behalf of the revisionist that testimony of CW-1 and CW-2 are not sufficient for conviction of the revisionist in the present case is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused the testimony of CW-1 and CW-2. Testimonies are trustworthy and reliable and inspire confidence of the Court. There are no reasons to disbelieve the testimonies of CW-1 and CW-2. Testimonies of CW-1 and CW-2 are corroborated with documentary evidence i.e. cheque Ext. C-1, registered letter Ext. C-2, cheque return memo Ext. C-3, demand notice Ext. C-4 and postal receipt Ext. C-5. Even as per provisions of Section 118 of Negotiable Instruments Act 1881 there is presumptions relating to (a) Consideration (b) Date (c) Time of acceptance (d) Time of transfer (e) Order of endorsements (f) As to stamps (g) That holder is a holder in due course. Presumptions of Section 118 of Negotiable Instruments Act 1881 against the revisionist remained un-rebutted on record. Revisionist did not adduce any oral as well as documentary evidence in order to rebut the presumptions of Section 118 of Negotiable Instruments Act 1881. Even as per Section 139 of Negotiable Instruments Act 1881 there is presumption in favour of holder of the cheque. Complainant is the holder of the cheque Ext. C-1. Cheque Ext. C-1 is duly signed by revisionist in sound state of mind. Revisionist was major when he signed the cheque. It is held that revisionist had admitted his liability of antecedent debt when revisionist signed the cheque Ext. C-1 placed on record. Under Section 139 of Negotiable Instruments Act 1881 there is legal presumption that cheque was issued for discharging of antecedent liability. ***See Anil Hada vs. Indian Acrylic Ltd. AIR 2000 Apex Court page 145***. Revisionist did not adduce any oral as well as documentary evidence on record in order to rebut the presumption in favour of holder of cheque under Section 139 of Negotiable Instruments Act 1881. Point No.1 is decided against revisionist.

Point No.2 Final Order:

13. In view of above findings criminal revision petition is dismissed. File of learned Trial Court and file of learned first Appellate Court along with certified copy of order be sent back forthwith. Criminal revision petition is disposed of. Pending applications if any also disposed of.

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

Cr.Appeal No.166 of 2013 With
Cr.Appeal Nos.171, 172, 192 & 193 of 2013.
Reserved on: 11.04.2016
Date of Decision :25th April, 2016.

1. Cr.Appeal No.166 of 2013:
Lakhan Singh ..Appellant.
Versus
State of Himachal Pradesh ..Respondent.

2. Cr.Appeal No.171 of 2013:
Banti Sharma ..Appellant.
Versus
State of Himachal Pradesh. ..Respondent.

3. Cr.Appeal No.172 of 2013:
Dharam Veer Singh ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

4. Cr.Appeal No.192 of 2013:
Vinod Kumar ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

5. Cr.Appeal No.193 of 2013:
Sonu Gautam ...Appellant.
Versus
State of Himachal Pradesh ...Respondent.

Indian Penal Code, 1860- Section 395, 147, 323, 324, 342, 427 read with Section 149- accused came for purchasing diesel to Petrol Pump- they paid currency notes of Rs.500/-- when M went inside the office, accused entered into the office room and attacked him with kicks and fist blows- accused gave a stick blow on the head of M while another employee was also beaten- accused entered into the office room and removed the entire cash- glass door was also broken- telephone sets were also taken away by the accused- FIR was registered against the accused- accused were tried and convicted by the trial Court- held, in appeal that testimonies of prosecution witnesses corroborated each other- medical examination corroborated the ocular version- test identification of the accused was conducted but the accused refused to participate in the same- adverse inference is to be drawn against the accused to the same- telephone sets were recovered in pursuance to the disclosure statement made by the accused- prosecution case was duly proved beyond reasonable doubt- however, sentence of 7 years was modified to a term of imprisonment already undergone by the accused. (Para-9 to 15)

For the Appellants: Mr.N.S.Chandel, Advocate except in Cr.Appeal No.193 of 2013.
For the Respondent: Mr.Vivek Singh Attri, Deputy Advocate General.

The following judgment of the Court was delivered:

Sureshwar Thakur, Judge

The instant appeals stand directed against the judgment of the learned Additional Sessions Judge, Fast Track Court, Solan, Himachal Pradesh, rendered on 25.03.2013 in Sessions Trial No.17 FTC.7 of 2011 whereby the learned trial Court convicted the appellants/accused as under:-

Sr. No.	Under Section	Punishment awarded.
1.	395 IPC	To undergo rigorous imprisonment for seven years each and to pay fine of Rs.5000/- each and in default they were to further undergo rigorous imprisonment for six months;
2.	147 IPC	To undergo rigorous imprisonment for one year each and to pay fine of Rs.2000/- each and in default they were to further undergo rigorous imprisonment for three months;
3.	323 IPC read with Section 149 IPC	To undergo rigorous imprisonment for one year each and to pay fine of Rs.1000/- each and in default they were to further undergo rigorous imprisonment for two months;
4.	324 IPC read with Section 149 IPC	To undergo rigorous imprisonment for two years each and to pay fine of Rs.3000/- each and in default they were to further undergo rigorous imprisonment for three months;
5.	342 IPC read with Section 149 IPC	To undergo rigorous imprisonment for six months each and to pay fine of Rs.1000/- each and in default they were to further undergo rigorous imprisonment for one month;
6.	427 IPC read with Section 149 IPC	To undergo rigorous imprisonment for three months each and to pay fine of Rs.1000/- each and in default they were to further undergo rigorous imprisonment for one month;

All the sentences were ordered to run concurrently.

2. The facts relevant to adjudicate the instant case are that on 11.6.2011 at about 3.45 a.m. Manjit Kumar @ Luxmi Chand salesman at Jai Hind Petrol Pump at Kumahrada Dharampur was on duty along with Yog Raj another salesman when accused Banti and Dharamveer came at Petrol pump with a 5 liters green coloured can, purchased diesel of Rs.200/- and gave currency note of Rs.1000/- to Yog Raj who returned them the balance amount of Rs.800/-. Again after about 10-15 minutes, all the accused persons came with a white coloured can for purchasing diesel for their vehicle and purchased the same for Rs.120/-, paid a currency note of Rs.500/- and when Manjit Kumar @ Laxmi Chand went inside the office of Petrol Pump for bringing the balance amount, the accused persons entered the office room and attacked him with kicks and fist blows. It is alleged that all the accused persons in furtherance of their common object gave blows of *danda* on head of Manjit Kumar which was lying inside the petrol pump and owing to the blows given

with force, it got broken into two pieces followed by merciless beatings to both the employees, namely, Manjit Singh and Yog Raj working at Jai Hind Petrol Pump. It is further case of the prosecution that accused persons had inflicted injuries with knife on the persons of Manjit Singh and Yog Raj upon which blood started oozing profusely from the injuries sustained by both the injured persons. In the meanwhile, accused Lakhan Singh entered the office room and removed the entire cash and while taking away the currency notes lying inside the office, the door made up of glass was also banged which was resultantly broken. It is further alleged that after beating Manjit and Yog Raj mercilessly with danda and knife, dragged them into the store and were confined there which was bolted from outside and the accused persons fled away from the spot by vehicle No.DL-8SZ-0444 (Indica Car of Black colour) and also took away with them the mobile phone of Manjit besides BSNL landline set and Tata Indicom set lying in the office of Petrol Pump. Injured Manjit and Yog Raj shouted for help from inside the store but there was none to hear their voice as it was dark around, however, both of them somehow managed to open the window of store room and came out of the same and ran towards the liquor vend nearby and knocked the shutter of the liquor vend for help when one Sanjay Kumar salesman came out who noticed that both Manjit Singh and Yog Raj were bleeding profusely. It is further case of the prosecution that said Sajnay Kumar informed Ashok Gupta (a person who was looking after the affairs of the petrol pump) telephonically about the occurrence. Said Ashok Gupta on receiving such information, rushed to the spot and reached there along with his son Vishal Gupta, noticed the injuries sustained by Manjit Kumar as well as Yog Raj and Ashok Gupta telephonically informed police about the incident. On such information being received by the Police, PSI Kshama Dutt along with other police officials visited CHC Dharampur and moved application for conducting medical examination of both the injured persons. PSI Kshama Dutt recorded the statement of injured Yog Raj under Section 154 Cr.P.C. and sent rukka for registration of FIR in pursuance to which FIR No.88 of 2011 came to be recorded. The then SHO Pritam Singh, Police Station, Dharampur along with police officials visited the spot and noticed blood stains on the floor, wall, store room as well as outside the office of petrol pump who lifted blood samples putting in the four papers which were put in a match box followed by preparation of seizure memo affixing seal 'M' and also seized two broken pieces of danda made of wood, broken pieces of glass lying in the office of petrol pump which had been identified by Ashok Gupta belonging to his office. Spot map was also prepared.

3. The further case of the prosecution is that one Sanjeev Kumar was owner of black coloured Indica Car bearing registration No.DL-8SZ-0444 but the said vehicle was in possession of Akhilesh Kumar of District Aligarh, U.P. SHO Pritam Singh formed a police team led by SI Sukhdarshan on 16.6.2011 and the team was sent to Delhi in search of vehicle aforesaid as well as the accused persons. Thereafter, SI Sukhdarshan visited village Bheempur, District Aligarh, U.P. whereat Akhilesh Kumar disclosed that he had engaged accused Sonu as a driver on the Indica Car and on being interrogated accused Sonu, he revealed the names of other accused persons who were accompanying him in the aforesaid car on the relevant date. Consequently, the accused persons were arrested. On conclusion of investigations into the offences allegedly committed by the accused a report under Section 173 of the Code of Criminal Procedure stood prepared and filed in the competent Court.

4. The accused stood charged by the learned trial Court for theirs committing offences punishable under Sections 147, 323, 324, 342, 427 read with Section 149 IPC and 395 IPC to which they pleaded not guilty and claimed trial. In proof of the prosecution case, the prosecution examined 30 witnesses. On conclusion of recording of the prosecution evidence, the statements of the accused under Section 313 of the Code of Criminal Procedure were recorded by the Court, in which the accused claimed innocence and pleaded false implication. In defence, the accused persons did not choose to lead any evidence.

5. On an appraisal of the evidence on record, the learned trial Court, returned findings of conviction against accused/appellants.

6. The appellants/convicts stand aggrieved by the judgment of conviction recorded against them by the learned trial Court. The learned defence counsel has concertedly and vigorously contended qua the findings of conviction recorded by the learned trial Court standing not based on a proper appreciation of evidence on record rather theirs standing sequelled by gross mis-appreciation of material on record. Hence, he contends qua the findings of conviction being reversed by this Court in the exercise of its appellate jurisdiction and being replaced by findings of acquittal.

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

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

9. The prosecution case rests upon ocular versions qua the ill-fated incident standing rendered by PW-1 (Manjit Kumar) and PW-2 (Yog Raj). Both in their recorded depositions on oath have rendered a version qua the prosecution case bereft of any inter-se contradictions vis-à-vis their depositions comprised in their respective examinations-in-chief vis-à-vis their respective depositions constituted in their respective cross-examinations besides their depositions stand un-ingrained with any vice of intra-se contradictions vis-à-vis their respective depositions qua the occurrence. In sequel, when hence their respective depositions stand un-ingrained with any blemish or taint aforesaid, as a sequitur this Court is constrained to impute implicit sanctity to their testimonies qua the inculpatory role attributed by each to the accused. An accentuated vigor to the probative vigor garnered by the unblemished testimonies qua the ill-fated occurrence rendered by PW-1 and PW-2 is lent by the factum of PW-25 (Dr.Parminder Singh) who subjected both PW-1 and PW-2 to medical examination, in sequel, whereto he prepared MLCs qua them comprised in Ext.PW-25/B and Ext.PW-25/D both whereof stand proven by him testifying of injuries borne on the persons of both PW-1 and PW-2 standing attained thereon at a time contemporaneous to their standing assaulted by the accused, an ensuing inference wherefrom is of hence the timing of the assault deposed by both to stand perpetrated on their respective persons by the accused bearing a synchronization with the opinion rendered by PW-25. Moreover, with PW-25 deposing qua the occurrence of injuries carried on the persons of PW-1 and PW-2 standing begotten with knife Ext.P-4 and Danda which got broken into pieces Ext.P-10 and Ext.P-11 (broken pieces of Danda) sanctifies the ocular account qua the occurrence rendered by injured eye witnesses thereto who have deposed as PW-1 and PW-2. In the FIR lodged qua the occurrence, the complainant had omitted to for lack of familiarity with the identity of the accused enunciate their names therein. However, the prime factum of the accused being the persons who committed the offences alleged against them stand sustained by the depositions of PW-7 (Madan Singh) and PW-8 (Dharam Singh) who in their respective depositions testify qua the factum of their sighting the accused Vinod Kumar, Banti Sharma, Lakhan Singh, Dharam Veer Singh and Sonu respectively in a black coloured Indica Car No.DL-8SZ-0444 at Sanwara. The Investigating Officer in sequel thereto locating the vehicle also his on reaching to its owner PW-11 (Akhilesh Kumar) who testified in his examination-in-chief qua his engaging co-accused Sonu as its driver who in his absence carried the vehicle to District Solan, Himachal Pradesh along with the remaining four accused, testification whereof remaining unshred during the course of his standing subjected to an exacting cross-examination, begets a conclusion of sanctity standing

imputed to the fact as occurs in his examination-in-chief of his engaging co-accused Sonu as driver in vehicle No.DL-8SZ-0444 besides credence standing garnered to the fact as disclosed in his examination-in-chief of the aforesaid Sonu in the company of other co-accused in his absence leaving for District Solan, Himachal Pradesh. The effect of the aforesaid uncontroverted deposition of PW-11 qua the facts aforesaid disclosed in his examination-in-chief corroborates the testimonies of PW-7 and PW-8 wherein they corroborately forthrightly unveil the factum of their sighting the accused in a black coloured Indica Car No.DL-8SZ-0444 at Sanwara in proximity to the site of occurrence on 10.6.2011. Sequelly, on PWs aforesaid being intra-se corroborative qua the factum of movement of the accused to Solan and of their standing sighted thereat on 10.6.2011 constitute the testimonies to stand on a sacrosanct pedestal.

10. Be that as it may, even if the factum probandum of the persons being the persons who committed the offences for which they stood charged, tried and convicted stands hence established nonetheless for lending potent probative vigor thereto the Investigating Officer had concerted to in accordance with law hold a test identification parade before PW-29 Sunish Aggarwal, the then JMIC, Solan. However, all the accused persons under their joint statement comprised in Ext.PW-29/C refused to participate in the test identification parade. Consequently, an adverse inference as tenably drawn by the learned trial Court is drawable qua the accused, facilitative of a sequelling deduction of their refusal to participate therein standing prodded by an inherent lurking fear in their minds of their participation therein unveiling their identity.

11. In pursuance to a disclosure statement comprised in Ext.PW-1/B made by the accused before the Investigating Officer comprised under memo Ext.PW-4/F proved by PW-4 landline phones (BSNL and Tata Indicom) installed in the petrol pump stood recovered from the bushes of Link Road, Dharampur. Moreover when in pursuance to disclosure statement comprised in Ext.PW-6/A made by accused Vinod Kumar before the Investigating Officer wherein a recital stands recorded of his facilitating recovery of a white coloured plastic can of three liters from bushes, its recovery stood effectuated under seizure memo Ext.PW-1/E proven by PW-6 lends sanctity to the factums recorded in both memos proven by PW-1 and PW-6. In addition, a disclosure statement comprised in Ext.PW-6/B made by accused Banti Sharma before the Investigating Officer containing a disclosure of his enabling recovery of a green coloured plastic can of five liters which stood utilized by him for procuring diesel, in pursuance whereto the apposite recoveries stood effectuated under memo Ext.PW-1/J also lends sanctity to the disclosures comprised in both memos proven by PW-1 and PW-2. Ext.PW-6/C is the disclosure statement made by accused Dharamveer before the Investigating Officer containing a recital of his enabling the Investigating Officer to recover knife Ext.P-4 used by the accused in committing the offences alleged, recovery whereof stood effectuated under Memo Ext.PW-1/F proven by PW-6 also lends sanctity to the factums recorded in both memos proven by PW-6. Ext.PW-1/B is the disclosure statement made by the relevant accused before the Investigating Officer containing a recital of theirs enabling the Investigating Officer to recover broken pieces of danda Ext.P-10 and Ext.P-11 used by the accused in committing the offences alleged recovery whereof stood effectuated under Memo Ext.PW-4/B proven by PW-4 lends sanctity to the factums recorded in both memos proven by PW-4 and PW-1.

12. Therefore, with the prosecution efficaciously proving through PW-4 (Ashok Gupta) and PW-6 (Shankar Lal) the witnesses to items/weapons of offence comprised both in the disclosure statements made respectively by accused aforesaid and the apposite recovery memos prepared in respect thereto the apposite recitals recorded in them, empowers this Court to conclude with aplomb of the prosecution succeeding in firmly

connecting the accused in the commission of the offences as alleged against them. Ext.PW-6/E unveils of on the relevant day the petrol pump whereat PW-1 and PW-2 were working as Salesmen transacting business in a sum of Rs.1,37,401/- yet there existed a short fall of Rs.12,128/- which PW-1 and PW-2 depose to stand looted by the accused. Even though the aforesaid sum of Rs.12,128/- proven to be looted by the ocular version of the witnesses aforesaid by the accused from the drawer of the petrol pump stood unrecovered, the mere factum of non effectuation of its recovery would not erode the genesis of the prosecution version nor would it stain the testimonies of ocular witnesses aforesaid with any vice of concoction or falsehood especially when for reasons attributed herein-above their testimonies stand on a sacrosanct pedestal, besides their standing lent support by efficaciously proven recoveries of various items/weapons of offence preceding whereof apposite disclosure statements stood made before the Investigating Officer by the relevant accused also predominantly when the medical evidence affords succor to the ocular testimonies qua the ill-fated occurrence.

13. 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 there-from the analysis of the material on record by the learned trial Court does not suffer from any perversity or absurdity of mis-appreciation and non appreciation of evidence on record, rather it has aptly appreciated the material available on record.

14. In view of the above, I find no merit in these appeals which are accordingly dismissed. In sequel, the impugned judgment is affirmed and maintained. Records of the learned trial Court be sent back forthwith.

15. The sentence of imprisonment of seven years, as imposed upon the appellants/accused by the learned trial Court, however, stands modified to the term of sentence of imprisonment already undergone by them. The accused are ordered to be released forthwith if not required in any other case. Release warrants be prepared accordingly.

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

Param Deep .....Appellant.

Versus

Smt. Sushma Rani .....Respondent.

FAO (HMA) No. 44 of 2016.
Reserved on:19.4.2016.
Decided on: 25.04.2016.

Hindu Marriage Act, 1955- Section 13- Marriage between the parties was solemnized on 5.12.1994- a daughter was born from the wedlock- wife left the company of the husband- husband had filed a petition for restitution- wife also filed a petition for maintenance in which maintenance @ Rs. 2,500/- per month was granted to wife- contents of the petition were denied by the wife pleading that husband had extra marital affair and he had asked the wife to reside separately- she was being maltreated by the husband and his family members- petition was dismissed by the trial Court- held, in appeal that wife was ready and willing to stay with the husband but the husband had never taken her with him- she was maltreated by husband and his relatives on which she had to file a complaint- she was not being

maintained and had to file a petition for maintenance- husband had forced the wife either to live with his or her parents – husband cannot be permitted to take advantage of his own wrongs- merely because wife had failed to prove that husband was living adulterous life will not amount to cruelty- trial Court had rightly dismissed the petition- appeal dismissed.

(Para-10 to 16)

Cases referred:

Manisha Tyagi vs. Deepak Kumar 2010(1) Divorce & Matrimonial Cases 451
Ravi Kumar vs. Julumidevi (2010) 4 SCC 476,
Bipinchandra Jaisinghbai Shah versus Prabhavati, AIR 1957 SC 176

For the appellant: Mr. R.K.Sharma, Sr. Advocate, with Mr. Gaurav Thakur, Advocate.
For the respondent: Mr.Ajay Kumar, Sr. Advocate, with Mr. Dheeraj Vashisht, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This FAO (HMA) is directed against the judgment dated 17.11.2015, passed by the learned Addl. District Judge-I, Kangra at Dharamshala, Distt. Kangra, H.P. in HMA No. 40-D/III/07.

2. Key facts, necessary for the adjudication of this appeal are that the appellant-petitioner (hereinafter referred to as the appellant) has instituted a petition under Section 13 of the Hindu Marriage Act, 1955 (hereinafter referred to as the Act), against the respondent. The marriage between the parties was solemnized on 5.12.1994 according to Hindu rites and customs at Nangal, Roopnagar (Punjab). A daughter was born out of the wed lock on 23.2.1996. According to the averments contained in the petition, the petitioner was in service and posted at Tonk in Rajasthan. After the marriage the respondent did not accompany him to Tonk, however, preferred to live with his parents at Talwara. In the month of May, 1996, the petitioner was transferred to Talwara where both the parties resided together. In the month of July, 1996, the father of the petitioner was transferred to Nangal. The respondent instead of staying with the petitioner at Talwara went to her parents' house at village Badala. In the month of May, 1997, the petitioner was transferred to Dharamshala and as such, he went to village Badala to bring the respondent, but she preferred to stay at Nangal with the parents of the petitioner. In the month of December, 1997, the respondent left Nangal and instead of coming to Dharmamshala went to her parents' house at village Badala. In the month of May, 2001, the respondent lodged a false complaint against the petitioner and his parents, brother and sister at Police Station, Nangal. The matter was compromised. After one month, the petitioner brought the respondent to Dharamshala and the parties lived together for some time. After that the respondent left the company of the petitioner. The petitioner was constrained to file a petition under Section 9 of the Act on 11.4.2002. In retaliation, the respondent also filed a petition under Section 125 Cr.P.C. before the learned Addl. Chief Judicial Magistrate, Una on 25.5.2002. The learned Addl. Chief Judicial Magistrate, Una ordered monthly maintenance of Rs. 2500/- to the respondent. The respondent has left the company of the petitioner.

3. The petition was contested by the respondent. She denied the averments made in the petition. According to her, the petitioner was having extra marital affair with

one Lata Sharma daughter of Baba Jayendra Puri of Baijnath temple. The petitioner did not prefer to take respondent along with him to Tonk in Rajasthan. The petitioner himself asked the respondent to stay with his parents at Talwara. When the parents of the petitioner went to Nangal, the respondent did not go to her parents' house at village Badala but she went to her in-laws house at Nangal. The family of the petitioner used to maltreat her. They used to abuse her on the pretext that she was not beautiful and has not brought sufficient dowry. The petitioner and his parents also held the respondent guilty for delivering a female child. The petitioner never asked the respondent to join his company at Dharamshala on his transfer. She was forced to report the matter to the police when the cruelty of the in-laws became intolerable. The matter was compromised on 17.6.2001. The respondent stayed at Dharamshala for three months in rented accommodation but the petitioner stayed in some other accommodation. She admitted that petition was filed under Section 125 Cr.P.C since the petitioner had refused to maintain her. The matter was compromised before learned Addl. District Judge-II, Kangra at Dharamshala. However, the petitioner kept the respondent again in separate accommodation. The petition was dismissed by the learned Addl. District Judge-II, Kangra at Dharamshala on 17.11.2015.

4. The issues were framed by the learned Addl. District Judge-I, Kangra on 11.5.2010. The learned Addl. District Judge-I, Kangra, dismissed the petition on 17.11.2015. Hence, this petition.

5. I have heard learned Senior Advocates for the parties and gone through the impugned judgment very carefully.

6. The petitioner has appeared as PW-1. He has reiterated the contents made in the petition. In his cross-examination, he testified that he remained posted at Tonk for three years. The respondent did not join his company at Tonk. He admitted that during the period he remained at Tonk, the respondent lived with her parents. He denied the suggestion that his parents used to beat and treat the respondent as a servant. His parents had never harassed her for bringing insufficient dowry. He admitted that when he came to Dharamshala, the respondent was staying at village Badala. He denied the suggestion that at Dharamshala he provided separate accommodation to the respondent. He denied that he has ousted the respondent after beating her.

7. PW-2 Sukhdev Singh is the father of the petitioner. He has led his evidence by filing affidavit Ext. PW-2/A. He admitted that when the petitioner was transferred to Dharamshala, the respondent lived with them. He admitted that the petitioner kept the respondent with him at Dharamshala for one month. He admitted that respondent lodged a complainant against them at Police Station Nangal and the matter was compromised. He also admitted that he disinherited the petitioner from his property.

8. The respondent has led her evidence by filing RW-1/A. She denied the suggestion that she did not accompany the petitioner during his posting at Tonk. She admitted that after the compromise at Police Station Nangal, her husband took her to Dharamshala from the house of her maternal uncle. She admitted that there were 8-10 houses in the vicinity where the parties were living at Dharamshala. She denied specifically that in October, 2001 she herself left the house of the petitioner without any reason.

9. RW-2 Prem Kumar, brother of the respondent tendered his affidavit vide Ext. RW-2/A. RW-3 Asha Devi and RW-4 Pushpa Devi also tendered their evidence by way of affidavits Ext. RW-3/A and Ext. RW-4/A, respectively. They have denied the suggestion that respondent was neither maltreated nor ousted by the petitioner and his parents.

10. The respondent was always willing and ready to go to Tonk but the petitioner has never taken her to Tonk. She was staying either at Nangal or Talwara with the parents of the petitioner. The respondent was mal-treated by the parents of the petitioner. It is, in these circumstances, she was constrained to file complaint against the petitioner and his family members. The matter stood compromised between the parties on 17.6.2001. Since the petitioner has failed to maintain respondent and her child, she was constrained to file petition under Section 125 Cr.P.C. The learned Addl. Chief Judicial Magistrate, Una has ordered the petitioner to pay monthly maintenance at the rate of Rs. 2500/- per month to the respondent.

11. The matter was also compromised before the learned Addl. District Judge-II, Kangra at Dharamshala in the proceedings initiated under Section 9 of the Act and the petitioner had agreed to take the respondent on 14.3.2003. It is the petitioner who has ousted the respondent from his house. He cannot be permitted to take advantage of his own wrongs. It was necessary for the petitioner to prove *animus deserendi*. The petitioner has forced the respondent either to live with his parents at Talwara or Nangal or with her parents at Badala. Since the petitioner and his family members have harassed the respondent for bringing insufficient dowry, she had no other alternative except to stay with her parents.

12. The petitioner has miserably failed to lead any tangible and reliable evidence to prove the allegation that he was treated with cruelty by the respondent. The petitioner has neither maintained the respondent nor he has taken the respondent to the place of his work. The petitioner has also failed to prove that the respondent has deserted him without sufficient cause. Merely that the respondent has failed to prove that the petitioner was living adulterous life, will not amount to cruelty, as canvassed by Sh. R.K. Sharma, learned Senior Advocate for the petitioner.

13. 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."

14. 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."

15. Their Lordships of the Hon'ble Supreme Court in ***Bipinchandra Jaisinghbai Shah*** *versus* ***Prabhavati***, AIR 1957 SC 176 have held that two essential conditions must be there to prove the desertion: (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Their Lordships have held that desertion is a matter of interference to be drawn from the facts and circumstances of each case. Their Lordships have held as under:

> "What is desertion? "Rayden on Divorce" which is a standard work on the subject at p.128 (6th Edn.) has summarized the case-law on the subject in these terms:-
>
> "Desertion is the separation of one spouse from the other, with an intention on the part of the deserting spouse of bringing cohabitation permanently to

an end without reasonable cause and without the consent of the other spouse; but the physical act of departure by one spouse does not necessarily make that spouse the deserting party".

The legal position has been admirably summarized in paras 453 and 454 at pp. 241. to 243 of Halsbury's Laws of England (3rd Edn.), VoL 12, in the following words:-

"In its essence desertion means the intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause. It is a total repudiation of the obligations of marriage. In view of the large variety of circumstances and of modes of life involved, the Court has discouraged attempts at defining desertion, there being no general principle applicable to all cases. Desertion is not the withdrawal from a place but from the state of things, for what the law seeks to enforce is the recognition and discharge of the common obligations of the married state; the state of things may usually be termed, for short, 'the home'. There can be desertion without previous cohabitation by the parties, or without the marriage having been consummated. The person who actually withdraws from cohabitation is not necessarily the deserting party. The fact that a husband makes an allowance to a wife whom he has abandoned is no answer to a charge of desertion.

The offence of desertion is a course of conduct which exists independently of its duration, but as a ground for divorce it must exist for a period of at least three years immediately preceding the presentation of the petition where the offence appears as a cross-charge, of the answer. Desertion as a ground of divorce differs from the statutory grounds of adultery and cruelty in that the offence founding the cause of action of desertion is not complete, but is inchoate, until the suit is constituted. Desertion is a continuing offence".

Thus the quality of permanence is one of the essential elements which differentiates desertion from wilful separation. If a spouse abandons the other spouse in a state of temporary passion, for example anger or disgust, without intending permanently to cease cohabitation, it will not amount to desertion. For the offence of desertion, so far as the deserting spouse is concerned, two essential conditions must be there namely, (1) the factum of separation, and (2) the intention to bring cohabitation permanently to an end (animus deserendi). Similarly two elements are essential so far as the deserted spouse is concerned: (1) the absence of consent, and (2) absence of conduct giving reasonable cause to the spouse leaving the matrimonial home to form the necessary intention aforesaid. The petitioner for divorce bears the burden of proving those elements in the two spouses respectively. Here a difference between the English law and the law as enacted by the Bombay Legislature may be pointed out. Whereas under the English law those essential conditions must continue throughout the course of the three years immediately preceding the institution of the suit for divorce, under the Act, the period is four years without specifying that it should immediately precede the commencement of proceedings for divorce. Whether the omission of the last clause has any practical result need not detain us, as it does not call for decision in the present case. Desertion is a matter of inference to be drawn from the facts and circumstances to each case. The inference may be drawn from certain facts which may not in another case be capable of leading to the same inference; that is to say, the facts have to be viewed as to the purpose

which is revealed by those acts or by conduct and expression of intention, both anterior and subsequent to the actual acts of separation. If in fact, there has been a separation, the essential question always is whether that act could be attributable to an animus deserendi. The offence of desertion commences when the fact of separation and the animus deserendi co- exist. But it is not necessary that they should commence at the same time. The de facto separation may have commenced without the necessary animus or it may be that the separation and the (animus deserendi) coincide in point of time; for example, when the separating spouse abandons the marital home with the intention, express or implied of bringing cohabitation permanently to a close. The law in England has prescribed a three years period and the Bombay Act prescribed a period of four years as a continuous period during which the two elements must subsist. Hence, if a deserting spouse takes advantage of the locus poenitentiae thus provided by law and decides to come back to the deserted spouse by a bona fide offer of resuming the matrimonial home with all the implications of marital life, before the statutory period is out or even after the lapse of that period, unless proceedings for divorce have been commenced, desertion comes to an end, and if the deserted spouse unreasonably refuses to offer, the latter may be in desertion and not the former. Hence it is necessary that during all the period that there has been a desertion, the deserted spouse must affirm the marriage and be ready and willing to resume married life on such conditions as may be reasonable. It is also well settled that in proceedings for divorce the plaintiff must prove the offence of desertion, like and other matrimonial offence, beyond all reasonable doubt. Hence, though corroboration is not required as an absolute rule of law the courts insist upon corroborative evidence, unless its absence is accounted for to the satisfaction of the court. In this connection the following observations of Lord Goddard CJ. in the case of Lawson v. Lawson, 1955-1 All E R 341 at p. 342(A), may be referred to :-

"These cases are not cases in which corroboration is required as a matter of law. It is required as a matter of precaution..... "

With these preliminary observations we now proceed to examine the evidence led on behalf of the parties to find out whether desertion has been proved in this case and, if so, whether there was a bona fide offer by the wife to return to her matrimonial home with a view to discharging marital duties and, if so, whether there was an unreasonable refusal on the part of the husband to take her back.

16. Consequently, there is no merit in this appeal, the same is dismissed. Pending application(s), if any, shall stand dismissed.

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

Raj Kumar ...Petitioner

Versus

State of Himachal Pradesh & others ...Respondents

CWP No. 206 of 2014-A
Judgment Reserved on: 19.04.2016
Date of Decision: 25.04 2016

Constitution of India, 1950- Article 226- Petitioner was appointed as a peon and was promoted as Process Server- respondents No. 3 and 4 were appointed as Process Servers- applications were invited for the two posts of clerk to be filled by selection/promotion from the amongst class-IV officials working in the Civil and Sessions Division having minimum 3 years service- petitioner along with respondents No. 3 and 4 had applied for the post and was invited for screening test- respondents No. 3 and 4 were promoted- writ petition was filed pleading that selection/promotion was to be made on the basis of seniority-cum-merit- respondent No. 2 had ignored seniority and had promoted the persons who were junior to the petitioner- respondent No. 1 stated that petitioner was appointed as Process Server in the year 2010, whereas, respondents No. 3 and 4 were appointed as Process Servers in the year 2005 and the petitioner was junior to respondents No. 3 and 4- held, that as per Himachal Subordinate Court Staff Recruitment (Recruitment, Promotion and Conditions of Service), Rules, 2012, seniority-cum-merit is to be determined on the basis of length of service in the feeder cadre- feeder cadre for the post of clerk is 10+2 class-IV court officials- Process Server, Daftri, Peon Orderly/Chowkidar, Safai Karamchari and Mali have been shown as 'Class-IV'- applications were invited from Class-IV and not from Process Server only- hence, entire service of employee as Class-IV is to be counted- legitimate right of the petitioner has been frustrated- writ petition allowed- promotion of respondents No. 3 and 4 quashed and respondent No. 2 directed to consider the case of the petitioner, respondents No. 3 and 4 along with other applicants in the light of observations made in the writ petition.

(Para-9 to 20)

For the petitioner	:	Ms. Archana Dutt, Advocate, for the Petitioner.
For the respondent	:	Mr. Ramesh Thakur, Deputy Advocate General with Mr. Pankaj Negi Deputy Advocate General, for respondent No. 1. Ms. Sunita Sharma, Advocate, for the respondent No. 2. Mr. Ashwani Pathak, Senior Advocate, with Mr. Sandeep K. Sharma, Advocate, for respondents No. 3 & 4.

The following judgment of the Court was delivered:

Vivek Singh Thakur.

In the present case, the petitioner has claimed that he was appointed as Peon in the Court of Civil Judge(Junior Division), Ghumarwin in the year, 2004 and was promoted on 26.06.2006 as Process Server from the post of Peon which is a feeder post for the post of Process Server, however in reply the respondent No.2 has clarified that the date of promotion shown as 26.6.2006 in the promotion order was clerical mistake and in fact the petitioner had been promoted as Process Server on 26.06.2010.

2. The respondents No. 3 and 4 were directly appointed as Process Servers on 16.07.2005 and 21.12.2005 respectively.

3. In the year, 2013, the District & Sessions Judge, Bilaspur had invited applications for two posts of Clerks vide advertisement notice dated 4.6.2013 **(Annexure P-1)** to be filled in by selection/promotion from amongst the Class-IV officials working in Civil and Sessions Division, Bilaspur having minimum 3 years service as on 01.06.2013 with minimum educational qualifications of 10+2 standard.

4. The petitioner alongwith respondents No. 3 & 4 and others had applied for the post through proper channel and the petitioner had been invited for Screening Test vide Memo. dated 28.06.2013 **(Annexure P-2)** and after completing the process of selection, the District and Sessions Judge, Bilaspur had promoted the respondents No. 3 and 4 and had posted them as Criminal Ahlmad vide Office Order dated 26.09.2013 **(Annexure-P-3**) as Clerks.

5. Aggrieved by the selection/promotion of respondents No. 3 & 4 and non-selection/promotion of the petitioner, the petitioner has preferred present petition for quashing and setting aside the promotion and posting order issued by the order dated 26.09.2013 **(Annexure P-3)** on the ground that the Selection/Promotion to the post of Clerk was to be made on the basis of Seniority-cum-Merit amongst the eligible candidates serving under 'Class-IV Cadre' whereas the respondent No. 2 has ignored the seniority of the petitioner from the date of his posting as Peon in the year, 2004 in Class-IV Cadre and has treated the petitioner Junior to respondents No. 3 & 4 on the basis of date of appointment of the respondents No. 3 & 4 as Process Servers prior in time to the promotion of the petitioner as Process Server. The contention of the petitioner is that for the purpose of promotion as a Clerk entire service in 'Class-IV' cadre whether as Peon or as Process Server was to be accounted for the purpose of deciding seniority for recruitment/promotion to the post of Clerk and the respondent No. 2 has committed an illegality by ignoring the service period of the petitioner as peon.

6. The stand of the respondent No.1 is that the petitioner had been appointed as Process Server on 26.06.2010, whereas the respondents No. 3 & 4 had been appointed as Process Servers in the year, 2005 much prior to the promotion of the petitioner as Process Server. It has been further stated in the reply that on promotion as Process Server, the petitioner has become junior in the category of Process Server because the seniority list of the Process Servers and Peons are prepared separately keeping in view the separate unit in the cadre. Therefore the petitioner is not liable to be treated senior against Class-IV official for Clerk from amongst the Class–IV employees against 25% quota provided for them. As per reply of the respondent No. 2 seniority list of Class-III and Class-IV officials of Civil Division Bilaspur was prepared on 01.06.2013 in which the petitioner has been shown at Sl. No. 79 in the seniority list and in the category of Process Server he is junior to 21 Process Servers including the respondents No. 3 & 4 and inspite of having knowledge about his position in seniority list, the petitioner has not objected of his being placed junior to the respondents No. 3 & 4. In the reply on merit it has been stated that the Peons, Chowkidars and Process Servers are all of Class-IV categories but their identity and unit are separate, as per the Rule 4 of "The Himachal Pradesh Subordinate Court Staff (Recruitment, Promotion and Conditions of Service), Rules, 2012, (hereinafter referred as 'R & P Rules') wherein the Cadre means "the total strength of posts sanctioned as a separate unit as shown in Schedule-I attached to these Rules". As per reply in the Schedule-I from Sr. No. 29 to 36, the category of Class-IV has been shown and its bare perusal would make it clear that both the categories, i.e. Peon and Process Servers are having separate unit and different grade pay. It has been further averred in the reply that the nature of duties of Process Server altogether gets changed because the post of Process Server carries higher responsibilities than the post of Peon and the grade pay of the Process Server is also higher than the Peon. It has also been stated that the Process Server has an opportunity and is eligible to become bailiff whereas peon is not entitled for the same.

7. Lastly, it has been sated that the candidatures of the petitioner and respondents No. 3 & 4 was duly considered by Screening Committee and respondents No. 3 & 4 have been promoted on the recommendation of the Committee on the basis of Seniority-

Cum-Merit and therefore, the petitioner has no case for seeking quashing of promotion of respondents No.3 and 4.

8. Ms. Archna Dutt, learned counsel for the petitioner and Ms. Sunita Sharma, counsel for the respondent No. 2 has strenuously argued in support of their respective contentions in the petition and in the reply. The counsel for the respondents No. 3 & 4 has adopted the arguments of respondent No. 2.

9. The petitioner has also placed on record information received under RTI from the office of District and Sessions Judge, Una and Chamba, for fortifying his contention for counting his service as peon for determining seniority amongst Class-IV officials for the purpose of promotion as Clerk, as according to him, in these Districts period of service as Peon has also been considered for determining the seniority of the candidates as Class-IV officials. Counsel for the respondent No. 2 has submitted that the orders pertaining to the Districts Chamba and Una are not in question in the present writ petition and therefore, these documents are of no help to the petitioner. I am of the view that even without considering these documents, the petitioner has made out a case for quashing the promotion of respondents No. 3 and 4 and for considering the petitioner for promotion as Clerk by reconsidering impugned appointments/promotions to the post of Clerk by counting the services of all the candidates in Class-IV classification irrespective of post of the candidates at different times, as warranted in view of R & P Rules, especially, classification provided in Schedule-1 and eligibility criteria for promotion as Clerk amongst Class-IV officials provided at Sl. No. 8 of Schedule-II of R & P Rules.

10. The respondent No.1 has notified 'The Himachal Pradesh Subordinate Court Staff (Recruitment, Promotion and Conditions of Service), Rules, 2012 vide notification dated 12th March, 2013, (referred to as R & P Rules) the copy of which has been placed on record (Annexure P-4) by the petitioner and R-2/4 by the respondent No. 2.

11. The Rule 2 (4) of the R & P Rules defines the cadre as "the total strength of posts sanctioned as a separate unit as shown in Schedule-I attached to these Rules".

12. The Rule 15 (4) of the R & P Rules provides 'The relative seniority-cum-merit to the various posts shall be determined on the basis of their length of service in the feeder cadre'.

13. The Schedule–I annexed with R & P Rules provides classifications of Process Servers, Daftri, Orderly, Chowkidar, Safai Karamchari and Malis as Class-IV officials.

14. The Schedule-II annexed with the R & P Rules provides qualification and feeder cadre for promotion to the various posts. At Sl. No. 8 in Schedule-II, 25% of the available vacancies of Clerks are provided to be filled on the basis of Seniority-cum-Merit amongst 10+2 'Class-IV' Court Officials on the basis of test as per part-II of Annexure-A and by considering ACRs of three years. It has been further provided that the promotes shall have to qualify typing test at the speed of 50 W.P.M. on computers within one year. In this Schedule also classification of Process Server, Daftri, Peon, Orderly/Chowkidar, Safai Karamchari and Mali has been shown as 'Class-IV' at Serial No. 12 to 15.

15. As per **Annexure P-1**, Advertisement Notice, dated 04.06.2013, the applications had been invited from Class-IV officials and not from the Process Servers only. Schedule-I and Schedule-II unambiguously indicate Classification of different post as Class-I, II, III and IV. Schedule-I indicates that persons serving in respective posts at Sl. Nos. 29 to 36 of the said Schedule are of Class-IV Classification. Similar Classification has also been mentioned in Schedule-II at Serial No. 12 to 15. As per Schedule-II, all Class-IV Court

Officials having minimum eligibility, as mentioned at Sl. No. 8 of the said Schedule, are to be considered on the basis of Seniority-cum-Merit for promotion to the post of Clerk.

16. So far as the contention raised by the counsel for the respondent No. 2 with regard to maintaining separate seniority list of Process Servers and Peons are concerned, it is evident from perusal of R & P Rules that the same is maintained for the reason that there are certain posts for which all Class-IV officials are not eligible to be considered and one of such example is the post of Bailiff mentioned at Sl. No.11 of Schedule-II for which recruitment by promotion on the basis of seniority from amongst only the Process Servers serving in the Division has been provided.

17. From the perusal of qualification provided for Clerk at Sl. No. 8 and qualification provided to Bailiff at Sl. No. 11 of Schedule-II, it is evident that the intention of the authority is clear that for the post of Clerk, all 'Class-IV' officials are eligible and for the post of Bailiff only Process Servers are eligible therefore, for promotion to Clerk entire service of the employee as 'Class-IV' is to be counted whereas for promotion to the post of Bailiff only service as Process Server is to be counted. Hence, for maintaining the separate seniority list for Process Servers and peons has no effect on the merit of the contentions raised by the petitioner as for the purpose of promotion to the post of Clerk, the entire continuous service of an incumbent served as Class-IV whether as Peon, as Process Server or holding any other post(s) in the said cadre is to be taken into consideration for determining the seniority as Class-IV official.

18. Keeping in view the factual matrix of the case, it is evident that legitimate right of the petitioner has been frustrated because of inappropriate action of the respondent No.2 and such action deserves to be interfered to do complete Justice. But before granting relief it would be necessary to consider the prayer of the petitioner which is as under:-

> *"i) That the impugned annexure P-3 may very kindly be quashed and set aside with the direction to the respondent to consider the petitioner for promotion to the post of Clerk".*
>
> *ii) That record of the case may be summoned for the kind perusal of this Hon'ble Court.*
>
> *iii) Any other and further order which this Hon'ble Curt deems fit and proper be also passed".*

The relief as prayed for in main prayer cannot be granted in toto because office order dated 26.09.2013 **(Annexure P-3)** contains transfer and posting of nine Clerks three officials including respondents No. 3 and 4. From Serial No. 1 to 7 are transfers/posting of employee which are not in question in the present petition and only promotion and posting of respondents No.3 and 4 which is at Serial No. 8 and 9 of the impugned order is under challenge. Therefore, relief for quashing of **Annexure P-3**, as prayed for, cannot be granted. However, once conclusion has arrived that the petitioner has been deprived from his legitimate promotion for no fault on his part it would be necessary to mould the relief for ends of justice and fair play, particularly, when the respondents have not taken any objection regarding the relief as prayed for.

19. It is also settled law that technicalities ought to take back seat in the interest of justice. It is trite that Courts can exercise judicial discretion in moulding relief and such discretion should be exercised to avoid perpetuating illegality and to discourage the same. Moreover, Annexure P-3 contains the posting of newly promoted respondents No. 3 and 4 and lesser relief can always be granted and therefore,in the interest of equity, the promotion

and posting of the respondents No. 3 and 4, only, can be quashed instead of quashing entire **Annexure P-3.**

20. Thus, in my considered view, the stand taken by the respondent No. 2 is not tenable in the eye of law whereas the petitioner has made out a case for interference of this Court. Consequently, writ petition is allowed. Promotion of respondents No. 3 and 4 as Clerk is quashed and respondent No.2 is directed to consider the petitioner, respondents No. 3 and 4 alongwith other applicants in the light of observations made here-in-above within two months positively from the date of decision of the present petition.

Pending application(s), if any, also stand disposed of.

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

State of H.P. ...Appellant
Versus
Sharda Devi. ...Respondent

Cr.A No. : 538 of 2008
Reserved on: 22.4.2016
Decided on: 25.4.2016

Indian Penal Code, 1860- Section 306 and 498-A- A was married to accused V- V went abroad- she was treated well for sometime after the marriage but thereafter accused started ill treating and taunting her about domestic chores- she complained to her parents regarding the harassment- matter was also brought to the notice of V who assured that he would ask his mother not to harass A- A consumed poison on 15.3.2004- accused were tried and acquitted by the trial Court- held, in appeal that father of the deceased had admitted that he used to visit the home of the deceased- PW-2 also admitted that deceased used to visit her parents twice or thrice in a year- complainant had never lodged any complaint with police, Panchayat or any other relatives- no inquiry was made from the neighbourhood about the cause of the death- all these circumstances, make the prosecution case doubtful- trial Court had rightly acquitted the accused- appeal dismissed. (Para-13 and 14)

For the appellant: Mr. Neeraj Sharma, Dy. A.G.
For the Respondent: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Per Justice Rajiv Sharma, Judge.

State has come in appeal against the judgment dated 29.2.2008 rendered by the Sessions Judge, Una in Sessions Case No. 12 of 2005 whereby the respondent-accused (hereinafter referred to as the "accused" for convenience sake), who was charged with and tried for offences punishable under sections 306 and 498-A of the Indian Penal Code, has been acquitted.

2. Case of the prosecution, in a nutshell, is that daughter of the complainant Som Nath was married to accused son Vinod Paul in accordance with Hindu rites at Nangal Jarialan Village in District Una in the year 1995. She started living in the matrimonial

home. Her husband went abroad. For sometime, after the marriage, Anjana Devi's husband, mother-in-law and father-in-law, according to the complainant, treated her well. Thereafter, accused started ill treating and taunting her about domestic chores. As and when Anjana Devi went to the house of her parents, she complained to her parents that her mother-in-law always harassed her by taunting her on trivial matters. The marriage of complainant's younger son Ravi Kumar was solemnized on 28.11.2003. Anjana Devi and her husband also attended the marriage. At that time, complainant complained to his son-in-law about the conduct of his mother. The son-in-law gave an assurance that he would ask his mother not to harass Anjana Devi. On 15.3.2004, complainant received telephonic information that his daughter has died by consuming poison. On 17.3.2004, complainant reported the matter to the police. The police got the post-mortem conducted. Cause of death was consumption of phosphide poison. 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 10 witnesses to prove its case against the accused. Statement of the accused under Section 313 Cr.P.C. was recorded. She denied having subjected Anjana Devi with cruelty or abetted her to commit suicide. The trial court acquitted the accused. Hence, the present appeal.

4. Mr. Neeraj Sharma, Dy. A.G. has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Sanjeev Kuthiala has supported the judgment rendered by the learned trial court.

6. We have heard the learned counsel for the parties and have gone through the judgment meticulously.

7. PW-1 Som Nath has testified that Anjana Devi was his daughter. She was married to accused's son Vinod Paul in the year 1995. Vinod Paul was staying in Dubai for the past about 15 years. Ever since her marriage with Vinod Paul, Anjana Devi was residing in her matrimonial house with her mother-in-law. Vinod Paul used to visit his house as and when he came from Dubai. Two children, a son and a daughter were born out of wedlock. Accused used to complain that she has not brought anything from her parents. The marriage of his son Ravi Kumar was solemnized in the year 2003. His daughter and her husband Vinod Paul also attended the marriage. Accused started ill-treating Anjana Devi saying Vinod Paul was the only son-in-law of Anjana Devi's parents and they had not given him even a gold ring. On 15.3.2004, he received telephonic intimation from unidentified relative that Anjana Devi has died by fall from the roof. He suspected that his daughter was in fact killed by accused Sharda Devi. He lodged FIR on 17.3.2004. In his cross-examination, he has admitted that all functions at the house of accused used to be managed by his son Madan Lal. He has also admitted that there are number of residential houses in the neighbourhood of accused house in which Anjana used to reside. He has also admitted that Anjana Devi was literate and wise. She was on regular conversation on telephone. He has admitted that father in-law of Anjana Devi also used to reside in the same house. Anjana Devi was living jointly with her in-laws and she did not have separate mess. He also admitted that on being informed about the demise of Anjana Devi, his son Madan Lal and his wife Anita went to Community Health Centre, Gagret where Anjana Devi was taken for treatment. He also admitted that he attended the funeral of Anjana Devi. He and his younger son Ravi Kumar had gone to the house of accused and demanded from her golden ornaments belonging to the deceased.

8. PW-2 Jeewan Lata has testified that Anjana Devi was her husband's niece. She was married to the accused son Vinod Paul in the year 1995. Ever since her marriage with Vinod Paul, deceased was residing in the matrimonial house in Nangal Jarliana village. She used to complain that her mother-in-law always criticized her for not bringing anything from her parents. She also used to quote her mother-in-law that her mother has not trained her in domestic chores. In her cross-examination, she has admitted that deceased used to visit her parents twice or thrice a year. She also admitted that Anjana Devi never wrote to her about the alleged mal-treatment meted out to her by the accused. She has also admitted that Anjana Devi never talked to her on telephone. She had made statement to the police under section 161 Cr.P.C. that deceased used to complain to her mother in her presence. Confronted with her statement Ex.PW-2/A, in which this fact is not stated.

9. PW-3 Rajneesh Kaushal has testified that he was Pandit by caste. He was Kul Purohit of the family of deceased. The marriage of deceased Anjana Devi's brother Ravi was solemnized in the month of November, 2003. All ladies of the village except deceased Anjana Devi accompanied the marriage party of Ravi. On his asking why she also had not gone with the marriage party like other ladies, she replied that she did not go because of her son being toddler and she had strict instructions from her mother-in-law that she would be responsible in case the child fell sick. Later, he went for Katha in the house of Anjana Devi's parents. She disclosed that her mother-in-law always ill treated her. In his cross-examination he has admitted that Anjana Devi and her husband Vinod Paul had attended the marriage of Ravi. He also admitted that deceased and her husband had gone back to their house about 2 days after the marriage of Ravi. He did not recollect the date on which Katha was to be recited by him at the house of Anjana Devi's parents.

10. PW-4 Dr. N.S. Dogra has conducted the post mortem of deceased Anjana alongwith Dr. V.K. Raizada. The post mortem report is Ex.PW-4/A. In their opinion, the cause of death of Anjana Devi was phosphide poison.

11. PW-6 Maya Devi has testified that Anjana Devi was her daughter. She was married to accused son Vinod Paul in the year 1995. Two children, one daughter and one son were born from the wedlock. As and when Anjana Devi came to their house she always complained against the ill-treatment meted out to her by the accused. Anjana Devi told her that accused used to taunt her. She used to send her back to her in-laws. The accused expected some valuable gifts from them. She admitted in her cross-examination that the entire family of Anjana Devi's in-laws was living jointly in a single house. She also admitted that she, her husband and sons were on visiting terms with Anjana Devi's in-laws.

12. PW-10 SI Om Parkash has testified that the matter was handed over to him for investigation. He went to Community Health Centre, Gagret where Anjana Devi daughter of complainant Som Nath was stated to have died. He prepared inquest reports Ex.PW-10/A and Ex.PW-10/B. The post mortem report is Ex.PW-4/A and MLC is Ex.PW-5/C. In his cross-examination, he has admitted that there were number of residential houses in the neighbourhood of the accused in village Nangal Jarialan.

13. The marriage between the deceased and Vinod Paul was solemnized 15 years back. Vinod Paul was residing at Dubai. The incident has happened on 15.3.2004. However, the FIR was registered on 17.3.2004 vide FIR Ex.PW-1/A. PW-1 Som Nath has admitted that all functions at the house of accused used to be managed by his son Madan Lal and he used to visit the house of deceased. He has admitted that he had attended the funeral of Anjana Devi alongwith other members of his community. PW-1 Som Nath alongwith his son Ravi Kumar had gone to the house of accused and demanded golden ornaments. PW-2 Jeewan Lata has also admitted that Anjana Devi used to visit her parents

twice or thrice in a year. She has also admitted that Anjana Devi had never talked to her on telephone. She never entered into correspondence with her. Statement of PW-3 Rajneesh Kaushal does not inspire confidence. He did not recollect the date of marriage of Ravi. He did not recollect the date on which Katha was recited at the house of deceased parents. The complainant has never lodged any complaint with the Police or Panchayat or other relations. The marriage was solemnized in the year 1995 and the incident has happened on 15.3.2004. There is sufficient evidence on record that there were number of houses in the neighbourhood of the house of deceased, but no inquiry has been made from the occupants of these houses why Anjana Devi has ended her life. The prosecution has not led tangible evidence to prove that accused had treated the deceased with cruelty compelling her to commit suicide. Even as per the case of prosecution, complaint was made by Anjana Devi only in the year 2003 when the marriage of her younger brother was solemnized. Anjana Devi used to visit her parents house frequently. The marriage of her younger brother was also attended by her husband. The prosecution has failed to prove that accused has ill-treated Anjana Devi with a view to compel her to commit suicide or to fulfill any illegal demand of the accused.

14. 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 306 and 498-A of the Indian Penal Code. Thus, there is no need to interfere with the well reasoned judgment dated of the learned Sessions Judge, Una.

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

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

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

Cr. Appeal No. 408/2008
Reserved on: April 22, 2016
Decided on: April 25, 2016

Indian Penal Code, 1860- Section 302 and 498A- Marriage of the sister of the complainant was solemnized with the accused- she was admitted in the hospital as she had sustained burn injuries- she gained consciousness and disclosed that accused had sprinkled kerosene on her and had set her on fire- incident was witnessed by her children- she succumbed to injuries- accused was tried and acquitted by the trial Court- held, in appeal that Medical Officer had certified that deceased was not fit to make the statement, therefore, prosecution version that deceased had told the witnesses that accused had put her on fire cannot be believed- prosecution case was not supported by son of the deceased- Medical Officer admitted that in case of pouring of kerosene, whole body will catch fire and there would be burn injuries all over the body - injuries were found only on front portion- the possibility of getting burn injuries while sitting near the kerosene stove cannot be ruled out- trial Court has taken a correct view- appeal dismissed- accused acquitted. (Para-14 and 15)

For the appellant : Mr. Neeraj K. Sharma, Deputy Advocate General.

For the respondent : Mr. Arun Sehgal, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 26.3.2008 rendered by the learned Additional Sessions Judge, Fast Track Court, Kullu, Himachal Pradesh in Sessions Trial No. 26/07, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Sections 302 and 498A IPC, has been acquitted.

2. Case of the prosecution, in a nutshell, is that the complainant Amar Chand was the resident of village Koli-Behar. He was a carpenter. Deceased Nirmala was his sister. Her marriage was solemnised with accused Bhagat Ram about 11 years back in accordance with local customs. A son and a daughter were born out of the wedlock. On 23.1.2007, during night time, complainant came to know that Nirmala had been admitted in Kullu hospital in serious condition. He alongwith his mother went to Kullu hospital. His sister had sustained burn injuries. She was unconscious. Both of them remained in the hospital throughout the night. His sister regained consciousness at about 8 AM in the morning. On questioning, she disclosed to them that on 23.1.2007, at 7.00 PM (sic. 7.00 AM), her husband Bhagat Ram had sprinkled kerosene on her person and thereafter she was set on fire. Deceased Nirmala also disclosed that at the relevant time, her two children were present in the house. Her husband used to take liquor and under the influence of liquor he used to administer them beatings. His sister had sustained burn injuries on her face, abdomen, back, both hands and legs. FIR was lodged. Partially burnt clothes of Nirmala were taken into possession by the police. Nirmala succumbed to burn injuries in the hospital on 6.2.2007. She was subjected to post-mortem examination by Dr. Paljor. Sealed parcels were deposited with police Malkhana Kullu by the police from where same were sent to FSL Junga. As per report, traces of kerosene were found on the pillow, clothes and hair of deceased. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 11 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. He stated that he did not set his wife on fire. He was fetching water from tap outside the house. He heard cries of his son. He rushed inside the kitchen. He extinguished the fire on the person of his wife with pillow. He asked his son Harish to inform his sister about the incident. One witness was examined from the defence side. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. Neeraj K. Sharma, Deputy Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Arun Sehgal, Advocate, has strongly argued that the prosecution has failed to prove case against accused.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Dr. Paljor, Senior Medical Officer, testified that on 23.1.2007 Nirmala was admitted in the hospital with history of having burnt with stove while cooking. She was subjected to medical examination by him. He noticed burn injuries over abdomen, fore arms, face and part of both inner aspect of thigh. According to him, deceased died due to

septicemia and shock. He prepared post-mortem report, Ext. PB. He also admitted in the cross-examination that the burn injuries were not present on backside of the body. He also admitted that he did not mention in the MLC that smell of kerosene was observed on the person of Nirmala. He admitted that if kerosene is poured while sitting, kerosene will spread over whole of the body. He admitted that the burn injuries can be caused if a person sits near a kerosene stove and catches fire.

8. PW-2 Amar Chand is the brother of the deceased. According to him, marriage of deceased and accused was solemnised about 10 years back. On 23.1.2007, he received a telephone message to the effect that his sister Nirmala had been admitted at Kullu hospital and she was suffering from stomach-ache. He alongwith his younger brother came to Kullu Hospital. His sister had been admitted in the hospital with burn injuries. She was not able to speak. His brother had also reached at the hospital. They stayed in the hospital throughout the night. She regained consciousness in the morning at about 8 o'clock. Nirmala disclosed to his mother Pikli Devi in his presence that accused Bhagat Ram had administered beatings to her and thereafter kerosene oil was poured on her body and she was set on fire by the accused. She also disclosed to him and his mother that her son Harish and daughter Nisha were also present in the house when she was burnt. She also disclosed that that accused used to administer her beatings under the influence of liquor. Deceased had suffered burn injuries on her face, hands, abdomen and part of legs. She was not able to speak. He went to the Police Station and reported the matter to the police, on the basis of which FIR was registered. His sister also disclosed in the hospital that the accused demanded Rs.50/- from her and on her refusal to pay Rs.50/- she was subjected to beatings by him. His sister also disclosed that she was dragged to the kitchen by the accused and set on fire. In his cross-examination, he admitted that he reached hospital at 9 AM. Accused was present there. Nirmala talked to his mother. He lodged FIR on 24.1.2007 at 8 AM.

9. PW-3 Sita Devi is the sister-in-law of deceased. As per her, marriage of Nirmala was solemnised with accused Bhagat Ram. Nirmala used to visit their house often and she used to state that she was being subjected to beatings and maltreatment by her husband under the influence of liquor. Accused used to take Nirmala back to his house from their house by threatening that either he would commit suicide or he would cause accident of his three-wheeler in the event of her refusal to return to his house. She had been obeying the dictates of her husband. On 23.1.2007, a telephonic message was received by them that Nirmala had been admitted to the hospital at Kullu and that she was suffering from stomach-ache and was serious. Her husband and her mother-in-law went to Kullu Hospital. She came to the hospital in the morning. Nirmala disclosed to her, her husband and her mother-in-law that kerosene oil had been poured on her body by accused and thereafter she was set on fire by him in the kitchen. Nirmala had also disclosed to them that accused was demanding money from her to purchase liquor. In her cross-examination, she admitted that her statement was recorded by the police. Statement of Nirmala was recorded on 26.1.2007 at about 10/10.30 AM. Doctor was not present when statement was recorded by the police. She also admitted that Nirmala had disclosed that accused Bhagat Ram had extinguished fire on her person.

10. PW-5 Vidya Devi deposed that she worked as a maid servant. She lived near the house of accused. During this year about six months back at 7.00 PM, she was cooking meals in her house. Harish, son of accused came to her house and stated that his mother had got burnt and as such she should come to his house. She found Nirmala with burn injuries on her person lying in the kitchen. Shirt of Nirmala had been burnt and she wrapped shawl on her person. Clothes of Nirmala were emitting kerosene oil smell. Accused

brought Nirmala to hospital on his back. She accompanied them to road and then returned back. In her cross-examination, she admitted that she has seen burn injury on the hands of the accused. She also admitted that Nirmala was having cordial relations with accused.

11. PW-10 Harish is the son of deceased. He was 11 years of age at the time of recording his evidence without oath. According to him, Nirmala was his mother. Accused was his father. About one year back, he was playing with his sister in the verandah of the house. Mother was cooking meals in the kitchen. Father had brought meat. His mother was cooking meat in the kitchen. He heard noise. He went near the door of kitchen and found that his mother had caught fire and he called his father. His father was present near water tap outside the house. His father tried to extinguish the fire with the aid of pillow. He threw water on the person of his mother. His father brought mother to the hospital on his back. His father was weeping. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that money was demanded by his father from the mother. He also denied that father picked up quarrel with his mother and that she was dragged to kitchen by his father. He denied that his mother raised hue and cry and his father had come out of the kitchen to fetch water from tap located outside the house. He admitted that he went inside the kitchen and poured water from a can on the person of his mother. He also admitted that father came inside kitchen and tried to extinguish fire. He also admitted that his father tried to remove clothes from the person of his mother and also asked him to call his aunt.

12. PW-11 SI Mahesh Kumar deposed that he visited the spot. Site plan was prepared. Clothes of deceased were taken into possession. On 26.1.2007, he visited the Regional Hospital, Kullu. Nirmala died in the hospital on 6.2.2007. She was subjected to post-mortem examination. In his cross-examination, he has admitted that he had reached the Regional Hospital, Kullu during day time on 26.1.2007. He had obtained the opinion of MO Regional Hospital, Kullu before recording the statement of Nirmala. He did not remember the name of the medical officer from whom he had obtained the opinion. He admitted that medical officer is present at Regional Hospital, Kullu around the clock. He admitted that there was a court complex situate near Regional Hospital, Kullu.

13. DW-1 Dorje Ram SHO, Police Station, Jogindernagar deposed that he was posted as SI at Police Station, Kullu from August, 2006 to November 2007. On 24.1.2007, he had moved an application before the MO for MLC of Nirmala Devi. He proved Ext. DA.

14. Mr. Neeraj K. Sharma, Deputy Advocate General, has placed strong reliance upon the dying declaration Ext. PJ. Ext. PJ is not signed by the deceased. It is dated 26.1.2007. PW-11 Mahesh Kumar, in his cross-examination deposed that he has recorded the statement of the deceased on 26.1.2007. He had obtained opinion of the MO, Regional Hospital. However, he could not recollect name of the MO from whom he had obtained opinion before recording statement of Nirmala. He also admitted that MO is present in the Regional Hospital Kullu around the clock. In case he had obtained opinion, it could have been placed on record by the prosecution. Deceased was admitted to the hospital on 23.1.2007. Her statement was not recorded on 23, 24 or 25.1.2007. PW-2 Amar Chand has deposed that the deceased has told his mother and him on 24.1.2007 that the accused put her on fire. PW-3 Sita Devi also deposed that the deceased had told on 24.1.2007 that she was set on fire by the accused in the kitchen. In fact, DW-1, Dorje Ram on 24.1.2007 had moved an application to MO seeking opinion, whether Nirmala was fit to make statement. This further has been proved vide Ext. DA. Doctor had given opinion that patient Nirmala was not fit to give statement on 24.1.2007. Thus, the statement made by PW-2 Amar Chand and PW-3 Sita Dev that the deceased has told them that the accused has put her on fire cannot be believed. Doctor has also put endorsement that the deceased was not fit to make

statement. Prosecution case has not been supported by PW-10 Harish, son of deceased. According to him, he was playing outside verandah. Mother was cooking meals in the kitchen. He heard noise. He went near the door and saw that his mother had caught fire. He called his father. He was outside near water tap. He tried to extinguish fire with the aid of pillow. He threw water on the person of mother. PW-3 Sita Devi has also deposed that Nirmala disclosed to her that Bhagat Ram had extinguished fire with the aid of water. PW-5 Vidya Devi has also deposed in cross-examination that she has seen burn injury on the hands of accused Bhagat Ram. PW-10 Harish has also deposed that father has taken his mother to the hospital on his back and was weeping. Deceased has received burn injuries as per post-mortem report Ext. PB, over forearms, legs and inner aspect of thighs. In his cross-examination, PW-1 Dr. Paljor admitted that if kerosene is poured from head side it would spread on whole of the body. If that is so, she would have received burn injury all over the body. She has received injuries only on front portion of her body.

15. Thus, the learned trial Court has come to a right conclusion that the possibility of deceased getting burn injuries accidentally while sitting near kerosene stove can also not be ruled out. PW-10 Harish has denied specifically that he had been tutored by his grand-mother to depose falsely in the Court.

16. In view of the discussion and analysis made herein above, the appeal has no merit and the same is dismissed. Bail bonds of accused are discharged.

All pending applications are also disposed of.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh ..... Appellant
Versus
Desh Raj and another ..... Respondents

Cr. Appeal No. 4222/2013
Reserved on: April 23, 2016
Decided on: April 25, 2016

N.D.P.S. Act, 1985- Section 20- Accused were found in possession of 1.5 kg. of charas- they were tried and acquitted by the trial Court- held, in appeal that accused were apprehended at busy place- no independent witness was associated – personal search of the accused was conducted but no option to be searched before Gazetted Officer or Magistrate was given- case of the prosecution was not proved- in these circumstances, accused were rightly acquitted by the trial Court- appeal dismissed. (Para-16 to 19)

Case referred:
State of Rajasthan v. Parmanand (2014) 5 SCC 345

For the appellant : Mr. V.S. Chauhan, Additional Advocate General.
For the respondents : Mr. Lovneesh Kanwar, Legal Aid Counsel, for respondent No.1

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 22.1.2013 rendered by the learned Special Judge (I), Kangra at Dharamshala (HP) in Sessions Case No. 10-K/VII-2009, whereby the respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offence under Sections 20 (Act No. 61-85) of the Narcotic Drugs & Psychotropic Substances Act, 1985, have been acquitted.

2. Case of the prosecution, in a nutshell, is that on 3.7.2008, ASI Vijay Kumar alongwith other police officials was on patrolling duty at new bus stand, Kangra and on the intervening night of 3.7.2008 and 4.7.2008, at 1.15 AM, they noticed two persons carrying a bag by holding its straps from each side. On seeing the police, they attempted to escape but were overpowered. On inquiry, they disclosed their identity. Bag carried by them was searched. Inside the bag, beneath the clothes, one white coloured polythene envelope wrapped in another envelope, green in colour was found and on checking the said envelope, *Charas* in the shape of sticks was found. It weighed 1.500 kg. From the recovered *Charas*, two samples of 25 grams each were separated and put inside a cloth parcel and sealed with two seals each bearing impression 'K'. Remaining residual quantity weighing 1.450 kg was put in the same polythene envelope and then put in a cloth parcel and sealed with four seal impressions of 'K'. Sample impression Ext. PW-14/A was taken on separate cloth piece. Columns No. 1 to 8 of NCB form were filled and ink impression of seal 'K' was also taken. Special report was prepared and sent to Superintendent of Police, Kangra. Case property was handed over to SI Piar Chand for resealing and safe custody. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 14 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. V.S. Chauhan, Additional Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Lovneesh Kanwar, Advocate, appointed as legal aid counsel, in this case, has supported Judgment dated 22.1.2013.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Piar Chand deposed that he was posted as SI/Additional SHO, Police Station, Kangra. On 3.7.2008, he received a *Rukka* sent by the then Inspector/ SHO Surinder Sharma. On the basis of same, FIR was registered. He resealed three parcels with seal 'H'. He also filled in columns No. 9 to 11 of the NCB form.

8. PW-2 ASI Vijay Kumar testified that he was posted as an Investigating Officer at Police Station, Kangra. On 3.7.2008, he alongwith other police party proceeded from Police Station, Kangra under the supervision of Inspector/ SHO Surinder Sharma, for patrolling in Government Vehicle. At about 1.15 AM, on the intervening night of 3.7.2008 and 4.7.2008, they were patrolling from new bus stand Kangra towards Kangra city. They spotted two boys moving on road near Polytechnic Kangra. They were carrying a bag jointly. They attempted to run away after noticing police vehicle. They were overpowered. Their identity was ascertained. Search of bag carried by accused was conducted in his presence. One green coloured polythene was found in the bag in which *Charas* in the shape of sticks

was recovered. It weighed 1.500 kg. Two samples of 25 grams each were separated from the total *Charas* and sealed in two different parcels and sealed with seal impressions of 'K'. Remaining *Charas* alongwith polythene bag was also sealed with four impressions of seal 'K'. Other articles were also sealed. Case property was produced by the learned Public Prosecutor during the examination of PW-2 Vijay Kumar. In his cross-examination, he has admitted that the Polytechnic was in Kangra town. They apprehended accused in front of the Polytechnic at about 1.15 AM on the intervening night of 3/4.7.2008. There were Chowkidars in the Polytechnic Kangra. They did not associate any Chowkidar of Polytechnic. At a distance of about 100-200 metres, there was a PWD office. He did not know whether there were Chowkidars available during night or not. He did not try to associate witnesses from the Polytechnic or from the PWD office nor he called any Chowkidar to witness the recovery. They did not call any Chowkidar from Kangra market. He further admitted that on coming to know that there was *Charas* in the poly bag, IO did not give any option under Section 50 of the Act. At that time, personal search of accused was conducted by the IO and after that poly bag of accused Ext. P5 was opened and *Charas* in the shape of sticks was found. They had IO kit bag. During night hours no witness was present on the taxi stand at bus stand or near the Polytechnic taxi stand. No taxi driver met them on the taxi stand. They did not visit taxi stand to associate any witness. Bus stand was 500 metres from the Polytechnic. He also admitted that a large number of taxis are available on the bus stand. He also admitted that taxi drivers are also available on the bus stand. Seal 'K' was of Surinder Sharma. It was made of iron. Seal after use was handed over to him. He was also posted in the same Police Station. This seal had been lost by him about a month earlier. SHO did not demand any seal from him till that date. NCB form Ext. PW-2/C was prepared on the spot by the IO. First part of NCB form was prepared by Surinder Sharma, SHO Kangra, in his presence.

9. PW-3 HHC Jagdev Singh deposed the manner in which accused were apprehended, *Charas* was recovered. In his cross-examination, he has admitted that the SHO asked both the accused that he had a suspicion that they might be carrying contraband and intended to take their search. No consent memo to this effect was reduced into writing. IO Kit was in possession of IO, which was of leather. Seal 'K' was of iron. They did not associate any independent witness because none was available there. They remained on the spot upto 5.30 AM. No police personnel was sent by the IO to procure the presence of any independent witness during their stay at the spot. They did not try to associate Chowkidar of Polytechnic. Distance between bus stand and Polytechnic was ½ km. There was a taxi stand at the bus stand premises. He admitted that drivers used to remain present in their respective vehicles. He also admitted that the taxi drivers were also not associated by them in the investigation.

10. PW-4 Constable Purshottam Dass also deposed the manner in which accused were apprehended and search, sealing and seizure proceedings were completed at the spot. He admitted in his cross-examination that new bus stand was at a distance of 100-150 metres from the Polytechnic. He also admitted that there was a taxi stand at the new bus stand Kangra and drivers used to be available with their taxis. Since it was night time, therefore, no driver was available. Volunteered that SHO had gone to procure presence of independent witnesses at New Bus Stand but he returned alone. SHO told them that he could not procure any independent witness at new bus stand. The SHO had left alone to procure the independent witnesses towards new bus stand Kangra. He had gone in the vehicle. The old bus stand was at a distance of 500-600 metres from the place of recovery. He also admitted that there was a taxi stand at Tehsil Chowk.

11. PW-5 Constable Narinder Singh also deposed the manner in which accused were apprehended. In his cross-examination, he has admitted that Purshottam had taken *Rukka* and case property to the Police Station. He also admitted that a large number of vehicles pass through the place where proceedings were conducted.

12. PW-6 Constable Kuldeep Singh deposed that he was posted as MHC Police Station, Kangra. He had brought the original record. As per Malkhana Register on 3.7.2008, at 6.30 AM, Inspector Surinder Sharma deposited one bag Ext. P9. The bag contained daily use articles, ten in number, which were Ext. P10. SHO also deposited with him personal search articles of both the accused persons which were taken into possession after arrest of the accused persons. He entered the case property at Sr. No. 124/08 in the Malkhana Register. On the same morning, SI Piar Chand at 7.10 AM deposited with him bulk parcel of *Charas* Ext. P1, two sample parcels, Ext. P2 and Ext. P3, which were sealed with seals 'K' and 'H'. He also deposited with him two NCB forms and specimen of both the seals. He entered the case property at Sr. No. 125/08. Same day, vide RC No. 180/08, he dispatched one sample parcel, sample seal, copy of FIR, copy of seizure memo and NCB form to FSL Junga for chemical analysis through HHC Piar Chand. In his cross-examination, he has admitted that original seal was not deposited with him.

13. PW-8 HHC Piar Chand deposed that on 3.7.2008, MHC Kuldeep Singh handed over to him one parcel allegedly containing sample of *Charas* which was duly sealed with seals 'K' and 'H'. Samples of both the seals, NCB form, copy of FIR and seizure memo were also handed over to him vide RC No. 180/08 with the direction to hand over said articles at FSL Junga. He deposited the articles in the office of Chemical Analyst Junga on 4.7.2008.

14. PW-10 Dalip Kumar deposed that he was working as a stop-gap MHC on 17.11.2010. He had brought Malkhana Register and Road Certificate Book pertaining to the case. He dispatched sample parcel which had not been already sent to FSL and the parcel of bulk *Charas,* both were sealed with seals 'K' and 'H', the bulk was sealed with four seal impressions of 'K' and two seal impressions of 'H' and sample parcel was sealed with two impressions each of 'K' and 'H'. He sent the sample parcel and bulk *Charas* alongwith copy of FIR, samples of both the seals and other documents to FSL Junga through HHC Narottam Singh No. 434 vide RC No. 290/10 dated 17.11.2010. In his cross-examination, he has admitted that he did not know whether NCB form was sent by him or not with the bulk parcel and sample parcels on 17.11.2010. He also admitted that there was no mention qua NCB form in RC vide which he sent the parcels.

15. PW-14 Dy.SP. Surinder Sharma deposed that on 2.7.2008, he went to the spot. Recovery was effected from the bag. Codal formalities were completed. *Rukka* Ext. PW-4/A was written and sent for the registration of case through Purshottam Dass. In his cross-examination, he has admitted that he filled columns No. 1 to 8 of NCB form with same pen and ink. He admitted that there was Polytechnic in the close vicinity of the place of recovery. He admitted that recovery was made on Kangra-Shimla highway.

16. Accused were apprehended at 1.15 AM on the intervening night of 3/4.7.2008 on Kangra-Shimla Highway. PW-2 Vijay Kumar has categorically deposed that the Polytechnic was in Kangra town. Accused were apprehended in front of the Polytechnic. Police has not joined any Chowkidar from Polytechnic. There was a PWD office also. Police did not join any Chowkidar from PWD office. PW-2 Vijay Kumar admitted that there were a large number of taxis available at bus stand. There were taxi drivers available. However, fact of the matter is that, despite availability, no independent witnesses were joined. Similarly, PW-3 Jagdev Singh also admitted that the distance between bus stand and Polytechnic was

½ kms. There was taxi stand at bus stand where taxi drivers used to remain in their vehicles. Taxi drivers were not associated in the investigation. PW-4 Constable Purshottam Dass also deposed that the new bus stand was at a distance of 100-150 metres from the Polytechnic. There was taxi stand at new bus stand Kangra. SHO went in search of independent witnesses but no independent witnesses were available at bus stand. He has also admitted that nobody has visited bus stand to procure independent witnesses. He also admitted that it dawns at 4 AM in the month of July. PW-5 Narinder Singh also admitted that a large number of vehicles pass through the place where proceedings were conducted. PW-14 Surinder Sharma has also admitted that place of recovery was on Kangra-Shimla Highway. It was neither a secluded place nor an isolated place. Police should have joined independent witnesses from either bus stand or Chowkidar of Polytechnic or PWD office. Taxis were also available and it has come on record that taxi drivers used to sleep in their vehicles. Many vehicles have passed through the place where recovery was effected. Police could easily request owners or passengers of the vehicles to become witnesses. PW-2 ASI Vijay Kumar deposed that nobody has gone to find out independent witness. PW-3 HHC Jagdev Singh has categorically testified in his examination-in-chief that no police personnel was sent by the IO to procure presence of independent witnesses. PW-4 Constable Purshottam Dass deposed that the SHO had gone to new bus stand in the vehicle to procure independent witnesses. However, PW-14 Surinder Sharma, the then SHO, has not deposed that he had gone to procure presence of independent witnesses.

17. PW-2 ASI Vijay Kumar has categorically deposed in his cross-examination that when he came to know that there was *Charas* in the poly bag, IO did not give option under Section 50 of the Act. At that time, personal search of the accused was conducted by the IO and after that polythene bag was opened. *Charas* in the shape of sticks was found. Similarly, PW-3 Jagdev Singh has deposed that SHO asked both the accused that he had a suspicion that they might be carrying contraband and intended to take their search. No consent memo to this effect was reduced into writing. It was not necessary for the police to conduct personal search of the accused since contraband was recovered from the bag but despite that, as per statements of PW-2 ASI Vijay Kumar and PW-3 Jagdev Singh, personal search of the accused was carried out. Neither the accused were apprised of their legal right to be searched before a gazetted officer or a Magistrate nor any consent memo was prepared. Thus there is violation of mandatory provisions of Section 50 of the Act.

18. 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."

19. Thus, the prosecution has failed to prove case under Section 20 of the Narcotic Drugs & Psychotropic Substances Act, 1985 against the accused person. There is no occasion for us to interfere with the well reasoned judgment of the learned trial Court.

20. In view of the discussion and analysis made herein above, the appeal has no merit and the same is dismissed. Bail bonds of accused are discharged.

All pending applications are also disposed of.

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

State of Himachal Pradesh ..... Appellant
Versus
Nirat Singh and another .....Respondents

Cr. Appeal No. 655/2008
Reserved on: April 22, 2016
Decided on: April 25, 2016

Indian Penal Code, 1860- Section 324, 307, 454, 392, 397 read with Section 34- Complainant had withdrawn Rs. 75,000/- and had kept this amount in his room- accused came and gave beatings to him- he became unconscious- when he regained consciousness, he found that his money was missing- accused N surrendered before the police and handed over Rs. 54,440/- a sum of Rs.20,708/- was deposited by D- accused also confessed about giving beatings and running away with money- accused were tried and acquitted by the trial Court- held, in appeal that name of the accused were not mentioned in FIR, therefore, it cannot be believed that identity of accused was known to the witnesses- Medical Officer had noted simple injuries and recovery was not proved- accused could not be connected with the commission of crime- trial Court had rightly dismissed the appeal. (Para-22 to 25)

For the appellant : Mr. Neeraj K. Sharma, Deputy Advocate General.
For the respondents : Mr. Rajiv Jiwan, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 17.7.2008 rendered by learned Sessions Judge, Kullu, HP in Sessions Trial No. 2/05-29/06, whereby respondents-accused (hereinafter referred to as 'accused' for convenience sake), who were charged with and tried for offences under Sections 324, 307, 454, 392, 397 read with Section 34 IPC, have been acquitted.

2. Case of the prosecution, in a nutshell, is that Chet Ram who was posted as a Clerk in Government High School, Shangar was carrying cash of Rs.75,000/- in his bag. He had withdrawn this amount from Punjab National Bank for disbursing salary of the staff of his school and same had been kept by him at his quarter in village Lohat. While he was present in the courtyard of his house, he saw Nirat and Devender alongwith another boy Raju crossing through the footpath adjacent to his house. After sometime, while he was washing utensils under the tap in the courtyard of his house, all the three accused persons put a cloth on his face and gave him beatings, due to which he became unconscious and he was thrown in the bushes. The complainant Chet Ram regained consciousness after some time. He went to the house of one Sarnu which was at a distance of about half a kilometre from his house and told him about the occurrence and requested him to take him to the Headmaster of the school. He was then taken to the residence of the Headmaster who made complaint to the police. Chet Ram was taken to the PHC Sainj where he was medically examined. Accused Nirat Singh expressed his desire to one Lila Dhar Pradhan to surrender before the police and he was taken to Police Station where he surrendered and also handed over Rs.54,440/- being part of looted amount. Later, a sum of Rs.20,708/- was deposited by Devender Singh accused. They confessed to Lila Dhar Pradhan about giving beatings to

Chet Ram and decamped with the money. Accused also made disclosure statement and got recovered some other articles which had been taken from the house of complainant. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 17 witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. They pleaded innocence. One witness was also examined from the defence side. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. Neeraj K. Sharma, Deputy Advocate General, has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Rajiv Jiwan, Advocate, has strongly argued that the prosecution has failed to prove case against accused.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Dr. V.P. Negi deposed that the injured was brought with alleged history of beating. He found following injuries on the person of complainant:

1. There was transverse lacerated wound on temporal region with clotted blood present over the scalp hair, face, neck and chest region. The wound was measuring 3.4 cm long x 0.3 cm in width and 0.3 cm deep.
2. There was lacerated wound in L shape over temporal region with clotted blood present on the injury. The injury was measuring 10.2 cm long, 0.4 cm in width and 0.3 cm deep.
3. There was lacerated wound over right parital region running obliquely with blood present on scalp hair. The injury was 1.7 cm long x 0.2 cm wide and 0.2 cm deep.
4. There was multiple abrasion on right chin and ankle anteriorally.

8. PW-1 Dr. V.P. Negi, issued MLC Ext. PW-1/B. According to him, injuries, specifically injuries No. 1 to 3 were sufficient to cause death in ordinary course of nature. Volunteered that the victim had not been given timely medical aid. Injuries No.1 to 3 were on vital part of body. In his cross-examination, he has admitted that by 'sharp weapon' he meant sharp edged wooden piece as a splinter of wood. It could be *Drat*, knife etc. Injury No.1 singularly was not sufficient to cause death. He has not given opinion that injury No.2 alone was sufficient to cause death. He did not testify that the nature of injury was simple. He further testified that the nature of injury No. 1 was simple, injury No.2 was also simple. Injuries No. 3 and 4 were also simple. He deposed in his cross-examination that nature of all the four injuries mentioned in MLC Ext. PW-1/B was simple in nature. He was re-examined by the Public Prosecutor. He then stated that injury No. 2 was sufficient to cause death of injured Chet Ram and injury was grievous in nature.

9. PW-2 Chet Ram testified that he was authorised and used to draw the salary and other cash for the school staff from Punjab National Bank Banjar by virtue of being Clerk. In the beginning, he used to reside in the rented quarter in the house of Narain Singh in village Dhara and for the last three years, prior to the occurrence, he was residing in the rented accommodation in the house of Lila Dhar, Pradhan at place Lohat. Nearest house located from said accommodation is at a distance of ½ km. There was no house in the vicinity. On 1.6.2004, he left his quarter at 7 AM for collecting salary and other money from

Punjab National Bank Banjar. When he left to the bank, he was having Rs.4,000/- with him of the scholarship of the students which was given to him by the Headmaster alongwith Challan to be deposited in the Bank after getting it passed from the Treasury. He carried pay bills and said cash in a bag. He reached Banjar bus stand at 1.30 PM. He presented the pay bills and authority letter given to him and drew an amount of Rs.70,748/-. He kept the amount in the bag and carried cash. He reached late in his quarter between 7.30 PM to 7.45 PM. He was not feeling well. He had to leave for the school after some time. In between, he kept the bag in the almirah and took water. Before taking lime water he went to bring water from the tap in a jug. The tap is located by the side of courtyard of his residence. During the said time, when he had come out from his quarter, after keeping the cash bag in almirah, he had seen Raju, Nirat and Davinder passing through the path adjoining to his residence. All of them were proceeding towards village Madana and High School Shangar. After taking lime water, he proceeded to the tap to wash jug, glass and knife. After reaching the tap, he cleaned the glass. When he started cleaning the jug and bent down to clean the jug, cloth was put on his head and face. He tried to remove the said cloth and in between the scuffle he saw that all the three accused persons were present. Thereafter, they inflicted injuries on his person. He fell unconscious. He regained consciousness after some time and he found himself in the bushes near the tap. On regaining consciousness, he came out of bushes and went to the house of Sarnu which was the nearest house from his residence which was about half a kilometre. He fell down in the verandah. He was lifted to the residence of Headmaster Jagjit Singh of Government High School, Shangar. In the meantime, Headmaster and other staff members reached there. They noted down his statement. His residence remained open. Headmaster asked Nainu Ram, Chowkidar to go and lock his residence. Arbind, Baldev Shastri and Prem Chand, Lab. Technician had reached there. He was lifted to Neoli. ASI Biri Singh Thakur met them at Neoli. From Neoli he was taken to Hospital at Sainj. He admitted his signatures on MLC Ext. PW-1/B. On the following day i.e. 2.6.2004, he accompanied the police to the spot. Quarter was opened. The bag in which cash was there was not found in the almirah. On 2.6.2004, he disclosed the names of accused to the police. Names and addresses of accused were disclosed by him to the police because the Headmaster and the villagers had assured him of his safety and change of his residence in the locality. After getting said assurance he disclosed the names and identity of the accused. In his cross-examination, he deposed that his first statement was recorded by the police at Sainj in the Hospital vide Ext. PW-2/B. Statement was recorded by the police after first aid was given. It was recorded in the morning hours. He had not stated to the police in his first statement that he knew the three boys namely Raju, Nirat and Davinder who passed from the footpath and later on they put a cloth over his head and face and when he scuffled and removed the cloth, he identified all the three accused. Volunteered that he had not disclosed their names and identity out of fear. He had asked Sarnu to take him to the Headmaster's house.

10. PW-3 Jagdish Chand deposed that in the year 2004, PW-2 was posted as Clerk in Government High School, Shangar. He had authorised PW-2 Chet Ram Clerk of his school to collect the salary of the staff members and other dues and also to deposit any amount if required in the bank and to get the *Challan* etc. passed from the Treasury concerned. For the month of May, 2004, he had authorised PW-2 to collect the salary of the staff of GHS Shangar from PNB Banjar. On 1.6.2004, at abut 8.30 PM, the villagers lifted PW-2 Chet Ram and brought to him. PW-2 Chet Ram had suffered injuries on his head and was bleeding profusely. He had talked to Chet Ram. He disclosed that the salary had been taken. He stated that three boys had attacked him. He called his staff members. Villagers also came on the spot.

11. PW-6 Lila Dhar deposed that he was ex Pradhan of Gram Panchayat, Shangar. He was not knowing third accused in the case i.e. Raj Kumar. He never met Nirat Singh and Raj Kumar after the occurrence nor did they make any disclosure statement before him. He never took Nirat Singh to Police Post Sainj nor did he produce stolen money to the police in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that the accused Nirat Singh produced currency notes of Rs.54,440/- to the police out of stolen money. (Confronted with portion B to B of his statement Mark X-2, wherein it is so recorded). He also denied that currency notes were sealed in his presence with seal 'X'. However, he identified his signatures on the parcels. He also denied that the seal was handed over to him.

12. PW-7 Prem Singh deposed that he reached the residence of Headmaster Jagjit Singh at 7.45 PM. When he was proceeding to the residence of PW-3, he found PW-2 Chet Ram was lying near the residence of PW-3 on the road and there were injuries on his head, which were bleeding. PW-3, Arbind Sharma, Baldev Chand Shastri and 2-3 villagers were present there with PW-2 Chet Ram. PW-3 Jagjit Singh stated to him that PW-2 Chet Ram was beaten up by somebody hence he asked him to go to the school and telephone the Police Post Sanij. On 2.6.2004 at about 2 PM they started from Sainj alongwith police, PW-2 Chet Ram injured, two other teachers and went to the residence of Chet Ram in village Lohat. Nainu Ram handed over key of the quarter. The lock was unlocked. No money or bag was found inside the quarter.

13. PW-8 Tek Singh deposed that on 9.6.2004 none of the accused including Nirat Ram made any statement to the police in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor.

14. PW-9 Hari Chand deposed that no statement was made by Nirat Singh to the police on 9.6.2004 in his presence. He was also declared hostile and cross-examined by the learned Public Prosecutor.

15. PW-10 Nainu Ram deposed that on 1.6.2004 at about 9/10 PM, Headmaster Jagjit Singh called him to his residence. He found Chet Ram injured there who was unconscious. Headmaster ordered him to lock the quarter of PW-2 Chet Ram.

16. PW-11 HC Yoginder Pal deposed that accused Davinder produced currency notes amounting to Rs.20,708/-. He deposited the said money in the Malkhana of Police Station, Banjar.

17. PW-12 Pankaj Kumar deposed that he never visited Police Post Sanij. No accused was produced in his presence in the Police Post Sainj during morning hours on 13.5.2005 nor any cash was produced by the accused in the police post. He was declared hostile and cross-examined by the learned Public Prosecutor.

18. PW-13 Moti Ram Palsra deposed that accused Davinder was not known to him. He was not produced in the Police Post Sainj on 13.5.2005 nor had he produced any money to the Police. He was also declared hostile and cross-examined by the learned Public Prosecutor.

19. PW-16 Achhar Singh deposed that he was running a shop in the market at Sainj. On 6.6.2004, Lila Dhar, ex-Pradhan Gram Panchayat, Shangar came to him. He was having cash with him and it was lying in the bag. He told him that money was to be given by him to the police. He accompanied him to the police post Sainj. He took out the money from the bag in the Police Post and the case of Rs.54,440/- was handed over by him to the ASI in-charge at that time. Other police officials were also present at that time. Nirat Singh was not

known to him. He did not know that the accused in the Court was Nirat Singh. Nirat Singh did not hand over currency notes worth Rs.54,440/- to the police in this presence. He was declared hostile and cross-examined by the learned Public Prosecutor.

20. PW-17 ASI Biri Singh deposed that at around 12.30 midnight he recorded statement under Section 154 CrPC of Chet Ram which is Ext. PW-2/B. It was sent to the Police Station, Banjar for registration of case. Both the accused surrendered in the Police Post in the presence of Lila Dhar on 6.6.2004. Accused Nirat Singh produced currency notes of Rs.54,440/- before him in the presence of Lila Dhar and Achhar Singh. These were taken into possession vide memo Ext. PW-6/B On 9.6.2004, he, accompanied by accused and Constable Kuldip left for village Gharali, where accused Nirat had concealed the money bag. The accused made disclosure statement Ext. PW-8/A in the presence of Tek Singh and Hari Chand. In the jungle bag was taken out by him concealed beneath a stone where it was hidden by him. It was 6 PM by that time. Thereafter, he came back to his house.

21. DW-1 Sarnu was not produced by the prosecution but he was cited as defence witness by the accused. DW-1 Sarnu has given a new dimension to the case by deposing that PW-2 Chet Ram came to his house and told him that he had fallen and he should accompany him to the school where he was working. He went to the school alongwith Chet Ram

22. Case of the prosecution, precisely, is that PW-2 Chet Ram has taken out money from the PNB. Money was to be disbursed towards salary. PW-2 Chet Ram has taken this money to his house. He went to his house. In the meantime, accused came on the spot and covered his face, gave beatings and pushed him down the bushes. He regained conscious and went to the house of Headmaster where PW-3 Jagjit Singh was also present. PW-2 Chet Ram when appeared in the Court deposed that he has seen the accused near his house who overpowered him and after inflicting injuries on his person, have decamped with the money. However, in Ext. PW-2/B, names of accused have not been mentioned. If he knew all the accused, their names should have been specifically mentioned in Ext. PW-2/B. Reason given by him that he was under fear, can not be believed. PW-2 Chet Ram deposed that he was pushed into the bushes. He regained conscious after some time and went to the house of Sarnu. House of Sarnu from the house of complainant was at a distance of about ½ kms. He should have gone to his house to see whether cash was intact instead of going to the house of Sarnu.

23. PW-1 Dr. V.P. Negi has proved MLC Ext. PW-1/B. According to him, injuries especially injuries No. 1 to 3 were sufficient to cause death in ordinary course of nature. However, in his cross-examination, he has admitted that all the four injuries mentioned in Ext. PW-1/B were simple. He also admitted that as per MLC, age of injury was more than 6 hours. He opined the nature of injury as grievous because injuries No.1 to 3 were on vital part of body i.e. scalp. He was re-examined and he stated that injury No. 2 singularly was sufficient to cause death of injured Chet Ram. In case injuries were grievous, he should have sent PW-2 Chet Ram for x-ray examination including of the skull. Injuries were superficial in nature. He should have explained categorically how the simple ijuries could have caused death of Chet Ram.

24. Case of the prosecution is also that Nirat Singh produced a sum of Rs.54,440/- before the police in the presence of Lila Dhar and Achhar singh. These witnesses have denied that the money was produced before the Police in their presence. Witnesses of recovery of bag at the instance of Nirat Singh have also disowned their statements and were declared hostile.

25. Now, so far as recovery of Rs.20,708/- is concerned, both the witnesses of recovery did not support the case of the prosecution. They were also declared hostile, as noticed herein above. Statement of Chet Ram was recorded under Section 154 CrPC vide Ext. PW-2/B when he was in the company of Headmaster. Had there been any threat, he would have disclosed about the same to the persons present on the spot. Rather, PW-2, Chet Ram has not seen the accused who had given beatings to him. Thus, the accused could not be connected with the commission of crime. There is no occasion for us to interfere with the sufficiently reasoned judgment of the learned trial Court.

26. In view of the discussion and analysis made herein above, the appeal has no merit and the same is dismissed. Bail bonds of accused are discharged.

All pending applications are also disposed of.

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

State of Himachal Pradesh ..... Appellant
Versus
Raj Kumar .....Respondent

Cr. Appeal No. 417/2008
Reserved on: April 21, 2016
Decided on: April 25, 2016

Indian Penal Code, 1860- Section 306- Deceased was married to the accused- accused maltreated the deceased- deceased had attempted to commit suicide earlier- she was sent to her matrimonial home at the instance of the accused - accused had coerced the deceased to prepare meals for him and his friends but there was no ration in the home- accused started abusing and beating the deceased on which she poured kerosene upon herself and set herself on fire- PW-10 and 11 stated that they had taken their meals in the house of the accused- they denied the prosecution version that there was no ration and accused had given beatings to the deceased- other prosecution witnesses had not supported the prosecution case and were declared hostile- proximate cause for taking life was not established- harassment of wife by husband or in-laws does not attract Section 306- prosecution has to prove something more than that- trial Court had taken a right view- appeal dismissed. (Para-16 to 20)

Case referred:
Bhagwan Das v. Kartar Singh and ors, AIR 2007 SC 2045

For the appellant : Mr. Neeraj K. Sharma, Deputy Advocate General.
For the respondent : Mr. Virender Thakur, Advocate.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 28.2.2008 rendered by the learned Additional Sessions Judge, Solan, District Solan, Himachal Pradesh in

Sessions Trial No. 14-S/7 of 2007, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Section 306 IPC, has been acquitted.

2. Case of the prosecution, in a nutshell, is that deceased Chanda who was the wife of accused Raj Kumar had been married about 5 years back. Accused was residing at Navgaon near Darla Maur and was a tenant of one Sohan Lal (PW-4). On 3.7.2007 at about 6.50 PM, ASI Sohan Lal (PW-12) received information from IGMC Shimla. He deputed HC Santokh Singh to proceed to Shimla on 4.7.2007. ASI Sohan Lal took over the investigation and recorded the statement of the father of the deceased, namely Daya Ram vide Ext. PW-1/A. On the basis of said statement, he prepared *Rukka* Ext. PW-7/A and sent the same through Constable Ashok Kumar to the Police Station, Darlaghat. FIR Ext. PW-7/B was recorded. Deceased Chanda had died by the time and as such, after preparation of inquest papers, Ext. PW-1/B and Ext. PW-1/C, he sent the dead body for post-mortem. Post-mortem report is Ext. PW-6/B. According to the averments made in the statement under Section 154 CrPC, accused from the inception of marriage had been maltreating his daughter and often used to resort to beatings without any rhyme or reason. Deceased was stated to have even attempted suicide earlier but due to his insistence she had been sent to her matrimonial house. As per the statement of the complainant, on 2.7.2007, about 2-3 guests had come to the house of the accused at Navgaon and he had coerced the deceased Chanda to prepare meals for them. But since their was no ration in the house she could not oblige the demand so made, which resulted in the accused hurling abuses and giving beatings to her. On this, the deceased had bolted herself in the kitchen and after sprinkling kerosene on herself had set herself ablaze. Because of burning she had been shifted to IGMC Shimla on 3.7.2007, where she had died. He came to know about the incident on 3.7.2007 at night that the deceased Chanda had died due to the ill-treatment meted out to her by the accused Raj Kumar. Case property was taken into possession and sent to FSL Junga. Reports of FSL Junga are Ext. PW-12/D and Ext. PW-12/E. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 13 witnesses to prove its case against the accused. Accused was also examined under Section 313 CrPC. He pleaded innocence. Learned trial Court acquitted the accused. Hence, this appeal.

4. Mr. Neeraj K. Sharma, Deputy Advocate General has vehemently argued that the prosecution has proved its case against the accused.

5. Mr. Virender Thakur, Advocate, has supported the judgment dated 28.2.2008.

6. We have heard the learned counsel for the parties and also gone through the record carefully.

7. PW-1 Daya Ram is the father of the deceased. He deposed that he had five daughters and two sons. Out of them four daughters had been married. Chanda, the deceased, was fourth daughter and was married to accused Raj Kumar about 5 years back. Accused was residing at Navgaon near Darla Mour. He was tenant of one Sohan Lal. Raj Kumar worked as a contractor. Initially, the relations between the accused and deceased were cordial. But later, accused kept changing his residence and whenever his daughter visited him, she used to complain that the accused is maltreating her. Accused did not use to give ration to the deceased. On 2.7.2007, his daughter had called him at about 9.00 AM and complained that the labour of the accused was pestering her for payments and accused was at rest house Jwalamukhi. She also told that accused had taken payments from the

contractor but was not paying to the labourers. He assured her that Raj Kumar would come back and she need not bother herself. Later, when he tried to contact Raj Kumar, he had switched off his mobile. On 3.7.2007, brother of accused informed telephonically at about 2.30 PM that Chanda is admitted at IGMC Shimla on account of burn injuries. Accused initially told him that he was far away and as such could not say as to what had happened to Chanda but since the brother of accused had already told that Chanda was in the hospital, he again contacted the accused over the telephone and it was only third time that accused told him that he was at Shimla and Chanda had sustained burn injuries. Accused told him on 3.7.2007 at 4.00 PM that Chanda was well but, later on, after 15 minutes when he again inquired from the accused, he told that Chanda had passed away. He managed to reach Darlaghat by 7 PM and went to Police Station, Darlaghat. On the next day, they went to Shimla. He was accompanied by his wife, daughters, sons-in-law and his sons. Chanda had died due to burn injuries. Police recorded his statement Ext. PW-1/A. Cremation took place at Shimla. They went to Navgaon, the place where deceased was residing. Case property was taken into possession vide seizure memo Ext. PW-1/E. In his cross-examination, he admitted that he has not given any statement to the police that his daughter had told him on telephone on 2.7.2007 that the labourers were pestering her for payments. He told the police that accused did not use to give ration to the deceased. (But it is not so recorded in the statement under Section 154 CrPC). He admitted that Raj Kumar had taken Chanda to the Hospital. He had not made any complaint to the police or anybody that the accused did not use to provide ration to the deceased. He also admitted that he has not told the police that the accused had switched off his mobile phone on 3.7.2007.

8. PW-2 Sheetla is the mother of the deceased. She deposed that the deceased used to reside at Navgaon near Darla Mour. They had started living at Navgaon hardly ten days prior to the incident. For about 2 years, accused and the deceased were happy. Thereafter, accused Raj Kumar started harassing and maltreating the deceased. He used to give beatings to the deceased. Her daughter used to complain about his behaviour when she used to come to her parental house. In her cross-examination, she admitted that she has not reported about the bickering between the deceased and the accused to the police, Panchayat or any relative. She also admitted that for two years of marriage, Raj Kumar used to love his wife Chanda.

9. PW-3 Pawan Kumar is the brother of the deceased. According to him, accused used to fight with his sister and harass her at night after 10-11 PM. At 12.00 on 2.7.2007, he had called on the mobile of Raj Kumar to talk to his sister but he informed him that he was at Jwalaji and will return back in the evening. When he tried to contact him in the evening, his mobile was switched off. He tried to contact accused on 3.7.2007 but his phone did not respond. He received a call on 3.7.2007 at 4.00 PM that his sister had expired. He joined his parents at Malokhar and thereafter went to Shimla. They went to Shimla on the same day and by that time, deceased had died. He had seen the dead body.

10. PW-4 Sohan Lal testified that Raj Kumar was his tenant. He had rented two rooms to accused on 2.6.2007. He and his wife alongwith their son used to reside there. He was in his house on the day of occurrence. On 2.7.2007 at about 10.30 PM, he heard hue and cry. Since he was asleep, he got up and saw the deceased in the lap of accused near the Mandir which was adjacent to his house. Deceased was in flames and had been burnt badly. She was thereafter sent to the hospital in a vehicle. Deceased was talking at that time. She did not say as to by whom she had been burnt. Police visited the spot on 5.7.2007. He saw partially burnt clothes inside the room and some cooked food lying on plates. Police took into possession burnt clothes, a plastic can and match stick and polythene bag. He did not know about the relations of the deceased and accused. He was declared hostile and cross-

examined by the learned Public Prosecutor. In his cross-examination he testified that he did not know whether accused used to beat or maltreat the deceased. He did not know whether guests had come to the house of accused on 2.7.2007. He did not know whether there was any ration in the house of accused on 2.7.2007. He did not know that the accused had a fight with deceased for not making food for his guests. There was some food lying on the plates. He could not say whether deceased had committed suicide because of maltreatment meted to her by the accused.

11. PW- 5 Jagan Nath testified that the accused used to live with his wife, son and his brother. On 5.7.2007, police joined him in the investigation and he visited the site of occurrence on said date. In the verandah, beds had been laid and in the kitchen the food was lying in two or three plates and things were scattered here and there. Some burnt clothes and polythene were lying there. Glass over the door was lying broken in the kitchen. Pieces of glass were lying on the floor. One plastic can was also lying which was smelling of kerosene. Articles were taken into possession by the police vide seizure memo Ext. PW-1/E. He was declared hostile and cross-examined by the learned Public Prosecutor. He did not know whether the accused used to give beatings to the deceased or that accused used to maltreat the deceased. He did not know whether 2-3 guests had come on 2.7.2007. He did not know whether accused did not have ration in his house on 2.7.2007. He was not aware whether accused gave beatings to the deceased because she did not prepare meals for his guests. He did not know that for the aforesaid reasons accused poured Kerosene on the deceased and set her ablaze.

12. PW-6 Dr. Sangeet Dhillion has conducted post-mortem examination. According to her, deceased died as a result of ante mortem burn injuries leading to neurogenic shock and due to accumulation of toxins. She issued post-mortem report Ext. PW-6/B.

13. PW-10 Birbal deposed that accused was a contractor. On 2.7.2007, he alongwith Teg Bahadur and one other labourer whose name he did not recollect had gone to the accused at Darlaghat in Navgaon. He had come for work. Apart from three of them, accused, his wife and children were present in the house. They had reached there at about 4 PM and thereafter, after taking their meals, had gone to village Malethi. Thereafter, on 4th the accused had called them to the hospital at Shimla. They had gone to the hospital at Shimla since wife of accused had been burnt. On 2.7.2007 nothing transpired in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that they were in the house of accused till late in night. He further denied that accused had asked his wife to prepare the meals. Volunteered that she had prepared food and they had left after having their meals. He denied that there was no ration in the house on that day. He denied that deceased told the accused that there was no ration and as such she could not prepare the meals. He denied that because of said fact, an altercation had ensued between the accused and the deceased. He denied that accused hurled abuses at the deceased and had quarreled with her. His statement was recorded by the police. He denied the portion A to A of his statement Ext. PW-10/A. According to him, no such statement was given by him to the police. He also denied portion B to B of his statement. He had no money due from the accused.

14. PW-11 Teg Bahadur also deposed that he alongwith Birbal and Suresh Kumar had visited the house of the accused. Accused, his wife and son were present in the house on that day. Three of them had reached the house of the accused at about 4.30 PM and after having their meals, they had left the house of accused. He did not know what transpired thereafter. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied the suggestion that that they had got late and stayed in the house of

accused. Accused had asked Chanda to prepare meals for them. He did not know that deceased told accused that there was no ration and after that an altercation ensued between accused and deceased and accused hurled abuses to deceased. He denied that they had not taken meal in the house of accused.

15. PW-12 ASI Sohan Lal deposed that the father of the deceased Daya Ram got recorded his statement Ext. PW-1/A at IGMC Shimla on 4.7.2007. He prepared *Rukka* Ext. PW-7/A, on the basis of which FIR Ext. PW-7/B was registered. Deceased was already dead as such after preparation of inquest report, Exts. PW-1/B and PW-1/C, he sent the dead body for post-mortem examination. Post-mortem report is Ext. PW-6/B. Case property was taken into possession and sent to FSL Junga.

16. According to PW-1, Daya Ram, guests had visited the house of accused. Accused asked his wife to prepare meals. She did not prepare meals since there was no ration and he hurled abuses. Thereafter, she put herself on fire. However, fact of the matter is that PW-10 Birbal and PW-11 Teg Bahadur, have categorically admitted that they had gone to the house of the accused. They had their meals in the house of accused and thereafter they had left the place. They have denied the suggestion that no ration was available and accused hurled abuses at the deceased, which led to the incident. PW-2 Sheetla deposed that accused used to give beatings to the deceased. However, in her cross-examination, she admitted that she has not reported about the bickering between accused and deceased either to the police or to any relative. PW-3 Pawan Kumar has given a new version that deceased was beaten up by the accused at night after 10-11 PM. PW-1 Daya Ram has admitted in his cross-examination that it was the accused who had taken Chanda to the hospital and he has not made any complaint to the police that accused did not provide ration to the deceased. PW-4 Sohan Lal testified that on 2.7.2007, at 10.30 PM he heard cry and visited the spot. He had seen deceased in the lap of accused near the temple. He was declared hostile and cross-examined by the learned Public Prosecutor. He did not know whether accused used to beat or maltreat deceased and whether any guests had come to the house of accused on 2.7.2007. He was not aware whether ration was available in the house or not. PW-5 Jagan Nath, in his cross-examination by the learned Public Prosecutor, after being declared hostile, testified that he did not know whether accused used to give beatings to the deceased or not and whether accused used to maltreat her. He did not know that guests had visited the house of accused on 2.7.2007. PW-1 Daya Ram has deposed in his examination-in-chief that his daughter called him on 2.7.2007 and told him that labour used to ask for the payments. However, it is not so recorded in the statement recorded under Section 154 CrPC. PW-10 Birbal and PW-11 Teg Bahadur deposed that they had left the place after taking meals and they were not aware what happened thereafter.

17. Surprisingly, PW-1 Daya Ram in his examination-in-chief testified that they reached Darlaghat by 7 PM and went to the Police Station, Darlaghat. On the next day, they went to Shimla. When the family came to know that Chanda was admitted in the hospital, they should have gone to the Hospital to look after her instead of going to the Police Station.

18. Prosecution has failed to prove as to what was the proximate cause which compelled the deceased to take her life. There is no material on record to show what were the compelling circumstances created by the accused forcing her to take such an extreme step of ending her own life.

19. Their Lordships of the Hon'ble Supreme Court in **Bhagwan Das v. Kartar Singh and ors**, reported in AIR 2007 SC 2045, have held that harassment of wife by husband or in-laws, per se, does not attract Section 306. Prosecution has to prove somehow

more than some avert act attributable to accused which was direct and proximate cause for the commission of suicide. Their Lordships have held as under:

> 15. In our opinion the view taken by the High Court is correct. It often happens that there are disputes and discords in the matrimonial home and a wife is often harassed by the husband or her in-laws. This, however, in our opinion would not by itself and without something more attract Section 306 IPC read with Section 107 IPC.
>
> 16. However, in our opinion mere harassment of wife by husband due to differences per se does not attract Section 306 read with Section 107 IPC, if the wife commits suicide. Hence, we agree with the view taken by the High Court. We, however, make it clear that if the suicide was due to demand of dowry soon before her death then Section 304B IPC may be attracted, whether it is a case of homicide or suicide. Vide Kans Raj vs. State of Punjab & Ors. 2000(5) SCC 207, Satvir Singh & Ors. vs. State of Punjab & Anr. 2001(8) SCC 633, Smt. Shanti & Anr. vs. State of Haryana AIR 1991 SC 1261.

20. In view of the discussion and analysis made herein above, the appeal has no merit and the same is dismissed. Bail bonds of accused are discharged.

All pending applications are also disposed of.

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

State of Himachal Pradesh .....Appellant
Versus
Ravinder Kumar .....Respondent

Cr. Appeal No. 738/2008
Reserved on: April 22, 2016
Decided on: April 25, 2016

Indian Penal Code, 1860- Section 363,366 and 376- Prosecutrix was found missing in the morning- accused was also found missing- matter was reported to police and the prosecutrix was recovered from the company of the accused- accused was tried and acquitted by the trial Court- held, in appeal that no witness had seen the accused while taking away the prosecutrix- prosecutrix had also not raised any alarm on the way to Jalandhar from where she was recovered- this shows that prosecutrix had left home at her own- no injuries were found on her person- she had not narrated the incident to any person in the neighbourhood- all this shows that she was a consenting party- trial Court had rightly acquitted the accused- appeal dismissed. (Para-20 and 21)

For the appellant : Mr. M.A. Khan, Additional Advocate General
For the respondent : Mr. Rakesh Chauhan, vice Counsel.

The following judgment of the Court was delivered:

Per Rajiv Sharma, Judge:

The State has come in appeal against Judgment dated 12.8.2008 rendered by the learned Additional Sessions Judge, Fast Track Court, Una, District Una, Himachal Pradesh in Sessions Case No. 15/07, whereby respondent-accused (hereinafter referred to as 'accused' for convenience sake), who was charged with and tried for offence under Sections 363,366 and 376 IPC, has been acquitted.

2. Case of the prosecution, in a nutshell, is that the complainant is a house wife. She was residing in her house in village Saloh Beri, alongwith her husband and a daughter. Her husband is an Ex-serviceman and is a heart patient. Her daughter (prosecutrix) was studying in 9th standard in *Maharishi Vidya Mandir* School, Daulatpur Chowk. Accused was running a tailoring shop near the house of the complainant and was residing in the house of his aunt Bishambari Devi. On 6.7.2007, the complainant and her above mentioned family members went to sleep at about 10.30 PM. At around 12.30 AM, (midnight) Sh. Hari Singh, brother of the father-in-law of the complainant asked her to give torch so that he may take care of the cattle. At that time, prosecutrix was sleeping in the house with the complainant. But in the morning on 7.7.2007, at about 5.30 AM, when she woke up, she saw that the prosecutrix was not there. Thereafter, complainant and her family members searched for her the whole day but without success. Accused was also found absent from the village. So the complainant suspected that the accused had kidnapped her daughter. Accordingly, she reported the matter to the police through her complaint/ statement under Section 154 CrPC Ext PW-12/A upon which FIR Ext PW-12/B was recorded in the Police Station, Gagret. Prosecutrix was recovered from the company of the accused from Industrial Area Jalandhar. She was got medically examined at CHC Daulatpur. Her clothes were also taken into possession and her vaginal swab and blood sample were taken and sent to the chemical examiner. Accused was arrested on 12.7.2007 and he was also got medically examined at CHC Gagret. Police also got ossification test of the prosecutrix at Dr. Rajinder Prasad Government Medical College, Dharamshala. The birth certificate of the prosecutrix was also obtained. Investigation was completed. Challan was put in the Court after completing all the codal formalities.

3. Prosecution has examined as many as 24 witnesses to prove its case against the accused. 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. Mr. Rakesh Chauhan, Advocate, vice counsel has supported Judgment dated 12.8.2008.

6. We have heard the learned counsel for the parties and also gone through the judgment and record carefully.

7. PW-1 Ram Chand testified that he was a retired Army personnel. Lekh Ram was his younger brother. Lekh Raj has one daughter (Prosecutrix). She was 14 years of age and studying in 9th class in *Maharishi Vidya Mandir* School, Daulatpur. On 7.7.2007, at about 6.30 AM, mother of prosecutrix came to his house and told that her daughter who was sleeping with her in the night was missing. Thereafter, they searched for her but she was not traced. They came to know that the accused, who was also residing in the vicinity, was also missing. He and the parents of the prosecutrix lodged FIR at Police post Daulatpur.

Accused used to come to the house of his brother Lekh Raj and they came to know that accused had taken the prosecutrix with him. In the evening the police came to the village and recovered a bag from the bushes in their presence. In his cross-examination, he has admitted that the Pradhan did not accompany them to the Police Post. They went to Jalandhar by engaging private vehicle. Police did not prepare any written memo in their presence.

8. PW-2 Surinder Kaur deposed that she had a house in Dada Colony, Industrial Area, Jalandhar. It was a double storeyed house. She was residing in the ground floor. She deposed that about 3-4 months back, accused and 2-3 persons came to her alongwith some luggage. They took a room from her on rent. On the next day, accused brought a girl with him. The girl was wearing red clothes and bangles generally worn by recently married ladies and they stayed there for 2-3 days. Rent was settled at `600/-. She could not say with certainty that the accused present in the Court was the same person who had taken the room on rent from her.

9. PW-4 Ashok Kumar deposed that the prosecutrix was the daughter of Lekh Raj (sic. Des Raj). She studied upto 9th standard in *Maharishi Vidya Mandir* School, Daulatpur Chowk. In his presence, Mark A was produced by Lekh Raj to the police regarding which memo Ext. PW-1/A was prepared. In his cross-examination, he admitted that he has not seen the accused going with the prosecutrix anywhere at any point of time. Her house was about 200-300 feet from the house of the prosecutrix.

10. PW-7 Vinod Kumar deposed that in the month of August, 2007, he was officiating as Principal/incharge of *Maharishi Vidya Mandir* Public School, Daulatpur. Prosecutrix got admitted in the school on 1.5.2003. Her admission number was 529 and her date of birth was 11.5.1993. Regarding this, entry was made in the admission register at Sr. No. 19. Photocopy of register is Ext. PW-7/A and the photocopies of the supporting documents are Ext. PW-7/B. In his cross-examination, he deposed that he had handed over certificate Mark A to the police. He also admitted that entries at Sr. Nos. 528 and 529 were made by one and the same person however, entries at Sr. Nos. 530 and 531 were made by some other person.

11. PW-13 Dev Raj deposed that he had gone to Jaipur. Deputy Registrar of Nagar Nigam Jaipur had handed over the birth certificate Ext. PW-6/B of the prosecutrix.

12. PW-15 Dr. Mirnal Lakhi has examined the prosecutrix. She had noticed no injury mark over vulvae, thighs, labia majora and labia minora. No blood stains or any other stains were found on vulvae, labia majora, labia minora and thighs. Hymen was not present. Two fingers were easily going inside vagina. There was no injury on vaginal walls. After receiving chemical examiner report Ext. PW-14/A, she opined that it could not be suggested that no rape or sexual intercourse has taken place. She issued MLC Ext. PW-15/A.

13. PW-16 Smt. Sunita Devi deposed that the prosecutrix was her daughter. She was admitted to *Maharishi Vidya Mandir* School, Daulatpur Chowk in 5th standard, and she was studying in the school till the date of occurrence. On 6.7.2007, they were sleeping in the verandah of their house. Prosecutrix was also with them in the verandah. They slept at 10.30 PM. At about 12.30 AM, she got up to answer the call of nature and found prosecutrix sleeping in the verandah. When she got up at 5.30 AM in the morning on 7.7.2007, she did not find her daughter (prosecutrix) in her bed. She woke up her husband who was a heart patient and told him about the same. She searched for her daughter alongwith her relatives but she could not be traced. Accused resided with Bishambari Devi whose house was situate

in front of their house and he used to do tailoring work. Bishambari Devi was the younger aunt of her husband. Accused was also missing. Matter was reported to the police.

14. PW-17 Lekh Ram deposed that the prosecutrix was his daughter. On 6.7.2007, he, his wife and daughter were sleeping in the verandah. He was awakened by his wife at 5.30 AM and was told that prosecutrix was not there. They searched for her but she was not found. Matter was reported to the police. In his cross-examination, he has admitted that he has not seen the accused in the night of 6.7.2007 taking away his daughter with him.

15. PW-18 is the prosecutrix (name withheld). She testified that the accused used to reside in the house of Bishambari Devi behind their house. He was also running a tailoring shop in front of her house in the house of Bishambari Devi. Bishambari Devi had two houses. Accused used to reside in the house which was situate at the back side of their house. In the absence of her parents, accused used to come to her house and used to talk to her in vulgar manner. In February, 2007, her father became ill and was taken to Jalandhar where her mother also accompanied him and she was alone in the house. On 10th February, she was alone in the house, accused came there and committed sexual intercourse with her saying that he will marry her. He also threatened her with dire consequences. On the night intervening 6th and 7th July 2007, accused took her to Jalandhar on a scooter. He firstly took her to the house of his cousin and then to Dada Colony. , Industrial Area, Jalandhar. On 12.7.2007, police came to Jalandhar with her father and two uncles. She and accused were brought to Gagret. She was medically examined. In her cross-examination, she has admitted that she has narrated the incident of 10.2.2007 to her parents. Volunteered that she told the incident to Bishambari Devi, her grand-mother. She also admitted that she has not raised any alarm while being taken away by the accused. She has gone to Jalandhar via Talwara. She admitted that there was one barrier at Marwari and another one at Punjab border. She did not tell the police at any of these barriers that she was being taken away by the accused forcibly.

16. PW-20 HC Prabhat Chand has partially investigated the case. He has gone to Jalandhar and recovered the girl and the accused.

17. PW-21 Dr. D.P. Swami deposed that the estimated age of the prosecutrix was between 15 years and 16 years, as per ossification/dental x-ray examination.

18. PW-22 ASI Darshan Singh has recorded the statement of the prosecutrix on 12.7.2007. She was medically examined. He also prepared the site plan.

19. PW-23 Dr. Arun Sharma has proved Ext. PW-14/A. In his cross-examination, he has admitted that no semen was detected on the exhibits sent for examination. Semen could be detected in the vagina upto 3 days and occasionally upto 5 days.

20. Case of the prosecution is that the prosecutrix was sleeping in the verandah on 6.7.2007. Mother found the prosecutrix missing at about 5.30 AM. She told this incident to her husband. They searched for her. Accused was also found missing. They suspected involvement of the accused. Matter was reported to the police. Police recovered the girl and the accused from Jalandhar. None of the witnesses has seen the accused taking away the prosecutrix from her house. PW-17 Lekh Ram, father of the prosecutrix, in his cross-examination stated that he has not seen the accused in the night of 6.7.2007 taking away his daughter with him. There is no evidence that the accused had visited their house prior to 6.7.2007. Accused is permanent resident of village Saloh. According to the prosecutrix, she was taken to Jalandhar via Talwara on scooter by the accused. She has not raised any

alarm while being taken away from the house to Jalandhar via Talwara. She admitted that there were two barriers on the way but she has not informed the police that she was being forcibly taken away by the accused to Jalandhar. Scooter was not even owned by the accused. Owner of the scooter has not been examined. No one has seen the accused taking the prosecutrix on scooter to Jalandhar. There is no tangible evidence on record that the accused has ever used force, threat or inducement upon the prosecutrix in any manner. It is apparent that the prosecutrix has left the house at her own. Since she has not raised any alarm and not informed her parents, same lends credence to the defence version that she had left the house voluntarily. Thus, the story of abduction or kidnapping is not plausible. Prosecutrix deposed that the accused had come to her house when she was alone and her parents had gone to Jalandhar. Accused raped her. However, fact of the matter is that the prosecutrix has not narrated this incident to her parents. She explained that she has narrated the incident to her grand-mother. In case grand-mother had been apprised of this serious incident, she would have immediately taken up the matter with the parents of the prosecutrix. There was no mark of injury on the vulva, thighs, labia majora or labia minora and vaginal walls. Prosecutrix has not mentioned the exact date and time of alleged rape upon her by the accused. Medical evidence does not show the symptoms of sexual intercourse with the victim in the near past.

21. Prosecution case is also that the accused raped the prosecutrix at Jalandhar between 7.7.2007 to 12.7.2007. The house where she was allegedly kept was a double storeyed house. She could raise alarm in case she was forcibly raped. Version of the prosecutrix is that she did not narrate the incident due to fear. It has not been stated so by her while recording her statement under Section 161 CrPC. The learned trial Court has given a reasoned judgment while acquitting the accused. There is no occasion for us to interfere with the same.

22. In view of the discussion and analysis made herein above, the appeal has no merit and the same is dismissed. Bail bonds of accused are discharged.

All pending applications are also disposed of.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of Himachal Pradesh .....Appellant.

Versus

Som Nath @ Babi and another .....Respondents.

Cr. Appeal No. 4205 of 2013.
Reserved on: April 23, 2016.
Decided on: April 25, 2016.

N.D.P.S. Act, 1985- Section 20 and 29- Accused tried to run away on seeing the police- they were apprehended – their search was conducted during which 3.2 kg. of charas was recovered from their possession- accused were tried and acquitted by the trial court- held, in appeal that I.O. had taken joint consent of the accused which is not permissible as individual consent had to be obtained- the place of apprehension of the accused was a busy place but no independent witness was associated- these circumstances make the

prosecution case doubtful- accused were rightly acquitted by the trial Court- appeal dismissed. (Para-11 to 14)

Case referred:
State of Rajasthan v. Parmanand reported in (2014) 5 SCC 345

For the appellant:	Mr. V.S.Chauhan, Addl. AG.
For the respondents:	Mr. Devinder K. Sharma, Advocate for respondent No.1. Mr. Pawanish Shukla, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 15.3.2013, rendered by the learned Special Judge P.O. (FTC), Mandi, H.P., in Sessions trial No. 29/2010, whereby the respondents-accused (hereinafter referred to as the accused), who were charged with and tried for offences punishable under Sections 20 & 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the ND & PS Act), have been acquitted.

2. The case of the prosecution, in a nut shell, is that on 1.1.2010, Insp./SHO Madan Dhiman (PW-8) along with HC Girdhari Lal (PW-4), HC Rajinder Kumar, HHC Ranvir Singh, Const. Rakesh Kumar (PW-5) and Const. Shankar Kumar was on patrolling duty in their official vehicle bearing registration No. HP-31B-0190 vide rapat No. 5 Ext. PW-8/A at about 3:30 AM. The police party was on patrolling duty via Purana Bazar Handeti. At about 4:00 AM, when they reached at place called Tail Control, Sundernagar, in the meantime, two persons came on foot from Saini Filling Station towards bus stand, who on seeing the vehicle of the police started running back. They were apprehended. They disclosed their identity. Both the accused were apprised of their legal right to be searched either before a Magistrate or before a Gazetted Officer vide memo Ext. PW-4/A in the presence of witnesses HC Rajender Kumar and Girdhari Lal. Both the accused gave their willingness to be searched by the police. Police officials also gave their personal search to the accused vide memo Ext. PW-4/B. Thereafter, search of accused Som Nath was carried out. Two packets wrapped with yellow colour tape with the calf of both the legs were found. Similarly, search of accused Narender Pal was carried out. Black coloured substance in the shape of sticks wrapped in a piece of newspaper kept around his vest with the help of yellow colour tape was found. It weighed 3 kg. 200 grams. NCB-I form in triplicate Ext. PW-8/B was filled in on the spot from column No. 1 to 8 and seal impression "A" was embossed over it. IO prepared rukka Ext. PW-8/C and sent the same to the Police Station through Const. Rakesh Kumar at about 5:30 AM, on the basis of which, FIR Ext. PW-6/A was registered. The case property was deposited in the malkhana. The case property was sent to FSL, Junga through PW-3 Const. Vyas Dev. 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 eight witnesses. The accused were also examined under Section 313 Cr.P.C. According to them, they were falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. V.S.Chauhan, Addl. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand,

M/S Devinder K. Sharma and Pawanish Shukla, Advocates for the respective accused have supported the judgment of the learned trial Court dated 15.3.2013.

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

6. PW-3 Const. Vyas Dev testified that he took the case property on 1.1.2010 and deposited the same at FSL, Junga on 2.1.2010.

7. PW-4 HC Girdhari Lal testified that he along with other police officials was on patrolling duty. At about 4:00 AM, when they reached near Tail Control, Sundernagar, in the meantime, two persons came on foot from Saini Filling Station towards bus stand, who on seeing the vehicle of the police started running back. They were apprehended. They disclosed their identity. No persons were available to be associated as witnesses in the investigation. Both the accused were apprised of their legal right to be searched either before a Magistrate or before a Gazetted Officer vide memo Ext. PW-4/A in the presence of witnesses HC Rajender Kumar and Girdhari Lal. Both the accused gave their willingness to be searched by the police. Police officials also gave their personal search to the accused vide memo Ext. PW-4/B. Thereafter, personal search of accused Som Nath was carried out. Two packets wrapped with yellow colour tape with the calf of both the legs were found. Similarly, personal search of accused Narender Pal was carried out. Black coloured substance in the shape of sticks wrapped in a piece of newspaper kept around his vest with the help of yellow colour tape was found. It was found to be charas. It weighed 3 kg. 200 grams. The recovered substance along with wrappers and newspaper pieces was kept in cloth parcels and sealed with seal impression "A" at 10 places. NCB-I form in triplicate Ext. PW-8/B was filled in on the spot from column No. 1 to 8 and seal impression "A" was embossed over it. Other formalities were completed on the spot. IO prepared rukka and sent the same to the Police Station through Const. Rakesh Kumar. I.O. prepared the site plan. The case property was produced before the Court while examining this witness. In his cross-examination, he admitted that the place where the accused have been allegedly intercepted was surrounded by many hotels and shops and a petrol pump also existed on the spot. The recovery was made from the National Highway. Nearby to the place, at a distance of 50 meters, there is a control gate of BBMB canal. He also admitted that there was a control room by the side of control gate where a guard remains on duty 24 hours. He also admitted that the petrol pump also remains open for 24 hours. He also admitted that there existed Dhabas at a distance of 100 meters from the spot. He admitted that in his statement under Section 161 Cr.P.C., he has not stated to the I.O. that while giving option to the accused, they were apprised that they have right to be searched either before the Magistrate or a Gazetted Officer. He also admitted that this fact was told by him in the Court in his statement only for the first time. He also admitted that no efforts were made to call for the witnesses from the bus stand Sundernagar.

8. PW-5 Const. Rakesh Kumar also deposed the manner in which the accused were apprehended, their personal search was carried out, the contraband was recovered and the codal formalities were completed on the spot. Rukka was prepared and handed over to him to be delivered at Police Station BSL Colony, Sundernagar. He delivered the same at 6:00 AM. In his cross-examination, he admitted that the charas recovered from the accused persons was not weighed separately. He could not tell as to how much charas was possessed by each accused. However, he admitted that the buses, trucks and other vehicles remain plying on the National Highway 24 hours.

9. PW-6 HC Durga Dass, deposed that he was posted as MHC, Police Station BSL Colony, Sundernagar. On 1.1.2010, rukka scribed by SHO Madan Dhiman was handed

over to him by Const. Rakesh Kumar. He made endorsement over the same. On 1.1.2010, SHO Madan Dhiman deposited with him the case property. It was sent to FSL, Junga through PW-3 Const. Vyas Dev vide RC No. 1/2010.

10. PW-8 SHO Madan Dhiman also deposed the manner in which the accused were apprehended, their personal search was carried out, the contraband was recovered and the codal formalities were completed on the spot. In his cross-examination, he deposed that he has written in the rukka that accused persons were apprised of their legal right to be searched before some Gazetted Officer or Magistrate. (Confronted with rukka Ext. PW-8/C wherein it is not so recorded.) He also admitted that there was Hotel Lake View near the alleged place of occurrence at about 50 meters. He had not called any person from the Lake View hotel to become a witness to the proceedings. Bus-stand Sundernagar is about 300 meters away from the spot. He admitted that the shops at bus stand remain open throughout the night, including the office of HRTC. He did not try to call any witness from the bus stand, Sundernagar. Petrol pump was also located near the spot. He had not weighed the recovered substance separately recovered from the accused. Sabji Mandi was also at a distance of about half a kilometer from the spot.

11. The accused were apprehended at 4:00 AM near Tail Control, Sundernagar. The contraband was recovered from their person. The case of the prosecution is that the I.O. had sought the consent of the accused as to whether they wanted to be searched before the Gazetted Officer or Magistrate. The consent memo is Ext. PW-4/A. The I.O. was required to seek the individual consent from each of the accused. It was prepared in the presence of HC Rajinder Kumar and Const. Girdhari Lal. HC Rajinder Kumar has not put his signatures on consent memo Ext. PW-4/A.

12. 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.
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> 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.

17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval.

18. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parnanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

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."

13. PW-4 HC Girdhari Lal, in his cross-examination, has admitted that the place where the accused have been allegedly intercepted was surrounded with many hotels and shops and petrol pump also exists on the spot. Nearby to the place of occurrence, at a distance of 50 meters, there was a control gate of BBMB canal. He also admitted that there was a control room by the side of control gate, where a guard remains on duty 24 hours. He also admitted that the petrol pump also remains open for 24 hours and Dhabas existed at the distance of 100 meters from the spot. He also admitted that no efforts were made to call for the witnesses from the bus stand Sundernagar, though it was at a distance of 500 metres from the spot. PW-8 SHO Madan Dhiman has also admitted that there was Hotel Lake View near the alleged place of occurrence at a distance of about 50 metres. He had not called any person from the Lake View hotel to become a witness to the proceedings. Bus-stand Sundernagar was about 300 metres away from the spot. He admitted that the shops at bus stand remain open throughout the night, including the office of HRTC. He had not tried to call any witness from the bus stand, Sundernagar. Petrol pump was also located nearby the place where the accused were apprehended. The place of occurrence was neither isolated nor desolate. The I.O. ought to have associated independent witnesses either by calling the persons from the bus stand or from the nearby locality in order to give credence to the search, seizure and sealing proceedings. The place where the accused were apprehended was on the National Highway. The police could always request the occupiers/passengers of the vehicles to be associated as witnesses. The non-joinder of the independent witnesses, though available, casts suspicion on the prosecution story.

14. Thus, the prosecution has failed to prove the case against the accused under Sections 20 & 29 of the ND & PS Act that the charas was recovered from the accused persons. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 15.3.2013. The bail bonds are discharged.

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

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

Sudesh Kumar ...Appellant

Versus

M/s Shivalik Hatcheries Pvt. Ltd. ....Respondent.

RSA No.31 of 2005.

Decided on: 25th April, 2016

Specific Relief Act, 1963- Section 5- Accommodation was allotted to K, the husband of the defendant as licencee- he died and the licence was revoked- wife of K was unauthorized possession- notice was served for handing over the possession but the possession was not handed over- hence, suit was filed for possession and the *mesne* profits at the rate of Rs.300/- per month- claim was denied by the defendant- suit was decreed by the trial Court- appeal was dismissed- held, in second appeal, husband of the defendant was

working as driver and the accommodation was allotted to him as licencee- he died during the course of employment- defendant approached the plaintiff for providing employment on compassionate grounds- defendant had received notice but had not vacated the premises- her claim was rejected- even by the Appellate Court and the Courts below had correctly appreciated the matter- appeal dismissed. (Para- 8 to 11)

For the appellant: Mr. Dinesh Bhanot, Advocate.
For the respondent: Mr. Jagdish Thakur, Advocate.

The following judgment of the Court was delivered:

Dharam Chand Chaudhary. (Oral)

This appeal is directed against the judgment and decree dated 17.12.2004, passed by learned Additional Disatrict Judge, Solan, Camp at Nalagarh, in Civil Appeal No.6-NL/13 of 2004, whereby the judgment and decree passed by learned Civil Judge (Jr. Division), Nalagarh, in Civil Suit No.120/1 of 2002, has been affirmed and the appeal dismissed.

2. The respondent, hereinafter referred to as "the plaintiff", is a Company registered under the Companies Act. It is owner of residential accommodation constructed for its employees over the land entered in Khewat/Khatauni No.95/96, bearing Khasra Nos. 121, 122, measuring 2B-2B, situate in village Pater Bhounkhu, Tehsil Nalagarh, District Solan. The said accommodation was allotted to Kashmir Singh, the husband of the appellant, hereinafter referred to as "the defendant", in his capacity, as a licencee. The licence of said Kashsmir Singh was revoked by the plaintiff-company after his death on 10.5.2001. His wife, the defendant, however, continued to occupy that accommodation even thereafter also. She being in unauthorized possession of the said accommodation, the plaintiff-company served upon her a notice under Section 106 of the Transfer of Property Act. She, however, failed to handover the vacant possession of the premises in question, even on receipt of the notice also. The plaintiff-company, therefore, ultimately filed suit for possession of the accommodation in question and also for *mesne* profits at the rate of Rs.300/- per month.

3. The defendants, when put to notice, has contested the suit, on the grounds, inter alia, that her husband died during the course of employment and as such she had made a request to the plaintiff-company to provide employment to her on humanitarian ground and also to retain the accommodation, in question. The matter was delayed by the plaintiff at one pretext or the other with a view to deprive her from availing the remedy under the Workmen's Compensation Act.

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

> "1. Whether the suit is not maintainable? OPD.
>
> 2. Whether the plaintiff is having no locus-standi? OPD.
>
> 3. Whether no proper Court fee was affixed on the plaint, if so, what is the proper court fee? OPD.
>
> 4. Relief."

5. Learned trial Court on appreciation of the evidence and pleadings of the parties has decreed the suit with a direction to the defendant to hand over the vacant possession of the premises in question to the plaintiff-company within one month from the

date of decree. She, however, preferred an appeal, which has been dismissed vide judgment and decree under challenge before this Court in the present appeal.

6. The challenge to the judgment and decree is on the grounds, inter alia, that the same is not only against the facts, but also against law. The plaintiff has allegedly failed to produce any evidence and as such, the suit could have not been decreed. Both Courts below have allegedly failed to adhere to and apply the provisions contained under Orders 14 and 18 of the Code of Civil Procedure. The findings recorded by both Courts below are based on surmises and conjectures, hence not legally sustainable.

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

1. Whether the decree can be passed by learned trial Court without compliance to the provisions of Order XIV and Order XVIII of the CPC?

2. Whether the findings of the learned lower Appellate Court regarding the applicability of the provisions of CPC to the Labour Court in view of Section 11 of the Industrial Disputes Act, 1947 is justified?

8. On hearing learned counsel representing the parties and having regard to the given facts and circumstances as well as the evidence available on record, as per admitted case of the defendants her husband was working as driver in the plaintiff-company and the accommodation in question was allotted to him as a licensee. Admittedly, he expired during the course of his employment. The defendant no doubt claims that she approached the plaintiff-company for providing her employment on compassionate ground and allow her to retain the demised premises, however, no evidence to this effect has been produced. She has admitted the receipt of notice under Section 106 of the Transfer of Property Act. Therefore, she being in unauthorized possession of the premises in question has rightly been directed to hand over the vacant possession thereof to the plaintiff-company.

9. True it is that she had approached the Labour Court, however, as per the copy of award placed on record produced in evidence by learned counsel representing the plaintiff-company, her claim stands rejected by the Labour Court also. She, therefore, has no legal right to retain the accommodation in question. Since she has admitted the plaintiff's case on all material aspects and as there was no issue qua which onus was upon the plaintiff-company, therefore, what evidence was required to be produced by the plaintiff-company, the defendant has failed to explain. The onus to prove the issues rather was upon the defendant, as the same were framed taking into consideration her pleadings in the written statement and as such she has failed to discharge such onus, therefore, the suit has rightly been decreed against her by learned trial Court and the decree so passed has also been rightly affirmed by learned lower appellate Court. Thus, the judgment and decree cannot be said to be violative of the provisions under Orders 14 and 18 of the Code of Civil Procedure.

10. Substantial question of law at Sl. No.1 supra, therefore, does not arise at all in the present lis.

11. Since the claim of the defendant preferred before Labour Court stands dismissed, therefore, substantial question of law at Sl. No.2 also does not arise at all for adjudication in the present appeal. The present, therefore, is a case where no legal question what to speak of substantial questions as framed, arise for adjudication. On the other hand, the judgment and decree passed by both Courts below being legally and factually sustainable do not call for any interference.

12. In view of what has been said hereinabove, the appeal being devoid of any merit fails and the same is accordingly dismissed. There is, however, no order so as to costs.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Akash Deep Sharma ...Appellant.

Versus

State of Himachal Pradesh and others ...Respondents.

LPA No. 213 of 2010
Decided on: 26.04.2016

Constitution of India, 1950- Article 226- Judgment on the face of it is non-speaking- appeal is allowed- judgment is set aside and the writ petition is transferred to the Tribunal for disposal in accordance with law. (Para-3 to 5)

For the appellant: Mr. Lalit K. Sharma, Advocate.

For the respondents: Mr. Shrawan Dogra, Advocate General, with Mr. Romesh Verma & Mr. M.A. Khan, Additional Advocate Generals, and Mr. J.K. Verma & Mr. Kush Sharma, Deputy Advocate Generals, 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 judgment and order, dated 10th August, 2010, made by the learned Single Judge in CWP (T) No. 8669 of 2008, titled as A.D. Sharma versus State of Himachal Pradesh and another, whereby the writ petition filed by the appellant-writ petitioner came to be disposed of (for short "the impugned judgment").

2. We have gone through the impugned judgment and are of the considered view that the impugned judgment, on the face of it, is non-speaking one, needs to be set aside.

3. Without marshalling the facts and merits of the case, the appeal is allowed, the impugned judgment is set aside and the writ petition is restored to its original number and remanded for decision on merits.

4. As the lis falls within the jurisdiction of the H.P. State Administrative Tribunal (for short "the Tribunal"), the same is transferred to the Tribunal. Learned counsel for the parties are directed to cause appearance before the Tribunal on **11th May, 2016.**

5. Registry is directed to send down the record to the Tribunal, after proper indexing.

6. The appeal is disposed of accordingly alongwith all pending applications.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J

Balbir Singh ..... Appellant.

Vs.

State of H.P. & ors. ..... Respondents

LPA No. 172 of 2014.
Judgement reserved on: 06.04.2016
Date of decision: April 26, 2016.

Constitution of India, 1950- Article 226- Petitioner was running a Khokha on the land owned by Panchayat Samiti- Samiti entered into an agreement and agreed to allot a shop in a newly constructed complex subject to the petitioner vacating Khokha- Shop No. 17 was allotted to the petitioner but the possession was not delivered rather Shop No. 18 was allotted to him on which a writ petition was filed seeking direction to allot shop No. 17- respondent stated that petitioner was in occupation of shop No. 18 and he was paying rent- petitioner had not removed the debris of Khokha despite order- writ petition was allowed by the Court- held, in appeal that no party had questioned the order of allotment- appellant was allotted shop No. 18, whereas, writ petitioner was allotted shop No. 17- appellant was duty bound to hand over the possession of shop No. 17- petitioner was not only occupying shop No. 18 but he continued carrying on his business from unauthorized Khokha without paying any amount- parties wanted to get undue enrichment by raising untenable pleas- the person who comes to the Court must come with clean hands and no party can be allowed to take law in its hand- appeal dismissed with cost of Rs. 10,000/- to the appellant and Rs. 20,000/- to the writ petitioner. (Para-11 to 23)

For the appellant : Ms. Ritta Goswami, Advocate.

For the respondents : Mr. Anup Rattan and Mr. Romesh Verma, Additional Advocate Generals with Mr. J.K. Verma, Deputy Advocate General, for respondents No. 1 to 3.
Respondent No.4 *ex-parte*.
Mr. Dushyant Dadwal, Advocate, for respondent No.5.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

The appellant is writ- respondent No. 5 (hereinafter referred to as the appellant), who is aggrieved by the judgement passed by the learned writ court, whereby the writ petition filed by writ petitioner (respondent No. 5 herein) (hereinafter referred to as the writ petitioner) came to be allowed and possession of shop No. 17 was directed to be handed over to writ petitioner, whereas shop No. 18 was directed to be handed over to the appellant.

2. The facts in brief may be noticed. The writ petitioner claimed that he had been running a *Khokha* (Kiosk) since 1983 at Jawalamukhi in District Kangra on the land owned by the Panchayat Samiti (for short 'Samiti'). In August, 1997 the Samiti undertook construction of a shopping complex and entered into an agreement with the writ petitioner agreeing therein to allot a shop to him subject to his vacating and removing the *Khokha* illegally raised by him.

3. The shopping complex was to be constructed within five months and thereafter the allotment was to be made on the basis of seniority. However, the shop was not allotted within the time frame, constraining the writ petitioner to initially issue a notice to the Executive Officer of the Samiti, Dehra and thereafter file a petition before the Deputy Commissioner, Kangra at Dharamshala. The Deputy Commissioner ordered an inquiry to be conducted by the Sub Divisional Officer, Dehra, who in furtherance thereof, submitted his report in August 1998.

4. However, before the Deputy Commissioner could decide the petition, the Executive Officer, Panchayat Samiti Dehra of his own allotted the shops and fixed the rent thereof. This led to various complaints being filed against the Panchayat Samiti constraining the Commissioner-cum- Secretary, Panchayati Raj to intervene. The shops were then directed to be allotted afresh in accordance with the provisions of Panchayati Raj Act as also in terms of the directions passed by this court in Swaran Kumar vs. Panchayat Samiti Dehra and Rattan Chand vs. Panchayat Samiti Dehra.

5. On 28.12.1999, a Committee was constituted to allot the shops firstly to the existing tenants and only thereafter consider the claim of the new allottees through open auction. The writ petitioner was allotted shop No.17 by the Additional Deputy Commissioner, Kangra vide his order dated 7.4.2000 and was simultaneously directed to remove the *Khokha* which had unauthorisedly been constructed by him. However, the writ petitioner even then failed to get the possession of shop No.17 and was instead allotted shop No. 18, which constrained him to approach this Court by filing CWP No. 6159 of 2010 claiming therein the following relief:

> *"(a) Direct the respondents to allot Shop No. 17, at Shopping Complex, Jawalamukhi Temple Road, Dehra, District Kangra and to give the possession of shop No.17 to the petitioner in terms of order dated 7.4.2000 (Annexure PD)."*

6. The official respondents in their reply submitted that the writ petitioner was in occupation of shop No. 18 allotted by the then Panchayat Samiti, Dehra on 23.3.1998 pursuant to an agreement to this effect. The petitioner thereafter had been consistently paying rent as per the aforesaid agreement. Whereas, at the same time, the petitioner was also continuing his business from the *Khokha* and despite having been asked to remove the same, the writ petitioner had failed to do so and had instead started giving applications to various authorities against the then Panchayat Samiti, Dehra.

7. Ultimately, a petition under Sections 5 and 7 of H.P Public Premises (Eviction and Rent Recovery) Act, 1971 for ejectment and recovery of rent was filed on 18.5.1999 before the competent authority, which was finally decided on 30.3.2010. The petitioner was directed to vacate the said premises within 30 days of the publication of order and in the event of refusal or failure to comply with this order, he was further held liable to eviction by use of force as may be necessary for the same purpose.

8. In addition thereto the writ petitioner was ordered to pay damages for unauthorized use and occupation of the same since 1.10.1997 and an amount of Rs.1500 x 20 = Rs.30,000/- was still due and recoverable from the writ petitioner.

9. It was further alleged that the writ petitioner had not removed the "Malwa" (debris) of the *khokha* despite orders having been passed to this effect by the Collector. It was also averred that the petitioner had not paid a single penny for shop No. 18 since 30.3.1998 and he was continuously carrying on his flourishing business in the heart of the town in shop No. 18 alongwith the *khokha*.

10. It is then submitted that in terms of orders passed by the Commissioner-cum-Secretary Panchayati Raj, re-allotment of shops was made in which the writ petitioner was allotted shop No. 17, but the said shop was in the illegal and unauthorized occupation of the appellant since 1998 and a petition under sections 5 and 7 of H.P Public Premises (Eviction and Rent Recovery) Act, 1971 had been filed on 19.9.2000 before the Collector Dehra. It was further claimed that official respondents were ready to hand over shop No. 17 against shop No. 18 to the petitioner, but the same could be done only after the eviction of the appellant from shop No. 17, but the matter was subjudice.

11. Insofar as the appellant is concerned, he initially was not a party to the writ petition. It is on the application preferred by him for impleading him as a party that he came to be impleaded as respondent No.5.

12. In reply to the petition the appellant had submitted that prior to 8.8.1997 he and writ petitioner had been running open *khokhas* with the prior permission of respondent No. 4 at the rate of Rs.100/- per month and after construction of shopping complex, shop No. 17 was allotted to him, whereas shop No. 18 had been allotted to the writ petitioner. After the said allotment he vacated the *khokha* but the writ petitioner had not vacated the same and as a reason whereof eviction proceedings had been initiated by the official respondents against the writ petitioner. It is only thereafter that appellant started running his business in shop No. 17 on a monthly rent of Rs.1090/-.

13. It is further averred that on 7.4.2000 without associating the appellant, a committee was constituted and shop No. 17 was allotted to writ petitioner whereas shop No. 18 came to be allotted to the appellant. The appellant did not deny the receipt of notice of eviction, but claimed that he had challenged the same vide Civil Suit No. 143 of 2000 before the learned Sub Judge, Dehra. The Civil Suit was compromised between the parties on 20.1.2001, wherein it was agreed that official respondents would not evict the appellant from the disputed shop except in due process of law.

14. The writ petition came to be allowed by the writ court, against which judgment the appellant has filed the instant appeal on the ground that the learned writ court has erred in not taking into consideration the compromise whereby the appellant was to be evicted only in accordance with due process of law. It was further averred that learned writ Court had not taken into consideration that the writ petition was barred by delay and laches and further that the writ petitioner had not approached the Court with clean hands.

We have heard the learned counsel for the parties and have also gone through the records.

15. Ms. Ritta Goswami, learned counsel for the appellant has vehemently argued that the appellant could not have been ordered to be evicted from the shop in question in teeth of the orders passed by the civil Court except after following the due process of law.

16. There is inherent fallacy in this argument, the reason being that none of the parties to the lis have admittedly questioned the orders of allotment of shops made by the Additional Deputy Commissioner pursuant to the directions issued to this effect by the Commissioner-cum-Secretary, Panchayat Raj. It is further not in dispute that in terms of such re-allotment, the appellant was allotted shop No.18, whereas the writ petitioner was allotted shop No. 17. Therefore, there is no reasonable ground available with the appellant to resist the handing over of shop No.17 to the writ petitioner and was rather duty bound to have handed over the peaceful and vacant possession of this shop. Having been allotted shop No.18, the appellant had no legal or other right to forcibly occupy shop No. 17 that too

only on the ground that the writ petitioner had not been vacated shop No.18. The appellant could not have taken law in his own hands and if aggrieved, should have approached the official respondents rather than forcibly occupying shop No.17.

17. That apart, even the directions issued by the Commissioner-cum-Secretary, Panchayati Raj (which have not been assailed by the appellant) could not in any way be construed to be not falling within the expression "due process of law".

18. Having said so, no doubt the writ petitioner is entitled to the possession of shop No. 17, but at the same time this Court cannot ignore even his conduct. It has come on record that the writ petitioner was not only occupying shop No.18 but continued carrying on his business from the unauthorized *Khokha*, that too, by not paying a single penny to the Panchayat Samiti, therefore, the conduct of the writ petitioner was equally unfair.

19. It is evident from the material placed on record that the entire endeavour of both the parties was only to get illegal and undue enrichment that too by raising untenable pleas. It is well settled that a party, who approaches a court of law, must not only come with clean hands, but also clean heart, clear mind and clear objective. The court proceedings are not a game of chess. At no cost can the stream of justice be permitted to be polluted by unscrupulous litigants. The writ court while exercising the writ jurisdiction exercises equitable jurisdiction. The estoppel stems from equitable doctrine and it requires that he who seeks equity must do equity. Not only this, a person who seeks equity, must act in a fair and equitable manner. The equitable jurisdiction cannot be exercised in case of a person who himself has acted unfairly. Even compassion cannot be shown in such cases. The compassion cannot be allowed to bend the arms of justice in a case where an individual(s) have tried to acquire the property by unscrupulous method and by forcibly occupying the premises which neither belong to them nor have been allotted in their favour.

20. Now, coming to the question of adjustment of equities. As already observed earlier, the principle that one who seeks equity must do equity is well known. Writ jurisdiction is equitable jurisdiction. It is well settled that the High Court in exercise of its jurisdiction under Article 226 of the Constitution of India can take cognizance of the entire facts and circumstances of the case and pass appropriate orders to give the parties complete and substantial justice. This jurisdiction of the High Court, being extraordinary, is normally exercisable keeping in mind the principles of equity. One of the ends of the equity is to promote honesty and fair play. If there be any unfair advantage gained by a party priorly, before invoking the jurisdiction of the High Court, the court can take into account the unfair advantage gained and can require the party to shed the unfair gain before granting relief.

21. We have referred to the provisions of Article 226 of the Constitution being fully conscious of the fact that we are dealing with Letters Patent Appeal. As it is more than settled that a writ appeal is a continuation of the writ petition and merely because it is an appeal under the Letters Patent of the Court, it does not change its character from being a writ appeal and, therefore, the appellate powers of this Court cannot be circumscribed and would remain the same as that of the writ Court. It is equally settled that Letters Patent Appeal being an intra-Court appeal and in continuation of the writ petition under Article 226 of the Constitution of India, the relief prayed for can be moulded and final relief can be granted. The proceedings of the intra-Court appeal are, normally, governed and regulated by the statutory provisions conferring right of appeal and jurisdiction to decide the appeal. However, intra-Court appeal under Clause 10 of the Letters Patent, arising out of the proceedings under Article 226 of the Constitution, is not at par with other statutory intra-Court appeals. It is, indeed, continuation of the proceedings under Article 226 of the Constitution.

22. Evidently, both the parties to the lis have reaped undue advantage by resorting to all sorts of unscrupulous methods in order to retain possession of the properties which had not even been allotted to them. None of the parties had the right to take law in their own hands and were required to approach the official respondents to resolve any difficulty rather than forcibly occupying the shops as per their convenience. Even the writ petitioner could not have retained and carried his business from the *Khokha* in violation to the orders passed by the Samiti. To say the least, the conduct of both the parties has been reprehensible and definitely not above board.

23. In view of the aforesaid discussion, there is no merit in this appeal and the same is dismissed with costs assessed at Rs.10,000/- to be paid by the appellant to the Samiti. However, at the same time, even the conduct of the writ petitioner has been totally unfair and he is therefore, required to compensate the Samiti for having gained unfair advantage by retaining possession of the *Khokha* as also shop No.18, therefore, before taking possession of shop No. 17, the writ petitioner is directed to pay a sum of Rs.20,000/- to the Panchayat Samiti towards unfair advantage gained by him prior to filing of the petition. The appeal is accordingly disposed of in the aforesaid terms.

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

Besro Devi and others — Appellants.

Versus

Ranjit Singh — Respondent.

RSA No. 462 of 2006
Date of decision: 26/04/2016

Specific Relief Act, 1963- Section 5- Plaintiff filed a civil suit for possession pleading that defendant had dispossessed him without any right to do so- defendant denied the claim of the plaintiff- trial Court dismissed the suit but in appeal Appellate Court allowed the same- held in Second Appeal that plaintiff relied upon the demarcation report and tatima to prove the encroachment- demarcation report was not accepted by the trial Court as the Demarcating Official had not recorded the statements of the parties regarding the permanent points from which demarcation was conducted- Appellate Court had wrongly relied upon the report of demarcation- requirement of recording statements is not an empty formality failure to record the statements vitiate the entire demarcation- Appellate Court had wrongly allowed the appeal- Appeal accepted- judgment of Appellate Court set aside.

(Para-7)

For the appellants: Mr. Dushyant Dadwal, Advocate.
For the respondent: Mr. Surinder Sharma, Advocate.

The following judgment of the Court was delivered:

Sureshwar Thakur, J.

The instant appeal is directed against the judgment and decree, rendered on 17.6.2006 in Civil Appeal No.13 of 2001, by the learned Additional District Judge, Fast Tract Court, Hamirpur, H.P., whereby, the learned First Appellate Court while allowing the

appeal, preferred by the plaintiff/respondent herein, set aside the judgment and decree, rendered by the trial Court on 28.11.2000.

2. Brief facts of the case are that the plaintiff had filed a suit for possession in respect of the land measuring 4-1/2 sarsahi described as Khasra NO. 377/1 out of Khasra No. 377 situate in Tika Samwi, Tappa Bamson, Tehsil Bhoranj, District Hamirpur, H.P. which is alleged to have taken forcible possession by the defendant in the first week of January, 1993 though the defendant had no right, title or interest in the suit land. Despite several requests by the plaintiff to hand over the possession of the suit land, the defendant did not pay any heed to his requests. The defendant vide his separate written statement, contested the case of the plaintiff. It was submitted that there was an old cattleshed of the defendant on Khasra No. 377/1 measuring 10 marlas which was converted into residential house about 7 years ago. It was also submitted that there were old boundaries on the spot. It was alleged that the plaintiff was interfering with the land of the defendant comprised of Khasra No. 377/1 and 379 measuring 10 and 9 marlas respectively. It was denied that the defendant had encroached upon the suit land.

3. In his replication filed by the plaintiff he denied the claim of the defendant in the written statement and re-affirmed the averments made in the plaint.

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

(i) Whether plaintiff is entitled to the relief of possession? OPP.

(ii) Whether there is residential house over Khasra No. 377/1 for the last 7 years, if so, its effect? OPD

(iii) Relief.

5. On an appraisal of the evidence, adduced before the learned trial Court, the learned trial Court had dismissed the suit of the plaintiff. In an appeal, preferred by the plaintiff before the learned first Appellate Court against the judgment and decree of the learned trial Court, the learned first Appellate Court allowed the appeal.

6. Now the legal heirs of the defendant have instituted the instant Regular Second Appeal before this Court, assailing the findings, recorded by the learned first Appellate Court in its impugned judgment and decree. When the appeal came up for admission on 23.3.2007 this Court admitted the appeal instituted by the appellants, against the judgment and decree, rendered by the learned first Appellate Court on the hereinafter extracted substantial questions of law:-

1. Whether the first appellate court has erred in placing reliance upon Ex.P-1 copy of Jamabandi, Ext.P-2, Ext.PW-3/A, Ext.PW-3/B, application for demarcation, report of demarcation and Tatima while reversing the decree of the trial Court?

Substantial question of Law

7. In support of the defendant encroaching upon the suit land, the plaintiff had placed reliance upon a demarcation report comprised in Ext.PW-3/A which stood accompanied by a Tatima which stands depicted in Ext.PW-3/B latter whereof stood prepared in consonance thereto. The estates of the plaintiff and the defendant are contiguous to each other. PW-3 who carried out demarcation of the contiguous estates of the parties at contest in sequel whereto he prepared Ext.PW-3/A accompanied by a Tatima comprised in Ext.PW-3/B has during the course of his deposition underscored therein the factum of his carrying out demarcation of the contiguous estates of the parties at lis in

consonance with the principles enjoined in the apposite rules. However, with there being an enjoined obligation fastened upon him under the apposite rules of his preceding to his holding demarcation of the contiguous estate of the parties at lis, his ascertaining the fixed points wherefrom demarcation is to commence besides any ascertainment of the fixed points upsurging on a consensus recorded before him by the parties at lis obliged him to mete adherence to the tenets aforesaid especially when adherence thereof by him was indispensable for imputing sanctity to the demarcation carried out by him besides to the demarcation report prepared in consonance thereto. The learned trial Court had dis-imputed sanctity to demarcation report comprised in Ext.PW-3/A and to Tatima borne on Ext.PW-3/B, on the score of Ext.PW-3/A disclosing of his before proceeding to carry out demarcation of the contiguous estates of the parties at lis his not recording their respective statements portraying their consensus ad idem qua fixed points wherefrom he was to commence demarcation. Since validity would stand fastened qua the demarcation held by PW-3 only on his preceding to his holding demarcation for detecting encroachment purportedly at the instance of the defendant over upon the suit land owned by the plaintiff his peremptorily ascertaining fixed points on the parties recording before him their consensus ad idem qua theirs constituting fixed points wherefrom he hence stood authorized to hold demarcation. Since PW-3 has underscored in his deposition of his prior to his proceeding to hold demarcation his omitting to record the statements of the parties with a disclosure by each, before him of theirs consensually agreeing to the fixed points wherefrom demarcation was to be held by him rather rendered the ascertainment of fixed points besides the conclusion formed by the demarcating officer qua the fixed points wherefrom he proceeded to hold demarcation of the contiguous estate of the parties at contest being in its entirety a unilateral and an arbitrary exercise on his part. Consequently, with the ascertaining of fixed points by the demarcating officer wherefrom he commenced the demarcation of the contiguous estates of the parties at lis standing ridden with a vice of arbitrariness besides bereft of any sanctity qua theirs constituting volitionally agreed fixed points by the contesting parties rather when they stood unilaterally concluded by him to be the points wherefrom he stood authorized to hold a valid demarcation also vitiates the entire demarcation proceedings as also the demarcation report prepared in consonance therewith. The learned trial Court aptly concluded of hence the entire demarcation proceedings besides the demarcation report as well as the Tatima appended thereto reflective of the defendant encroaching upon the suit land to the extent of one marla being liable to be discounted. The learned first appellate Court had proceeded to on its assigning the flimsy reason of PW-3 in Ext.PW-3/A carrying out a detailed exercise to demarcate the contiguous estates of the parties at lis hence find fault in the reasoning adopted by the learned trial Court. The learned First Appellate Court also hence discounted the reasoning afforded by the learned trial Court of non recording of by the demarcating officer the statements of the parties prior to his holding demarcation of the contiguous estates of the parties at lis with unfoldments therein of theirs portraying their consent to him qua the fixed points wherefrom he hence held leverage to commence the demarcation, vitiating the demarcation proceedings. However, the reason adopted by the learned First Appellate Court in discounting the reasoning afforded by the learned trial Court in concluding of the demarcation proceedings held by the local commissioner wanting in legal worth arising from the latter infringing the mandate enjoined upon him by the apposite rules of his prior to proceeding to hold demarcation of the contiguous estate of the parties at lis his standing enjoined to record the statements of the parties at contest with a communication by each to him of theirs consensually agreeing to the fixed points wherefrom the demarcating officer was hence authorized to proceed to hence hold a valid demarcation of their contiguous estates, when could not be easily slighted renders hence the disconcurrence of the first appellate court with the findings of the trial Court to suffer

impairment. The necessity of the Local Commissioner or the demarcating officer preceding to his holding demarcation of the contiguous estates of the parties at lis his recording the consensus ad idem of the parties at lis qua the fixed points wherefrom he hence holds leverage to conduct a valid demarcation, is not an idle formality rather adherence thereto is indispensable for validating the demarcation proceedings especially when the salutary object underlying it, precludes the demarcating officer or the revenue officer concerned to arbitrarily besides unilaterally fix the fixed points wherefrom he holds demarcation of the contiguous estates rather is promotive of transparency as well as impartisanship in the holding of demarcation by the officer concerned. Given the salutary object underlying the adherence by the officer concerned with the tenets expounded hereinbefore inasmuch as of its promotive of transparency contrarily non adherence thereto would lead to a conclusion of the demarcation proceedings undertaken by the demarcating officer standing ridden with a palpable vice of lack of transparency besides with a stain of partisanship. In sequel, a tainted or a stained demarcation of the contiguous estates of the parties at lis is unworthy of acceptance by this Court.

8. The result of the above discussion is that the learned first appellate Court has mis-appreciated the evidence on record hence the judgement and decree rendered by the learned Additional District Judge warrants interference which is accordingly set-aside and the judgement and decree rendered by the learned trial Court is affirmed. The substantial questions of law are answered in favour of the legal heirs of the defendant. Decree sheet be prepared accordingly. The parties are left to bear their own costs. All pending application(s) are also disposed of accordingly. Records be sent back forthwith.

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

Mst.Mobina wife of Mohd Ikram and others .....Appellants/plaintiffs.

Vs.

Smt. Kala wife of Balla Ram. .....Respondent/defendant.

RSA No. 501 of 2002.
Judgment reserved on: 12.4.2016
Date of judgment April 26,2016

Specific Relief Act, 1963- Section 34- Plaintiffs filed a suit pleading that N was owner of the suit land- he left village in the year 1972 and plaintiffs occupied the land in the year 1973- plaintiffs are cultivating suit land and they have become owners by adverse possession- M general power of attorney of N had received an amount of Rs. 3,800/- but had not executed the sale deed- defendant denied the claim of the plaintiffs- they pleaded that possession of the plaintiffs was as licensee- when defendant requested to deliver the possession of suit land, plaintiffs became dishonest and filed the civil suit- counter-claim was also filed by the defendant seeking possession on the basis of the title- suit was dismissed and counter-claim was decreed by the trial Court- appeal was preferred, which was dismissed- held, in second appeal that plaintiffs had admitted their permissive possession in agreement to sell and, they cannot claim adverse possession- plea of part performance is available only by way of defence and is not available to plaintiffs- suit for specific performance was barred by limitation and specific performance cannot be granted to the plaintiffs- defendant being owner is entitled to claim the possession- Appellate Court had rightly dismissed the appeal- second appeal dismissed. (Para-10 to 16)

Cases referred:
Gurdwara Sahib Vs. Gram Panchayat village Sirthala and another, 2014 (1) SCC 669
State of Haryana Vs. Mukesh Kumar and others, 2011 (10) SCC 404
Mandal Revenue officer Vs. Goundla Venkaiah and another, 2010 (2) SCC 461
L.N. Aswathama and another Vs. P. Prakash, 2009 (13) SCC 229
P.T. Munichikkanna Reddy and others Vs. Revamma and others, 2007 (6) SCC 59
Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan and others, 2009 (16) SCC 517
Rajinder Kumar Vs. Bhag Singh, 1996 (1) SLJ 215 HP
Mohan Lal Vs. Mirza Abdul Gaffar and another, 1996 (1) SCC 639
Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, AIR 1994 SC 1496
Guru Amarjit Singh Vs. Rattan Chand and others, AIR 1994 SC 227
Nedunuri Kameswaramma Vs. Sampati Subba Rao, AIR 1963 SC 884
Tilak Raj Vs. Bhagat Ram and another, 1997 (1) SLJ HP 84
Amar Singh Vs. Jai Singh, 2009 (1) SLJ HP 189

For the appellants: Mr. Karan Singh Kanwar, Advocate.
For respondent : Mr.K.D.Sood, Sr. Advocate with Mr.Rajneesh K.Lal, Advocate.

The following judgment of the Court was delivered:

P.S.Rana, J.

Present appeal is filed against judgment and decree dated 3.9.2002 passed by learned District Judge Sirmour District at Nahan HP announced in civil appeal No. 24-CA/13 of 2002 title Neen Ali and others Vs. Smt. Kala. Learned District Judge affirmed judgment and decree of learned trial Court passed in civil suit No. 38/1 of 2000/1996 title Neen Ali and others Vs. Smt. Kala.

Brief facts of the case:

2. Sh. Jaan Mohamad deceased plaintiff filed suit for declaration to the effect that plaintiff is owner in possession of suit land by way of oral sale deed and by way of right of adverse possession and entries in the revenue record relating to Smt. Choli and entries of succession in favour of defendant are illegal, fraudulent, wrong and not binding upon deceased plaintiff and his legal heirs. Consequential relief of permanent injunction also sought restraining defendant from interfering in suit land comprised in khata-khatauni No. 289/539 khasra No. 276 situated at mauza Manpura Deora Tehsil Paonta Sahib District Sirmour HP. It is further pleaded that Nanak son of Sh Fatta was owner of suit land. It is further pleaded that Nanak left village in the year 1972 and thereafter deceased plaintiff forcibly occupied suit land in the year 1973 and since 1973 deceased plaintiff is cultivating suit land and after death of deceased his legal heirs are in possession of suit land as owner in possession openly to the notice of true owner Nanak and after death of Nanak to the notice of his widow Smt. Choli and perfected title by way of right of adverse possession in the year 1986-87. It is further pleaded that Smt. Choli died and defendant inherited her property as legal heir. It is further pleaded that in the month of August 1996 husband of defendant threatened deceased plaintiff to dispossess the deceased plaintiff from suit land. It is further pleaded that Sh Mansa Ram who was general attorney of Nanak received a sum of Rs. 3800/- (Three thousand eight hundred) as sale consideration amount but did not execute sale deed. It is further pleaded that in alternative right of adverse possession has accrued to deceased plaintiff through his legal heirs. During the pendency of civil suit

plaintiff Jaan Mohamad died and his legal heirs brought on record. Prayer for decree of suit sought as mentioned in relief clause of plaint.

3. Per contra written statement filed on behalf of defendant pleaded therein that deceased plaintiff and legal heirs of deceased plaintiff have no right, title or interest in suit property and they have no locus standi to file suit. It is further pleaded that suit in the present form is not maintainable. It is further pleaded that Smt. Choli widow of Nanak and mother of defendant gave suit land to late Sh Jaan Mohamad for cultivation purpose as licensee in the month of June 1975 with condition that whenever late Smt. Choli or her daughter would need or demand suit land then licensee late Sh Jaan Mohamad or his successor would hand over vacant possession of suit land. It is further pleaded that possession of late Sh Jaan Mohamad was as licensee over suit land. It is further pleaded that on 15th June 1996 defendant requested late Sh Jaan Mohamad to deliver the possession of suit land but in vain. It is further pleaded that intention of late Sh Jaan Mohamad and thereafter his legal heirs became dishonest and late Sh Jaan Mohamad filed present suit. It is further pleaded that late Sh Jaan Mohamad has suppressed true facts from Court. It is further pleaded that late Jaan Mohamad has no right, title or interest in the suit land. It is further pleaded that on dated 15.11.1996 Jaan Mohamad refused to deliver the possession of suit land. It is further pleaded that possession of deceased plaintiff from 15.11.1996 is in the capacity of tress passer and plaintiff and his legal heirs are under legal obligation to deliver possession of suit land to defendant. It is further pleaded that defendant is also entitled for special cost under Section 35A CPC. It is further pleaded that Jaan Mohamad did not dispute title of defendant. Prayer for dismissal of suit sought. Deceased plaintiff through his legal heirs filed replication and re-asserted the allegations mentioned in plaint.

4. Defendant also filed counter claim and sought relief of possession of suit land on the basis of title. Deceased plaintiff through his legal heirs filed written statement to counter claim.

5. As per pleadings of parties following issues framed by learned trial Court on 28.4.1999.

1. Whether plaintiff has become owner of suit land by way of adverse possession as alleged? …OPP.

2. Whether entry in revenue record showing defendant as 'Kabiz' is wrong and illegal as alleged?. …OPP.

3. Whether plaintiff is entitled to relief of injunction as prayed for? …OPP.

4. Whether plaintiff has no locus-standi to file present suit? …OPD

5. Whether suit is not maintainable in present form? …OPD.

6. Whether plaintiff was a licensee over suit land as alleged, if so its effect?….OPD.

6-A Whether plaintiff is entitled for protection of section 53-A of Transfer of Property Act as alleged?. …OPP.

7. Relief.

6. Findings of learned trial court on issues No. 1 to 3 are in negative and findings of learned trial Court on issues No. 4,5 and 6 are in affirmative. Learned trial Court decided issue No.6-A in negative. Learned trial court dismissed suit of plaintiff and decreed counter claim filed by defendant.

7. Feeling aggrieved against judgment and decree passed by learned trial Court deceased plaintiff through his legal heirs filed civil appeal No. 24-CA/13 of 2002 which was dismissed by learned District Judge Sirmour at Nahan. Thereafter deceased plaintiff through his legal heirs filed present RSA No. 501 of 2002 Hon'ble High Court of HP framed following substantial questions of law.

1. Whether learned District Judge has misconstrued, misinterpreted the material with regard to plea of adverse possession of deceased plaintiff and view taken by him on this plea is perverse, more particularly when deceased plaintiff is recorded 'Kabij' on suit land since 1976 onward in revenue record?.

2. Whether learned District Judge has erred in taking view that Nanak had died in the year 1972 and therefore there is no question of execution of agreement Ext PW6/A dated 23.4.1975 by his general attorney Mansa Ram in favour of Jaan Mohamad for sale of suit land and giving benefit of section 53A of Transfer of Property Act by ignoring fact that defendant has herself pleaded in written statement that Nanak had died in Baisakh 1975?.

3. Whether learned District Judge has committed an error of law in rejecting application of plaintiffs under order 41 rule 27 CPC for additional evidence for proving mutation No. 620 dated 2.3.1976 regarding succession of Nanak in favour of Smt. Choli and mutation No. 1210 dated 23.1.1995 wherein defendant had represented herself to be adopted daughter of Nanak but in present case defendant is claiming herself to be natural daughter of Nanak and Smt. Choli?.

4. Whether learned District Judge in facts and circumstances of case has not appreciated that even after counter claim of defendant in suit the trial court did not frame any issue with respect to entitlement of defendant for possession of suit land but in fact has decreed claim of defendant for possession of suit land which has prejudiced plaintiffs?.

5. Whether learned District Judge has misconstrued, misinterpreted and misapplied the pleadings and evidence on record and view taken by him in impugned judgment and decree is not possible on basis of material on record?.

8.Oral evidence adduced by parties.

8.1 PW1 Neen Ali has stated that suit land is 15 bighas which is situated at Manpura Devora and the owner of suit land was Nanak. He has stated that Nanak went to UP and thereafter deceased plaintiff occupied suit land. He has stated that his father deceased plaintiff cultivated suit land during his life time and after the death of his father he is cultivating suit land. He has stated that he has become owner of suit land by way of right of adverse possession. He has stated that Choli was the wife of Nanak. He has stated that there was no issue from the loin of Nanak and Choli. He has stated that Choli also went to U.P along with Nanak. He has stated that defendant is not the legal heir of Nanak and Choli. He has stated that defendant got recorded her name in the revenue record as legal heir of Nanak and Choli in illegal manner. He has stated that Mansa Ram was attorney of Nanak. He has stated that in the year 1975 attorney of Nanak came to his father and took Rs. 3800/- (Three thousand eight hundred). He has stated that thereafter attorney of Nanak returned back to UP and did not come back. He has stated that defendant has no legal title in suit property.He has tendered in evidence jamabandi for the year 1978-79 Ext PW1/A, jamabandi for the year 1983-84 Ext PW1/B and jamabandi for the year 1993-94 Ext PW1/C. He has denied suggestion that Choli died in the house of defendant on 29.9.1992.

He has denied suggestion that defendant is the daughter of Choli. He has denied suggestion that Nanak had died in the year 1975. He has denied suggestion that deceased plaintiff was licensee in the suit land. He has stated that Mansa Ram has executed agreement with Jaan Mohamad to execute sale deed qua suit property. He has denied suggestion that Mansa Ram was not general attorney of Nanak. He has denied suggestion that no agreement on behalf of Nanak was executed relating to sale of suit land.

8.2 PW2 Shudu Ram has stated that he was familiar with Jaan Mohamad and Nanak. He has stated that Choli was the wife of Nanak. He has stated that Choli and Nanak were issueless. He has stated that land of Nanak was cultivated by Jugal Kishore and Jaan Mohamad. He has stated that after some time Jugal Kishore left land and thereafter entire land was cultivated by Jaan Mohamad. He has stated that Nanak and Choli both went to UP and possession of land remained with Jaan Mohamad. He has stated that after death of Jaan Mohamad possession of suit land remained with legal heirs of Jaan Mohamad. He has stated that Mansa Ram was general attorney of Nanak. He has stated that Mansa Ram took Rs. 3800/- (Three thousand eight hundred) from Jaan Mohamad. He has stated that defendant is daughter of Nathu and defendant has no title or interest in suit property. He has stated that defendant is not daughter of Nanak and Choli. He has denied suggestion that Mansa Ram was not general attorney of Nanak. He has denied suggestion that no consideration amount was paid to Mansa Ram. He has denied suggestion that Choli and Nanak did not go to U.P. He has denied suggestion that defendant is daughter of Choli. He has denied suggestion that no consideration amount was paid to Mansa Ram amounting to Rs. 3800/- (Three thousand eight hundred).

8.3 PW3 Randhir Singh Patwari has proved rojnamcha No. 478 dated 12.4.1976 Ext PA. He has stated that same is correct as per original record.

8.4 PW4 Suresh Kumar has stated that he is familiar with the signature of his father. He has stated that his father has signed in agreement mark 'A' and he identified the signature of his father. He has stated that his father did not sign the document in his presence. He has denied suggestion that he is not familiar with the signature of his father.

8.5 PW5 Ran Singh Chauhan registration clerk Paonta Sahib has stated that he has brought summoned record. He has stated that on 5.9.1974 Nanak son of Fata has given power of attorney to Mansa Ram Ext PW5/A and the same is correct as per original record. He has admitted that he was not posted as registration Clerk in the year 1974. He has denied suggestion that document Ext PW5/A is the forged document.

8.6 PW6 Umesh Gupta has stated that his father was petition writer who died in the year 1993. He has stated that he is familiar with signature of his father. He has stated that document Ext PW6/A was signed by his father. He has denied suggestion that document Ext PW6/A did not bear signature of his father. He has denied suggestion that he did not work along with his father.

8.7 PW7 Jug Mohan Singh has stated that his father was agriculturist and he is familiar with signature of his father. He has stated that his father has died. He has stated that document Ext PW7/A bears signature of his father. He has denied suggestion that document Ext PW7/A did not bears signature of his father.

8.8 DW1 Smt. Kalawati has stated that the name of her father was Nanak and name of her mother was Choli. She has stated that her father was owner of suit property. She has stated that she is only legal heir of deceased Nanak and Choli. She has stated that after her marriage she settled in-laws house. She has stated that suit land was given to Jaan Mohamad as licensee. She has stated that deceased plaintiff and his legal heirs are in

possession of suit land as licensee. She has stated that after the death of her mother she inherited the suit property. She has stated that Jaan Mohamad and his legal heirs have no title in the suit property. She has stated that she requested deceased Jaan Mohamad and his legal heirs to vacate suit land. She has stated that suit land was not alienated to Jaan Mohamad. She has stated that her father did not receive any sale consideration amount. She has denied suggestion that general attorney was given to Mansa Ram. She has denied suggestion that deceased plaintiff and his legal heirs are in settled possession of suit land by way of right of adverse possession. She has denied suggestion that in order to acquire suit land she has falsely pretended herself to be daughter of Nanak and Choli.

8.9 DW2 Raghubir has stated that Choli was his relative. He has stated that Choli was married with Nanak. He has stated that he used to visit the house of Nanak. He has stated that defendant was born from the loin of Nanak and Choli. He has stated that defendant was married with Bal Ram. He has stated that he does not know that Mansa Ram alienated suit land in favour of deceased Jaan Mohamad.

8.10 DW3 Mela Ram has stated that he is familiar with Nanak and Choli who are residents of his village. He has stated that defendant is the daughter of Nanak. He has stated that Choli had died in the residential house of defendant. He has stated that Nanak was his uncle. He has denied suggestion that Nanak died in U.P.

9. Following documentaries evidence adduced by parties. (1) Ext PW1/A is the copy of jamabandi for the year 1978-79. (2) Ext PW1/B is the copy of jamabandi for the year 1983-84. (3) Ext PW1/C is the copy of missal haquiat for the year 1993-94 (4) Ext PA is the copy of rapat No. 478 dated 12.4.1976. (5) Ext PW5/A is the copy of general power of attorney dated 5.9.1974 given by Nanak in favour of Mansa Ram. (6) Ext PW6/A is the copy of agreement of sale dated 23.4.1975 executed between Nanak through general attorney Mansa Ram in favour of Jaan Mohamad. (7) Ext PW6/A is the letter written by Brij Bhushan to Sub Registrar Paonta Sahib. (8) Ext DA is the copy of missal haquiat for the year 1978-79. (9) Ext DB is the copy of missal haquiat for the year 1993-94. (10) Ext DC is the copy of missal haquiat for the year 1973-74. (11) Ext DE is the copy of khasra Girdawari w.e.f. 21.11.1974 to 1979. (12) Ext DE is the copy of rapat. (13) Ext DF is the copy of jamabandi (14) Ext DG is the copy of death certificate.

Findings upon point No.1 of substantial question of law.

10. Submission of learned Advocate appearing on behalf of appellants/plaintiffs that right of adverse possession has accrued to appellants/plaintiffs over suit land because predecessor-in-interest of appellants remained in settled possession of suit land since 1978 in relevant record is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that suit for declaration of adverse possession cannot be filed by plaintiffs. It is well settled law that plea of adverse possession can be pleaded as defence/shield only. See 2014 (1) SCC 669 title Gurdwara Sahib Vs. Gram Panchayat village Sirthala and another. It is well settled law that animus possessio should be proved and mere possession for long period does not result in converting permissive possession into adverse possession. See 2011 (10) SCC 404 title State of Haryana Vs. Mukesh Kumar and others, see 2010 (2) SCC 461 title Mandal Revenue officer Vs. Goundla Venkaiah and another, see 2009 (13) SCC 229 title L.N. Aswathama and another Vs. P. Prakash, see 2007 (6) SCC 59 title P.T. Munichikkanna Reddy and others Vs. Revamma and others, see 2009 (16) SCC 517 title Hemaji Waghaji Jat Vs. Bhikhabhai Khengarbhai Harijan and others. It was held in case reported in 1996 (1) SLJ 215 HP title Rajinder Kumar Vs. Bhag Singh that entries in revenue record regarding possession without any status will not give any legal right. In the present case plaintiffs have admitted permissive possession of suit land by way of agreement of sale Ext PW6/A dated 23.4.1975 in consideration amount of Rs.3800/- (Three thousand

eight hundred). It is well settled law that permissive possession cannot be adverse possession. Hence it is held that plaintiffs are not entitled for right of adverse possession in the present case. Point No.1 of substantial question of law is decided against appellants/plaintiffs.

Findings upon point No.2 of substantial question of law.

11. Submission of learned Advocate appearing on behalf of appellants that right of part performance as mentioned under Section 53A of Transfer of Property Act 1882 also accrued in favour of appellants/plaintiffs in present case over suit property in view of agreement Ext.PW6/A dated 23.4.1975 is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that plea of part performance as mentioned under section 53A of Transfer of Property Act 1882 is available only by way of defence. It is held that above stated plea is available to defendant only and plea of part performance is not available to plaintiffs. See 1996 (1) SCC 639 title Mohan Lal Vs. Mirza Abdul Gaffar and another.

12. Submission of learned Advocate appearing on behalf of appellants/plaintiffs that defendant is not daughter of Nanak but daughter of Nathoo and Rassali is rejected being devoid of any force for the reasons hereinafter mentioned. Appellants/plaintiffs did not examine Nathoo and Rasali in Court in order to prove fact that defendant is daughter of Nathoo and Rasali. On the contrary DW1 Smt. Kalawat, DW2 Raghubir and DW3 Mela Ram have stated in positive manner that Kalawati was born from loins of Nanak and Choli. Testimonies of DW1, DW2 and DW3 are trustworthy, reliable and inspire confidence of Court. Nanak was uncle of DW3 Mela Ram. DW3 Mela Ram is close relative of Nanak. It is well settled law that close relative is best witness relating to dispute of relationship status. Point No.2 of substantial question of law is decided against appellants/plaintiffs.

Findings upon point No.3 of substantial question of law.

13. Submission of learned Advocate appearing on behalf of appellants that learned District Judge has committed error of law in rejecting application of plaintiffs filed under order 41 rule 27 CPC for adducing additional evidence for proving mutation No. 620 dated 2.3.2016 regarding succession of Nanak in favour of Choli and mutation No. 1210 dated 23.1.1995 wherein defendant represented herself to be daughter of Nanak is also rejected being devoid of any force for the reason hereinafter mentioned. It is well settled law that mutation proceedings are only for fiscal purpose and mutation proceedings did not confer any title in favour of any party. See AIR 1994 SC 1496 title Navalshankar Ishwarlal Dave and another Vs. State of Gujarat and others, See AIR 1994 SC 227 title Guru Amarjit Singh Vs. Rattan Chand and others**.** Even learned first appellate court has specifically held that plaintiffs did not fulfill requirement of Order XLI rule 27 CPC i.e. (1) Learned trial court refused to admit evidence which ought to have been admitted. (2) Party seeking to produce additional evidence establishes that non-withstanding the exercise of due diligence such evidence was not within knowledge or could not after exercise of due diligence be provided at the time when decree appealed was passed. (3) That documents are required to enable court to pronounce judgment or for any substantial cause.

14. Submission of learned Advocate appearing on behalf of appellants/plaintiffs that general attorney of Nanak has executed agreement for sale in favour of Jaan Mohamad predecessor-in-interest of plaintiffs Ext PW6/A on 23.4.1975 in consideration amount of Rs.3800/- (Thirty thousand eight hundred) and on this ground appeal be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Agreement for sale was executed on 23.4.1975 and there is recital in agreement Ext PW6/A that sale deed would be executed within six months w.e.f. 23.4.1975. Court is of the opinion that time is essence of contract. Plaintiffs did not file any suit within three years after expiry of six

months from the date of execution of agreement of sale dated 23.4.1975. Present suit was filed by plaintiffs in the year 1996. As per Limitation Act 1963 suit for specific performance of contract can be filed within three years from the date of cause of action. Court is of the opinion that in present case date of cause of action accrued to plaintiffs after expiry of six months from the date of execution of agreement. Six months from the date of execution of agreement expired on 23.10.1975. Hence it is held that relief of specific performance of contract on the basis of agreement Ext PW6/A cannot be granted in favour of appellants/plaintiffs because relief is barred as per Limitation Act 1963. As per Section 3 of Limitation Act 1963 every suit instituted should be dismissed if the same is filed after prescribed period mentioned in Limitation Act 1963. Point No.3 of substantial question of law is decided against appellants/plaintiffs.

Findings upon point No.4 of substantial question of law.

15. Submission of learned Advocate appearing on behalf of appellants/plaintiffs that learned trial Court did not frame issue of counter claim and without framing issue of counter claim learned trial court has granted relief by way of counter claim to defendant and on this ground appeal filed by appellants be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. In the present case both parties went to trial fully knowing the rival case and led evidence not only in support of their contentions but in refutation of those of adverse party. It is held that appellants did not file any application before learned trial court for framing of any additional issues. It is held that plea of counter claim was within the knowledge of appellants/plaintiffs because counter claim was filed by defendant before framing of issues. It is held that no mis-carriage of justice has been caused to appellants/plaintiffs by way of non-framing of issue of counter claim by learned trial court. See AIR 1963 SC 884 title Nedunuri Kameswaramma Vs. Sampati Subba Rao. It is well settled law that when right of adverse possession is claimed by any party and if right of adverse possession is defeated then true owner is legally entitled for relief of possession on the basis of title. See 1997 (1) SLJ HP 84 title Tilak Raj Vs. Bhagat Ram and another. See 2009 (1) SLJ HP 189 title Amar Singh Vs. Jai Singh. It is well settled law that non framing of issue is not material unless prejudice is caused to party. In the present case no prejudice is caused to appellants/plaintiffs by way of non framing of issue of counter claim of possession because appellants/plaintiffs themselves pleaded right of adverse possession against true owner. Even plea of non framing of issue of counter claim not raised by appellants before first appellate Court and same is raised at belated stage in RSA only. It is not expedient in ends of justice to entertain plea at belated stage of case. Hence point No.4 of substantial question of law is decided against appellants/plaintiffs

Findings upon point No.5 of substantial question of law.

16. Submission of learned Advocate appearing on behalf of appellants that learned District Judge has mis-construed and mis-interpreted the pleadings and evidence on record and on this ground appeal filed by appellants be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused oral as well as documentary evidence placed on record. It is held that learned District Judge has properly appreciated oral as well as documentary evidence placed on record and no miscarriage of justice is caused to appellants in present case. It is held that there is no infirmity and illegality in the judgment of learned Trial court and learned first Appellate Court. It is held that judgment and decree of learned Trial court and learned first Appellate Court are based upon oral as well as documentary evidence placed on record. It is held that judgment and decree passed by learned Trial court and learned first Appellate Court are in consonance with law. Hence point No.5 of substantial question of law is decided against appellants/plaintiffs.

Relief.

17. In view of above findings appeal filed by appellants is dismissed. No order as to costs. Learned Registrar Judicial will prepare decree sheet in accordance with law. File of learned Trial Court and learned first Appellate Court be sent back forthwith along with a certify copy of judgment and decree sheet. Appeal is disposed of. Pending applications if any also stands disposed of.

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BEFORE HON'BLE MR. JUSTICE MANSOOR AHMAD MIR, C.J. AND HON'BLE MR. JUSTICE TARLOK SINGH CHAUHAN, J.

Sher Singh .....Petitioner.
Versus
Union of India and others .....Respondents.

CWP No.9030 of 2011.
Judgment reserved on: 19.04.2016.
Date of decision: April 26,2016.

Constitution of India, 1950- Article 226- Petitioner was appointed as Branch Post Master- he was placed under put off duty for keeping with himself the salary of J after forging signatures of J in the acquittance roll- he was ordered to be removed after inquiry- he filed original application before the Central Administrative Tribunal which was dismissed- held, that petitioner had confessed his guilt- Court cannot re-appreciate the evidence led in the inquiry- further, Court would only go into the question of proportionality of punishment only when it shocks its conscience. - once petitioner had confessed, no leniency could have been shown to him- writ petition dismissed. (Para-5 to 15)

Cases referred:
Union of India and others versus P.Gunasekaran AIR 2015 SC 545
Life Insurance Corporation of India and others versus S.Vasanthi (2014) 9 SCC 315
Diwan Singh versus Life Insurance Corporation of India and others (2015) 2 SCC 341

For the Petitioner : Mr.Surender Sharma, Advocate.
For the Respondents : Mr.Ashok Sharma, Assistant Solicitor General of India with Mr.Ajay Chauhan, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge.

This writ petition has been filed taking exception to the order passed by the Central Administrative Tribunal, Chandigarh whereby the original application preferred by the petitioner challenging the order of his removal from service came to be dismissed.

2. The minimal facts as are necessary for the adjudication of this case are that in the year 1981 the petitioner came to be appointed as Branch Post Master and while working as such was served with an office memorandum dated 27th August, 2007 whereby he was placed under put off duty under Rule 12(i) of the Gramin Dak Sewak (Conduct and Employment) Rules, 2001. The charge against the petitioner was that he on 01.05.2006 had kept with himself the salary of Jai Ram 'Dak Distributor' and had himself signed for Jai Ram

in the acquittance roll of the month and by doing so had violated Rule 138(2) of the Branch Post Office Rules. After completion of all procedural requirements, the inquiry eventually culminated into an order of removal of the petitioner from service.

3. The appeal preferred against such removal was rejected by respondent No.3 and thereafter the revision petition preferred against such orders also came to be dismissed by respondent No.2 on 14.07.2010. The petitioner thereafter filed original application before the learned Central Administrative Tribunal which too came to be dismissed vide order dated 03.08.2011.

We have heard the learned counsel for the parties and gone through the material placed on record.

4. Shri Surender Sharma, learned counsel for the petitioner has made two-fold submissions. Firstly, the disciplinary proceedings initiated against the petitioner and thereafter the removal as confirmed by the various authorities including the learned Tribunal are perverse and, therefore, deserve to be set aside and secondly that even if the allegations are taken to be proved, even then the penalty of removal from service cannot be sustained as it is totally disproportionate.

5. It would be noticed that the petitioner himself during the course of inquiry had confessed to his guilt, although he did try to take a stand that the concerned employee i.e. Jai Ram had authorized him to sign on his behalf which did not find favour with any of the authorities or the learned Tribunal.

6. That apart, it would also be noticed that the order of removal from service of the petitioner has been upheld by the first appellate authority, the revisional authority and thereafter by the learned Tribunal and there is nothing to suggest that the findings recorded by any of the authorities below are in any manner perverse.

7. Insofar as the reliability and adequacy of the evidence is concerned, this Court cannot venture into reappreciation of the evidence and act as third appellate authority.

8. The scope of interference by the High Court in such matters has been succinctly summed up by the Hon'ble Supreme Court in its recent decision in ***Union of India and others*** *versus* ***P.Gunasekaran AIR 2015 SC 545*** in the following terms:-

> *"13. Despite the well-settled position, it is painfully disturbing to note that the High Court has acted as an appellate authority in the disciplinary proceedings, re-appreciating even the evidence before the enquiry officer. The finding on Charge No.I was accepted by the disciplinary authority and was also endorsed by the Central Administrative Tribunal. In disciplinary proceedings, the High Court is not and cannot act as a second court of first appeal. The High Court, in exercise of its powers under Article 226/227 of the Constitution of India, shall not venture into reappreciation of the evidence. The High Court can only see whether:*

a. the enquiry is held by a competent authority;

b. the enquiry is held according to the procedure prescribed in that behalf;

c. there is violation of the principles of natural justice in conducting the proceedings;

d. the authorities have disabled themselves from reaching a fair conclusion by some considerations extraneous to the evidence and merits of the case;

e. the authorities have allowed themselves to be influenced by irrelevant or extraneous considerations;

f. the conclusion, on the very face of it, is so wholly arbitrary and capricious that no reasonable person could ever have arrived at such conclusion;

g. the disciplinary authority had erroneously failed to admit the admissible and material evidence;

h. the disciplinary authority had erroneously admitted inadmissible evidence which influenced the finding;

i. the finding of fact is based on no evidence.

Under Article 226/227 of the Constitution of India, the High Court shall not:

(i). re-appreciate the evidence;

(ii). interfere with the conclusions in the enquiry, in case the same has been conducted in accordance with law;

(iii). go into the adequacy of the evidence;

(iv). go into the reliability of the evidence;

(v). interfere, if there be some legal evidence on which findings can be based.

(vi). correct the error of fact however grave it may appear to be;

(vii). go into the proportionality of punishment unless it shocks its conscience."

9. Notably, the case of the petitioner does not fall within any of the exceptions enumerated above so as to call for any interference by this Court in exercise of its writ jurisdiction.

10. Now adverting to the second contention regarding the proportionality of punishment, it was held in ***P.Gunasekaran's case*** (supra) that the High Court would go into the question of proportionality of punishment only in case it shocks its conscience, but then this Court would not reappreciate the evidence for reaching at such conclusion.

11. As observed earlier, the indictment of the petitioner was mainly on the basis of the confession made by him. Once the petitioner confessed to the charge of impersonation and retained the salary for 10 days before handing to Jai Ram, no leniency could have been shown by the Department.

12. It is trite that punishment is the discretion of the disciplinary authority and the Court would not substitute its own judgment unless the punishment shocks the conscience. Even, in such case, it has been held that the Court should ordinarily remit the matter to the disciplinary authority for consideration of punishment.

13. The scope and power of judicial review of the Courts while dealing with the validity of quantum of punishment imposed by the disciplinary authority was subject matter of discussion before the Hon'ble Supreme Court in ***Life Insurance Corporation of India and others*** *versus* ***S.Vasanthi (2014) 9 SCC 315*** wherein it was reiterated that the High Court in exercise of its powers of judicial review cannot assume the role of sitting as a departmental appellate authority as the same is not permissible under law. It shall be apt to reproduce paras 10 and 11 of the judgment which read thus:-

> *"10.The scope and power of judicial review of the courts while dealing with the validity of quantum of punishment imposed by the disciplinary authority is now well settled. In Kendriya Vidyalaya Sangthan v. J. Hussain (2013) 10 SCC 106, the law on this subject, is recapitulated in the following manner: (SCC pp.110-12, paras 7-10)*
>
> > *"7. When the charge is proved, as happened in the instance case, it is the disciplinary authority with whom lies the discretion to decide as to what kind of punishment is to be imposed. Of course, this discretion has to be examined objectively keeping in mind the nature and gravity of charge. The Disciplinary Authority is to decide a particular penalty specified in the relevant Rules. Host of factors go into the decision making while exercising such a discretion which include, apart from the nature and gravity of misconduct, past conduct, nature of duties assigned to the delinquent, responsibility of duties assigned to the delinquent, previous penalty, if any, and the discipline required to be maintained in department or establishment where he works, as well as extenuating circumstances, if any exist.*
> >
> > *8. The order of the Appellate Authority while having a re-look of the case would, obviously, examine as to whether the punishment imposed by the Disciplinary Authority is reasonable or not. If the Appellate Authority is of the opinion that the case warrants lesser penalty, it can reduce the penalty so imposed by the Disciplinary Authority. Such a power which vests with the Appellate Authority departmentally is ordinarily not available to the Court or a Tribunal. The Court while undertaking judicial review of the matter is not supposed to substitute its own opinion on reappraisal of facts.(See: Union Territory of Dadra & Nagar Haveli vs. Gulabhia M.Lad (2010) 5 SCC 775.) In exercise of power of judicial review, however, the Court can interfere with the punishment imposed when it is found to be totally irrational or is outrageous in defiance of logic. This limited scope of judicial review is permissible and interference is available only when punishment is shockingly disproportionate, suggesting lack of good faith. Otherwise, merely because in the opinion of the Court lesser punishment would have been more appropriate, cannot be a ground to interfere with the discretion of the departmental authorities.*
> >
> > *9. When the punishment is found to be outrageously disproportionate to the nature of charge, principle of proportionality comes into play. It is, however, to be borne in mind that this principle would be attracted, which is in tune with doctrine of Wednesbury[4] Rule of reasonableness, only when in the facts and circumstances of the case, penalty imposed is so disproportionate to the nature of charge that it shocks the conscience of the Court and the Court is forced to believe that it is totally unreasonable and arbitrary. This principle of proportionality*

was propounded by Lord Diplock in Council of Civil Service Unions vs. Minister for Civil Service 1985 AC 374 : (1984) 3 WLR 1174, in the following words: (AC p. 410 D-E)

> *'….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 of 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". This 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".'*

10. An Imprimatur to the aforesaid principle was accorded by this Court as well, in Ranjit Thakur vs. Union of India (1987) 4 SCC 611. Speaking for the Court, Justice Venkatachaliah (as he then was) emphasizing that "all powers have legal limits" invokes the aforesaid doctrine in the following words: (SCC p.620, para 25)

> *'25….The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review.' "*

11. We are of the opinion that the High Court transgressed its limits of judicial review by itself assuming the role of sitting as departmental appellate authority, which is not permissible in law. The principles discussed above have been summed up and summarised as follows in the case of Lucknow Kshetriya Gramin Bank . v. Rajendra Singh, (2013) 12 SCC 372 (SCC p.382, , para 19)

> *"19.1. When charge(s) of misconduct is proved in an enquiry, the quantum of punishment to be imposed in a particular case is essentially the domain of the departmental authorities.*
>
> *19.2. The courts cannot assume the function of disciplinary/ departmental authorities and to decide the quantum of punishment and nature of penalty to be awarded, as this function is exclusively within the jurisdiction of the competent authority.*
>
> *19.3 Limited judicial review is available to interfere with the punishment imposed by the disciplinary authority, only in cases where such penalty is found to be shocking to the conscience of the court.*
>
> *19.4 Even in such a case when the punishment is set aside as shockingly disproportionate to the nature of charges framed against*

the delinquent employee, the appropriate course of action is to remit the matter back to the disciplinary authority or the appellate authority with direction to pass appropriate order of penalty. The court by itself cannot mandate as to what should be the penalty in such a case.

19.5. The only exception to the principle stated in para 19.4 above, would be in those cases where the co-delinquent is awarded lesser punishment by the disciplinary authority even when the charges of misconduct were identical or the co-delinquent was foisted with more serious charges. This would be on the doctrine of equality when it is found that the employee concerned and the co-delinquent are equally placed. However, there has to be a complete parity between the two, not only in respect of nature of charge but subsequent conduct as well after the service of charge-sheet in the two cases. If the co-delinquent accepts the charges, indicating remorse with unqualified apology, lesser punishment to him would be justifiable."

14. The legal position has thereafter been reiterated by the Hon'ble Supreme Court in its recent decision in ***Diwan Singh*** *versus* ***Life Insurance Corporation of India and others (2015) 2 SCC 341*** and it was held as under:-

"8.As far as argument relating to quantum of punishment, as modified by the High Court, which results in consequential forfeiture of pensionary benefits in view of Rule 23, quoted above, is concerned, we do not find the punishment to be harsh or disproportionate to the guilt, in view of the nature of the charge of which the appellant is found guilty in the present case. Time and again, this Court has consistently held that in such matters no sympathy should be shown by the Courts.

9. In NEKRTC v. H. Amaresh (2006) 6 SCC 187, this Court, in para 18 of the judgment has expressed the views on this point as under: (SCC p.193)

"18. In the instant case, the misappropriation of the funds by the delinquent employee was only Rs 360.95. This Court has considered the punishment that may be awarded to the delinquent employees who misappropriated the funds of the Corporation and the factors to be considered. This Court in a catena of judgments held that the loss of confidence is the primary factor and not the amount of money misappropriated and that the sympathy or generosity cannot be a factor which is impermissible in law. When an employee is found guilty of pilferage or of misappropriating the Corporation's funds, there is nothing wrong in the Corporation losing confidence or faith in such an employee and awarding punishment of dismissal. In such cases, there is no place for generosity or misplaced sympathy on the part of the judicial forums and interfering therefore with the quantum of punishment."

10. In Karnataka SRTC v. A.T.Mane (2005) 3 SCC 254 in which unaccounted amount was only Rs.93/- this Court expressed its opinion in para 12 as under: (SCC p.259)

"12. Coming to the question of quantum of punishment, one should bear in mind the fact that it is not the amount of money misappropriated that becomes a primary factor for awarding punishment; on the contrary, it is the loss of confidence which is the primary factor to be taken into consideration. In our opinion, when a

person is found guilty of misappropriating the corporation's funds, there is nothing wrong in the corporation losing confidence or faith in such a person and awarding a punishment of dismissal".

11. In Niranjan Hemchandra Sashittal and another v. State of Maharashtra(2013) 4 SCC 642, this Court has made following observations in paragraph 25 of the judgment: (SCC p.654).

"25..... In the present day scenario, corruption has been treated to have the potentiality of corroding the marrows of the economy. There are cases where the amount is small, and in certain cases, it is extremely high. The gravity of the offence in such a case, in our considered opinion, is not to be adjudged on the bedrock of the quantum of bribe. An attitude to abuse the official position to extend favour in lieu of benefit is a crime against the collective and an anathema to the basic tenets of democracy, for it erodes the faith of the people in the system. It creates an incurable concavity in the Rule of Law."

12. In Rajasthan State Road Transport Corporation and another v. Bajrang Lal (2014) 4 SCC 693, this Court, following Municipal Committee, Bahadurgarh v. Krishnan Behari and others (1996) 2 SCC 714, has opined that in cases involving corruption there cannot be any other punishment than dismissal. It has been further held that any sympathy shown in such cases is totally uncalled for and opposed to public interest. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant. In said case (Rajasthan SRTC[6]), the respondent employee was awarded punishment of removal from service. In the present case it is compulsory retirement. Learned counsel for respondents submitted that on earlier occasion, appellant was awarded minor punishment, for his misconduct, regarding defalcation of stamps. And now he is found guilty for the second time."

15. It would be evident from the aforesaid exposition of law that it is not the amount misappropriated but the loss of confidence which is the primary factory to be considered while awarding punishment. No doubt, the amount in this case belongs to one Jai Ram and not the Department, but then this incident in itself was sufficient for the employer to lose confidence or faith in the petitioner and award punishment of removal. In such cases, there is no place for generosity or sympathy on the part of judicial forum and, therefore, the same calls for no interference.

16. To be fair to the learned counsel for the petitioner, it may be noted that he has placed heavy reliance on the affidavit executed by Jai Ram wherein it is stated that he had no grievance against the petitioner and the allegations against him i.e. the petitioner were without any foundation and thus were baseless. Suffice it to say that the affidavit relied upon by the petitioner is clearly an after-thought. This is evident from the affidavit which has been executed on 04.11.2009, whereas, the petitioner already stood removed from service before this date vide order dated 30.09.2009.

17. As a sequel to the aforesaid discussion, we find no merit in this petition and the same is accordingly dismissed, leaving the parties to bear their own costs. Pending application, if any, also stands disposed of.

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

State of H.P. & another ……Petitioners.

Versus

Suresh Verma ……..Respondent.

Arb. Case No. 61 of 2012.
Reserved on: 7.04.2016.
Decided on: 26.04.2016.

Arbitration and Conciliation Act, 1996 - Section 34(2)- Respondent was awarded the work amounting to Rs. 1,72,26,850/- completion period of work was 18 months- respondent had executed work of more than Rs. 10,43,401/- - Arbitrator was appointed due to dispute between the parties- arbitrator announced the award in favour of the respondent- aggrieved from the award, arbitration petition was filed- held, that petitioner had asked the respondent to stop the execution of work for want of clearance and permission of the forest department- department ought to have taken permission before entering into the agreement – Arbitrator had rightly held that respondent was entitled for the refund of the earnest money – respondent had deployed the machinery for execution of the work- he is entitled to amount paid by him for hiring machinery- he is also entitled for the amount paid to the labourer at the site- he was prevented from completing the work and is entitled for the loss of profit- objection dismissed. (Para-5 to 17)

Cases referred:

M/S A.T. Brij Paul Singh and others vs. State of Gujarat, (1984) 4 SCC 59,
Dwarka Das vs. State of M.P. and another, (1999) 3 SCC 500
Navodaya Mass Entertainment Limited vs. J.M. Combines, (2015) 5 SCC 698,
Bharat Heavy Electricals Ltd. vs. Globe Hi-Fabs Ltd., (2015) 5 SCC 718
Swan Gold Mining Limited vs. Hindustan Copper Limited, (2015) 5 SCC 739

For the petitioners: Mr. Parmod Thakur, Addl. AG.
For the respondent: Mr. Suneet Goel, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

The State has preferred objections under Section 34(2) of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as the Act, for convenience sake), against the arbitral award dated 5.5.2012.

2. Key facts, necessary for the adjudication of this petition are that the respondent is a registered contractor. He was enlisted as such with the Himachal Pradesh Public Works Department. He was awarded the work vide award letter dated 1.12.2008 amounting to Rs.1,72,26,850/-. The agreement was also entered into between the parties. The completion period of work was 18 months. The work was to be completed by 16.6.2010. The respondent has executed work of more than Rs.10,43,401/-. The respondent approached this Court for appointment of the Arbitrator. Sh. M.D.Sharma, learned District and Sessions Judge (Retd.) was appointed as Arbitrator vide order dated 31.3.2011. The petition was filed. The counter claim was also filed by the petitioners. He claimed refund of earnest money, claim of damages on account of machinery lying idle at the site, damages on

account of idle labour and staff, claim for loss of profit, cost of litigation and interest @ 18% per annum. The petitioners also filed counter claim claiming compensation due to delay of work, compensation for damages of Shallu Dhabas road, expenditure incurred by the petitioners department for the removal of debris from Shallu Dhabas road, compensation for not establishing canteen at site, compensation for not employing Engineer at the site, compensation to deprive the people from getting benefit from the road, compensation on account of extra expenditure if the work was to be executed by the other agency and lastly interest @ 18% per annum. The counter claim was dismissed. The learned Arbitrator made the award on 5.5.2012. The respondent was awarded sum of Rs.1,47,000/- under claim for refund of earnest money, Rs.18,15,000/- for claim of damages on account of machinery lying idle at the site and Rs. 60,000/- on account of labour lying idle, Rs.16,18,345/- for claim for loss of profit. The total amount of Rs.36,40,345/- along with interest @ 9% p.a from September, 2009 when the construction work was stopped till realization plus costs, including arbitration fee of Rs.35,000/- (Rs.30,000/- being arbitration fee plus Rs. 5000/- as ministerial charges) and a sum of Rs.120/- as stamp charges was awarded by the learned Arbitrator. Hence, these objections under Section 34(2) of the Act.

3. Mr. Parmod Thakur, Addl. Advocate General for the State has vehemently argued that the contractor was merely asked to stop the work till forest clearance was received. The approval under the Forest Conservation Act, 1980 was accorded on 18.4.2011. The earnest money could not be allowed to be refunded. The respondent could not be paid Rs.18,15,000/- on account of claim of damages on account of machinery lying idle at the site w.e.f. October, 2009 to December, 2009 and also Rs.60,000/- for the labour remaining idle. The respondent was not entitled to anticipatory profit of 10% amounting to Rs.16,18,345/-. The interest @ 9% p.a. from September, 2009 till its realization was on the higher side. On the other hand, Mr. Suneet Goel, Advocate has supported the award dated 5.5.2012.

4. I have heard learned counsel for the parties and gone through the impugned award dated 5.5.2012, carefully.

5. The work was awarded to the respondent vide letter No. PWCSD/Tender/08915-73-73 dated 1.12.2008. The work was to be completed within 18 months. The contractor has executed the work amounting to Rs.10,43,401/-. The Forest Range Officer, Chopal vide letter dated 22.7.2009, directed him to stop the work and further directed not to allow agency for the use of forest land for non-forest purposes. He stopped the execution of the construction work. He was also informed on 26.9.2009 as well as on 22.12.2009 not to further execute the work. However, the respondent has already made necessary arrangements for execution of the work by engaging one L & T machine, three compressors, two JCB machines, two tippers and one tractor. He had also employed 20 beldars for the work. He informed the department vide letters dated 1.10.2009, 28.10.2009 and 18.11.2009 (Annexures C-5 to C-7) to the effect that his labour and machinery has remained idle causing him loss.

6. Now, as far as refund of earnest money is concerned, the petitioners had issued letter dated 22.7.2009 followed by another letter dated 26.9.2009 asking the respondent to stop the execution of the work for want of clearance and permission of the forest department. In fact, the forest department has accorded the permission only on 18.4.2011. The department ought to have taken the permission before entering into agreement with the respondent. The learned Arbitrator has rightly come to the conclusion that the fault lied with the department and not with the respondent. Thus, an amount of Rs.1,47,000/- has rightly been awarded in favour of the respondent.

7. Now, as far as the claim of damages on account of machinery lying idle and on account of labour remaining idle is concerned, the work was to be completed within 18 months. The respondent has worked up to 2.8.2009. The work was stopped on the basis of letters dated 22.7.2009, 26.9.2009 and 22.12.2009, issued by the department whereby the respondent was directed to stop the work for want of clearance and permission of the forest department under the Forest Conservation Act, 1980. By that time, the respondent had already started work and executed it worth Rs.10,00,000/-. He had deployed one L & T machine, three compressors, two JCB machines, two tippers and one tractor for the same. The respondent has also given the details of rents on which each of the machinery was hired by him. The monthly rent of two JCB machines was Rs.1,10,000/-, of one L & T machine was Rs.1,50,000/- per month and for each Compressor was Rs.40,000/- per month. It was Rs.40,000/- per month for each of the two tippers. The respondent was to pay Rs.35,000/- per month for hiring tractor.

8. Mr. Parmod Thakur, Addl. Advocate General for the State has vehemently argued that the learned Arbitrator has awarded the amount under these heads w.e.f. September, 2009 till June, 2010. However, the fact of the matter is that the learned Arbitrator has only awarded the compensation to the contractor under these two claims for the months of October to December, 2009. The respondent has placed on record the extract of attendance register for the month of October, November and December, 2009. The expenditure incurred by him was shown to be Rs.30,000/-, 20,000/- and 20,000/-, respectively. Thus, there is no infirmity in the compensation awarded for three months w.e.f. October, 2009 to December, 2009 to the tune of Rs.18, 15, 000/- and Rs.60,000/- on account of machinery and idle labour at the site.

9. The total value of the contract was 1,72,26,850/-. The work was to be executed within 18 months, as noticed hereinabove. It is not in dispute that the respondent has executed the work worth Rs. 10,43,401/- up to August, 2009. The work was stopped vide letter dated 22.7.2009 followed by letters dated 26.9.2009 and 22.12.2009, only for the reason that the necessary clearance and permission of the forest department under the Forest Conservation Act, 1980 has not been obtained. The petitioners have permitted the respondent to start the work and it was only mid-way he was informed that the necessary permission under the Forest Conservation Act, 1980, has not been obtained. Thus, in these circumstances, the respondent could not be deprived of expected profit. He was rather prevented from completing the work. He had engaged the labour and hired machinery for the work. The learned Arbitrator has awarded Rs. 16,18,345/- to the respondent for the damages on account of expected profit to the extent of 10% of the left over value of contract. The awarding of 9% p.a. interest on a sum of Rs. 36,40,345/- from September, 2009 till its realization is strictly in accordance with law. The arbitration fee of Rs. 35,000/- and ministerial charges are in conformity with law. The learned Arbitrator has rightly rejected the counter claim filed by the objectors. They have not led any evidence to prove their entitlement. The petitioners themselves are at fault by permitting the respondent to commence the work and thereafter asking him to abruptly stop the work for want of clearance under the Forest Conservation Act, 1980. The issues raised in the counter claim have already been dealt with by the learned Arbitrator while deciding the claims raised by the respondent. The award dated 5.5.2012 cannot be held to be against the public policy. The fact of the matter is that the permission under the Forest Conservation Act, 1980, was only obtained on 18.4.2011. The learned Arbitrator has correctly appreciated the entire material placed on record by the petitioners as well as the respondent.

10. Their lordships of the Hon'ble Supreme Court in the case of ***M/S A.T. Brij Paul Singh and others vs. State of Gujarat,*** reported in ***(1984) 4 SCC 59,*** have held that

ordinarily, when a contractor submits his tender in response to an invitation to tender for a works contract, a reasonable expectation of profit is implicit in it and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract. Their lordships have further held that what would be the measure of profit would, however, depend upon facts and circumstances of each case. While estimating the loss of profit for the breach of contract, it would be unnecessary to go into the minutest details of the work executed in relation to the value of the works contract. Their lordships have held as follows:

> "9. It was not disputed before us that where in a works contract, the party entrusting the work commits breach of the contract, the contractor would be entitled to claim damages for loss of profit which he expected to earn by undertaking the works contract. What must be the measure of profit and what proof should be tendered to sustain the claim are different matters. But the claim under this head is certainly admissible. Leaving aside the judgment of the trial court which rejected the claim for want of proof, the High Court after holding that the respondent was not justified in rescinding the contract proceeded to examine whether the plaintiff-contractor was entitled to damages under the head 'loss of profit.' In this connection, the High Court referred to Hudson's Building and Engineering Contract (1970), tenth edition and observed that 'in major contracts subject to competitive tender on a national basis, the evidence given in litigation on many occasions suggests that the head-office overheads and : profit is between 3 to 7% of the total price of cost' which is added to the tender. In other words, the High Court was of the view that the claim under this head was admissible. The High Court, however, addressed itself to the question whether adequate proof is tendered to sustain the claim. In this connection, it was observed that the loss of profit when it is sought to be recovered on the percentage basis has to be proved by proper evidence. Having settled the legal position in this manner, the High Court proceeded to reject the claim observing that the bare statement of the partner of the contractor's firm that they are entitled to damages in the nature of loss of profit @ 20% of the estimated cost is no evidence for the purpose of establishing the claim. The High Court further observed that the appellant has not proved by any primary documents the basis of its pricing for the purpose of quotation in reply to the tender and more so when it has quoted at 7 % less than the original estimated cost and in this view of the matter the claim for loss of profit is unsustainable.
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> 10. Mr. Aneja, learned Counsel for the appellant urged that the appellant was placed at a comparative disadvantage on account of his two appeals arising from two identical contracts inter prates being heard on two different occasions by two different Benches even though one learned Judge was common to both the Benches. Mr. Aneja pointed out that in the appeal from which the cognate Civil Appeal No. 1998/72 arises, the same High Court in terms held that the claim by way of damages for loss of profit on the remaining work at 15% of the price of the work as awarded by the trial court was not unreasonable. The High Court had observed in the cognate appeal that 'the basis adopted by the learned civil Judge in computing the loss of profit at 15% on the value of the remaining work contract cannot be said to be unreasonable'. In fact, the High Court had noticed that this computation was not seriously challenged by the State, yet in the judgment under appeal the High Court observed that actual loss of profit had to be proved and a mere percentage as deposed to by the partner of the appellant would not

furnish adequate evidence to sustain the claim. In this connection the High Court referred to another judgment of the same High Court in First Appeal No. 89 of 1965 but did not refer to its own earlier judgment rendered by one of the Judges composing the Bench in First Appeal No. 384 of 1962 rendered on 3/6 July, 1970 between the same parties. When this was pointed out to Mr. Mehta, his only response was that the court cannot look into the record of the cognate appeal. We find the response too technical and does not merit acceptance. We are not disposed to accept the contention of Mr. Mehta for two reasons: (1) that in an identical contract with regard to another portion of the same Rajkot-Jamnagar road and for the same type of work, the High Court accepted that loss of profit at 15% of the price of the balance of works contract would provide a reasonable measure of damages if the State is guilty of breach of contract. The present appeal is concerned with the same type of work for a nearby portion of the same road which would permit an inference that the work was entirely identical. And the second reason to reject the contention is that ordinarily a contractor while submitting his tender in response to an invitation to tender for a works contract reasonably expects to make profits. What would be the measure of profit would depend upon facts and circumstances of each case. But that there shall be a reasonable expectation of profit is implicit in a works contract and its loss has to be compensated by way of damages if the other party to the contract is guilty of breach of contract cannot be gainsaid. In this case we have the additional reason for rejecting the contention that for the same type of work, the work site being in the vicinity of each other and for identical type of work between the same parties, a Division Bench of the same High Court has accepted 15% of the value of the balance of the works contract would not be an unreasonable measure of damages for loss of profit. We are therefore, of the opinion that the High Court was in error in wholly rejecting the claim under this head.

12. Mr Aneja then attempted to take us through the maze of evident and requested us that the claim under this head in the amount of Rs. 4,30,314/- is reasonable, fair and just. The value of the works contract was Rs. 16,59,900/- and the appellant had offered the rate at 7 % less of the estimate made by the State. The appellant had executed some part of the contract. How much work he had completed and what was the balance of the work contract was attempted to be spelt out by a reference to Ext. 77/1 (Line Plan of Road) read with Ext. 77/2 and 77/3 showing the widening of the side strips near Kankawati Bridge as well as Longitudinal Sections of the Roads. In our opinion, while estimating the loss of profit that can be claimed for the breach of contract by the other side, it would be unnecessary to go into the minutest details of the work executed in relation to the value of the works contract. A broad evaluation would be sufficient. We in this connection, invited both Mr. Aneja, learned Counsel for the appellant and Mr. T.U. Mehta, learned Counsel for the respondent to give broad features of the work as well as the portion of the work executed by the appellant. Having heard them, we are satisfied that the appellant should be awarded Rs. 2 lakhs under the head 'loss of estimated profit' for breach of contract by the respondent."

11. Their lordships of the Hon'ble Supreme Court in the case of ***Dwarka Das vs. State of M.P. and another,*** reported in ***(1999) 3 SCC 500,*** relying upon the earlier

decision have held that whereby the claim of Rs. 20,000/- on account of damages as expected profit out of the contract was found to have been illegally rescinded was justified. It has been held as follows:

> "6. Section 152 C.P.C. provides for correction of clerical arithmetical mistakes in judgments, decrees or orders or errors arising therein from any accidental slip or omission. The exercise of this power contemplates the correction of mistakes by the Court of its ministerial actions and does not contemplate of passing effective judicial orders after the judgment, decree or order. The settled position of law is that after the passing of the judgment, decree or order, court or the tribunal becomes functus officio and thus being not entitled to vary the terms of the judgments, decrees and orders earlier passed. The correction contemplated are of correcting only accidental omission or mistakes and not all omissions and mistakes which might have been committed by the Court while passing the judgment, decree or order. The omission sought to be corrected which goes to the merits of the case is beyond the scope of Section 152 for which the proper remedy for the aggrieved party is to file appeal or review application. It implies that the Section cannot be pressed into service to correct an omission which is intentional, how erroneous that may be. It has been noticed that the courts below have been liberally construing and applying the province of Sections 151 and 152 of the CPC even after passing of effective order in the Us pending before them. No Court can under the cover of the aforesaid sections modify, alter or add to the terms of its original judgment, decree or order. In the instant case, the trial court had specifically held the respondents-State liable to pay future interest only despite the prayer of the appellant for grant of interest with effect from the date of alleged breach which impliedly meant that the court had rejected the claim of the appellant in so far as pendente lite interest was concerned. The omission in not granting the pendente lite interest could not be held to be accidental omission or mistake as was wrongly done by the trial court vide order dated 30th November, 1973. The High Court was, therefore, justified in setting aside the aforesaid order by accepting the revision petition filed by the State.
>
> 7. The reliance of the learned counsel for the appellant on Jainab Bai case (supra) is misplaced inasmuch as in that case the aggrieved party had sought for award of interest after the decree, by filing the application under Section 152 C.P.C. and under Order 47 Rule (1) of the C.P.C. The Division Bench relied upon the decision of Madras High Court in Thirugnanavali Amal v. P. Venugopala, AIR (1940) Madras p. 29 wherein it was held that where a mistake had occurred in the decree inspite of mention of the future interest in the judgment, the Court had the power to rectify the mistake and if it occurred in the decree because of omission of it in the judgment, the mistake could not be corrected. We agree with the view taken by Madras High Court but cannot subscribe to the general observations made by the Madhya Bharat High Court in Jainab Bai's case. In Maharaja Puttu Lal v. Sripal Singh and Ors., AIR 1937 Oudh 191, the court had awarded the mesne profits to the decree holder by correction upon satisfaction that the plaintiff had specifically claimed such profits and its pleader was admitted to have made an oral statement requesting the court to determine the amount of mesne profits in the execution department which was accepted but not mentioned in the decree sheet. Under the facts and circumstances of that case the court held that such being an accidental omission the same could

be corrected in exercise of the powers vested in the court under Section 152 of the C.P.C."

12. In the instant case, the respondent has placed on record copies of agreement dated 3.2.2009 and 16.5.2009 entered into between the parties for hiring the machinery such as JCB, compressor etc.. He has also placed on record copies of attendance register of the labour showing payments made to them. Mr. Bhardwaj, Executive Engineer has filed his own affidavit in support of counter claims.

13. Their lordships of the Hon'ble Supreme Court in the case of ***Navodaya Mass Entertainment Limited vs. J.M. Combines,*** reported in ***(2015) 5 SCC 698***, have held that once the Arbitrator has applied his mind to matter before him, Court cannot reappraise said matter as if it were an appeal. Even if two views are possible, view taken by Arbitrator would prevail. It has been held as follows:

> " ***8***. In our opinion, the scope of interference of the Court is very limited. Court would not be justified in reappraising the material on record and substituting its own view in place of the Arbitrator's view. Where there is an error apparent on the face of the record or the Arbitrator has not followed the statutory legal position, then and then only it would be justified in interfering with the award published by the Arbitrator. Once the Arbitrator has applied his mind to the matter before him, the Court cannot reappraise the matter as if it were an appeal and even if two views are possible, the view taken by the Arbitrator would prevail. (See: Bharat Coking Coal Ltd. Vs. L.K. Ahuja, (2004) 5 SCC 109; Ravindra & Associates Vs. Union of India, (2010) 1 SCC 80; Madnani Construction Corporation Private Limited Vs. Union of India & Ors., (2010) 1 SCC 549; Associated Construction Vs. Pawanhans Helicopters Limited, (2008) 16 SCC 128; and Satna Stone & Lime Company Ltd. Vs. Union of India & Anr., (2008) 14 SCC 785.)
>
> **9**. We have also perused the clauses of the said Agreement, in particular clauses 3 & 5 of the Agreement. We find that the reasoning given by the Division Bench of the High Court cannot be said to be perverse. Furthermore, the appellant never terminated the Agreement or requested the first respondent to take back the machinery. Now, at this stage it would not be proper for us to express further opinion in the matter when the matter/dispute has already been concluded by the Arbitrator and the award has been affirmed by the High Court."

14. In the same volume, their lordships of the Hon'ble Supreme Court in the case of ***Bharat Heavy Electricals Ltd. vs. Globe Hi-Fabs Ltd.,*** reported in ***(2015) 5 SCC 718,*** have held that where Arbitrator has awarded interest at the statutory rate of interest, reduction of interest by court is impermissible. Lesser rate of interest cannot be awarded as it would amount to amending the law, which is not within the powers of judiciary. Their lordships have held as follows:

> "17. On the facts of the case we agree with the submission of Mr. Gourab Banerji that interest is only payable from the date of the award. However, we do not agree with him that the interest should be reduced because of Section 31(7)(b) of the Arbitration and Conciliation Act, 1996 which clearly states that rate of interest will be 18% p.a. Shri Gourab Banerji submitted that in some decisions, a lesser interest has been awarded. We cannot see how a lesser interest can be awarded when the statute specifically provides that the rate of interest will be 18% p.a. and the arbitrator has accepted and awarded

this rate of interest. Judges cannot legislate or amend the law by judicial decisions. They have to maintain judicial discipline and give their decisions in accordance with law. Hence the lesser rate of interest cannot be awarded because that would be amending the law which is not within the powers of the judiciary."

15. In the instant case, the award is strictly in conformity with the terms of the agreement entered into between the parties.

16. Their lordships of the Hon'ble Supreme Court in the case of ***Swan Gold Mining Limited vs. Hindustan Copper Limited,*** reported in ***(2015) 5 SCC 739,*** have held that it is well settled proposition that the court shall not ordinarily substitute its interpretation for that of the arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the arbitrator or by the court would be erroneous or illegal. The arbitrator appointed by the parties is the final Judge of the facts. The award made was not contrary to the fundamental policy of Indian law or against the interest of India or on the ground of patent illegality. Their lordships have further held that the words "public policy" or "opposed to public policy" find reference in Section 23 of the contract Act and also Section 34(2)(b)(ii) of the Arbitration and Conciliation Act, 1996. The interpretation of the contract is matter of the arbitrator, who is a Judge chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy. It has been held as follows:

> *"11.* Section 34 of the Arbitration and Conciliation Act, 1996 corresponds to Section 30 of the Arbitration Act, 1940 making a provision for setting aside the arbitral award. In terms of sub-section (2) of Section 34 of the Act, an arbitral award may be set aside only if one of the conditions specified therein is satisfied. The Arbitrator's decision is generally considered binding between the parties and therefore, the power of the Court to set aside the award would be exercised only in cases where the Court finds that the arbitral award is on the fact of it erroneous or patently illegal or in contravention of the provisions of the Act. It is a well settled proposition that the Court shall not ordinarily substitute its interpretation for that of the Arbitrator. Similarly, when the parties have arrived at a concluded contract and acted on the basis of those terms and conditions of the contract then substituting new terms in the contract by the Arbitrator or by the Court would be erroneous or illegal.
>
> 12. It is equally well settled that the Arbitrator appointed by the parties is the final judge of the facts. The finding of facts recorded by him cannot be interfered with on the ground that the terms of the contract were not correctly interpreted by him.
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> 19. The words "public policy" or "opposed to public policy", find reference in Section 23 of the Contract Act and also Section 34 (2)(b)(ii) of the Arbitration and Conciliation Act, 1996. As stated above, the interpretation of the contract is matter of the Arbitrator, who is a Judge, chosen by the parties to determine and decide the dispute. The Court is precluded from re-appreciating the evidence and to arrive at different conclusion by holding that the arbitral award is against the public policy."

17. Accordingly, the objections are dismissed. The award made by the learned Arbitrator dated 5.5.2012 is upheld. Pending application(s), if any, shall also stand disposed of. No costs.

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

CWP Nos. 8789 and 8781 of 2014
Judgment reserved on: 12.4.2016
Date of Decision : 27.04.2016.

1. CWP No. 8789 of 2014

Business Institute of Management Studies. ... Petitioner

Versus

State of Himachal Pradesh and others. ...Respondents

2. CWP No. 8781 of 2014

Business Institute of Management Studies. ... Petitioner

Versus

State of Himachal Pradesh and others. ...Respondents

Constitution of India, 1950- Article 226- Petitioner claims to be a registered education society recognized by the Sikkim Manipal University- private respondents filed a petition claiming refund of admission fee paid to the petitioner on the ground that the same was exorbitant and had never been approved by the State Government or by the UGC- petitioner was directed to refund the fee- petitioner challenged the order on the ground that respondent No. 2 had no jurisdiction to entertain the petition- private respondents did not fall within the definition of students- respondent No. 2 claimed that University established or incorporated by or under a State Act is to operate only within the territorial jurisdiction allotted to it under the Act and in no case can it operate beyond the territory of the State - private Universities and deemed Universities cannot affiliate any college or institution for conducting courses leading to award of diploma, degrees or other qualifications - Sikkim Manipal University is a private university and is not authorized to affiliate the petitioner- held, that a number of fraudulent boards and institutions are coming up in the country with a primary aim of duping the public in the field of education - right to establish an educational institution is not a business or trade for making profit but bears a clear charitable purpose- State should act as a regulator to maintain academic standard- petitioner is a private educational institution within the territorial jurisdiction of Himachal Pradesh and is amenable to the jurisdiction of respondent No. 2- private respondents had specifically averred that they were students of the petitioner institute- private respondents were competent to file the petition before respondent No. 2- petitioner was not granted affiliation by the UGC to run the institute as a distance education programme study centre – petitioner is no less than commercial shop- Sikkim Manipal University can operate only within jurisdiction of the State of Sikkim and it cannot operate beyond the territory of Sikkim - respondent No. 2 had rightly ordered the refund of the fee- in these circumstances, petition dismissed with cost of Rs.10,000/-- further, direction issued to the State to constitute a committee to carry out inspection of all the private educational institutions at all levels and to indicate whether the private institutions have the requisite infrastructure, parents teacher associations, qualified staff and to ensure that no private education

institution is allowed to charge fee towards building fund, infrastructure fund, development fund and it displays the necessary information. (Para-9 to 64)

Cases referred:
State of Tamilnadu and others Vs. K. Shyam Sunder and others, (2011) 8 SCC 737,
State of Orissa Vs. Mamata Mohanty (2011) 3 SCC 436
Osmania University Teachers' Association Vs. State of Andhra Pradesh, (1987) 4 SCC 671
Prof. Yashpal and another Vs. State of Chhattisgarh and others, (2005) 5 SCC 420
Rai University Vs. State of Chattisgarh and others (2005) 7 SCC 330
Annamalai University Represented by Registrar versus Secretary to Government, Information and Tourism Department and others (2009) 4 SCC 590
State of Maharashtra versus Vikas Sahebrao Roundale and others (1992) 4 SCC 435
Morvi Sarvajanik Kelavni Mandal Sanchalit MSKM B.Ed. College versus National Council for Teachers' Education and others (2012) 2 SCC 16

For the petitioner(s):	Mr.Rajesh Prakash, Advocate, in both the petitions.
For the respondents:	Ms.Meenakashi Sharma, Additional Advocate General with Ms. Parul Negi and Mr.Pankaj Negi, Deputy Advocate Generals, for respondent No. 1, in both the petitions. Mr.Dilip Sharma, Senior Advocate with Mr.Manish Sharma, Advocate, for respondent No. 2, in both the petitions. Mr. Ajit Sharma and Mr.Prashant Sharma, Advocates, for respondents No. 3 to 6 in CWP No. 8789 of 2014 and for respondents No. 3 to 12 in CWP No. 8781 of 2014.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan, Judge

"*Mata shatru pita bairi, yena balo na pathita. Na shobhate sabha madhye hans madhye bako yatha.*"

This is a Sanskrit saying espousing the importance of education. It means that "Parents who do not educate their children are their children's enemies. Such children look as awkward in any gathering, as a Stork amongst dainty Swans."

2. Education is an investment made by the nation in its children for harvesting future crop of responsible adults productive of a well-functioning society (*Refer Rohit Singhal Vs. Jawahar Navodya Vidyalaya, (2003) 1 SCC 687*).

3. Since common questions of law and fact arise for consideration, therefore, both these writ petitions were taken up together for hearing and are being disposed of by way of a common judgment.

4. These petitions are directed against the order passed in case Nos. 2 and 3 of 2012, whereby respondent No. 2 directed the petitioners to jointly and severally refund the fees taken from private respondents.

The facts in brief may be noticed.

5. The petitioner institute is a registered education society, under the Societies Registration Act, 2006 and would claim that it was recognized by the Sikkim Manipal University and thus entitled to run various courses on its behalf.

6. It appears that the private respondents filed petition under Section 11 of the H.P. Private Educational Institutions (Regulatory Commission), Act, 2010 (for short the "Act") and Rule 6 of the H.P. Private Educational Institutions (Regulatory Commission) Rules, 2011 (for short the "Rules"), claiming refund of admission fee paid to the petitioner for MBA PGDM course, on the ground that the same was exorbitant and had never been approved either by the State Government or by the UGC.

7. These petitions were contested by the petitioner and vide impugned order, the petitioner was directed to refund the fee. The impugned orders have been challenged on the ground that respondent No. 2 had no jurisdiction to entertain the petition, as the dispute relating to Sikkim Manipal University was beyond its territorial jurisdiction and further that the private respondents did not fall within the definition of students, therefore, also their claim before the respondent No. 2 was not maintainable.

8. Only respondent No. 2 has contested the petition by filing reply wherein it has been averred that University established or incorporated by or under a State Act is to operate only within the territorial jurisdiction allotted to it under its Act and in no case can it operate beyond the territory of the State of its location. It has further been averred that the private Universities and deemed Universities cannot affiliate any college or institution for conducting courses leading to award of its diploma, degrees or other qualifications and that no University whether Central, State or deemed can offer its programmes through franchising arrangement with private coaching institutions even for the purpose of conducting courses through distance education. It is then averred that the prospectus issued by the petitioner would show that the institute has been recognized by Sikkim Manipal University and whereas the Sikkim Manipal University, as per the official website of the University Grants Commission, is a State private University, therefore, the petitioner institute could not have been affiliated to this University and was thus illegally claiming to have been recognized by Sikkim Manipal University. Once the petitioner was not authorized to act as franchisee or affiliated Institute of Sikkim Manipal University, therefore, it could not have collected any fee from the students.

I have heard the learned counsel for the parties and have gone through the material placed on record.

9. This Court can take judicial notice of the fact that number of fraudulent boards and institutions are coming up in the country with a primary aim of duping the public in the field of education, by presenting imaginary and illusionary picture for making a successful career to the innocent and vulnerable students.

10. The Hon'ble Supreme Court has repeatedly deprecated the practice of admitting students to these unrecognized, unapproved and unaffiliated institutions. Undeniably, slackening the standard and judicial fiat to control the mode of education and examining system are detrimental to the efficient management of education.

11. In ***State of Tamilnadu and others Vs. K. Shyam Sunder and others, (2011) 8 SCC 737***, the Hon'ble Supreme Court explained the importance of education in the following terms:-

> *"18. In the post-Constitutional era, an attempt has been made to create an egalitarian society removing disparity amongst individuals, and in order to achieve that purpose, education is one of the most important and effective means. After independence, there has been an earnest effort to bring education out of commercialism/mercantilism. In the year 1951, the Secondary School Commission was constituted as per the recommendation of Central*

Advisory Board of Education and an idea was mooted by the Government to prepare textbooks and a common syllabus in education for all students. In 1964-1966, the report on National Education Policy was submitted by the Kothari Commission providing for common schools suggesting that public funded schools be opened for all children irrespective of caste, creed, community, religion, economic conditions or social status. Quality of education imparted to a child should not depend on wealth or class. Tuition fee should not be charged from any child, as it would meet the expectations of parents with average income and they would be able to send their children to such schools. The recommendations by the Kothari Commission were accepted and reiterated by the Yashpal Committee in the year 1991. It was in this backdrop that in Tamil Nadu, there has been a demand from the public at large to bring about a common education system for all children."

12. In ***State of Orissa Vs. Mamata Mohanty (2011) 3 SCC 436***, the Hon'ble Supreme Court emphasized the importance of education by observing that education connotes the whole course of scholastic instruction which a person has received. Education connotes the process of training and developing the knowledge, skill, mind and character of students by formal schooling.

13. In ***Osmania University Teachers' Association Vs. State of Andhra Pradesh, (1987) 4 SCC 671***, it was held that democracy depends for its very life on a high standard of general, vocational and professional education. Dissemination of learning with search for new knowledge with discipline all round must be maintained at all costs.

14. A learned Division Bench of this Court in CWP No. 7688 of 2013 titled *H-Private Universities Management Association (H-PUMA) vs. State of H.P.* and others decided on 23.7.2014, was dealing with the right of private universities to make admission to various technical courses in the institution dehors the rules and it was held that right to establish an educational institution was not a business or trade, given solely for profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the public interest and private freedom determines the nature of public controls which can be permitted to be permissible. This Court also upheld the right of the State to act as a regulator to maintain academic standard. The following observations from the judgment deserve to be taken note of:

"20. In view of the various pronouncements of the Hon'ble Supreme Court, it can safely be concluded that in a right to establish an institution, inherent is the right to administer the same which is protected as part of the freedom of occupation under Article 19 (1) (g). Equally, at the same time, it has to be remembered that this right is not a business or a trade, given solely for the profit making since the establishment of educational institutions bears a clear charitable purpose. The establishment of these institutions has a direct relation with the public interest in creating such institutions because this relationship between the public interest and private freedom determines the nature of public controls which can be permitted to be "permissible". Even the petitioners concede that they have established the institutions to ensure good quality education and would not permit the standard of excellence to fall below the standard as may be prescribed by the State Government. The petitioners also conceded that the

State makes it mandatory for them to maintain the standard of excellence in professional institutions. Thus, ensuring that admissions policies are based on merit, it is crucial for the State to act as a regulator. No doubt, this may have some effect on the autonomy of the private unaided institution but that would not mean that their freedom under Article 19 (1) (g) has in any manner been violated. The freedom contemplated under Article 19 (1) (g) does not imply or even suggest that the State cannot regulate educational institutions in the larger public interest nor it be suggested that under Article 19 (1) (g), only insignificant and trivial matters can be regulated by the State. Therefore, what clearly emerges is that the autonomy granted to private unaided institutions cannot restrict the State's authority and duty to regulate academic standards. On the other hand, it must be taken to be equally settled that the State's authority cannot obliterate or unduly compromise these institutions' autonomy. In fact it is in matters of ensuring academic standards that the balance necessarily tilts in favour of the State taking into consideration the public interest and the responsibility of the State to ensure the maintenance of higher standards of education.

23. The State has power to regulate academic excellence particularly in matters of admissions to the institutions and, therefore, is competent to prescribe merit based admission processes for creating uniform admission process through CET. Any prayer for seeking dilution or even questioning the authority of the State to act an regulator is totally ill-founded in view of the various judicial pronouncements, particularly in Visveswaraiah Technological University and another vs. Krishnendu Halder and others (2011) 4 SCC 606 and reiterated in Mahatma Gandhi University and another vs. Jikku Paul and others (2011) 15 SCC 242."

15. Adverting to the facts, two fold submissions have been made by learned counsel for the petitioner. Firstly that respondent No. 2 had no territorial jurisdiction to adjudicate upon the issue and secondly, that the private respondents were no longer the students and therefore, also their claim before respondent No. 2 was not maintainable.

16. Section 2(c) of the Act of 2010 defines private educational institutions in the following terms:

"2(c) "Private Educational Institutions" means all the private educational institutions in the State viz. degree colleges, professional colleges of Education, Institutes of Technical Education, Management, Law, Engineering, Medicine, Pharmacy, Paramedical Institutions and Universities, deemed Universities, Centres of Excellence, or any other educational institutions of higher learning, except schools affiliated to any recognized Board of School Education."

Likewise, student has been defined in Section 2(f) in the following terms:-

"2(f) "student" means a person enrolled in the Private Educational Institution for pursuing a course of study for the award of a degree, diploma, certificate or other academic distinction."

17. Powers and functions of the Commission have been set out in Section 9, as follows:-

*"9. **Powers and functions of the Commission**.--- (1) It shall be the duty of the Commission to ensure that standards of admission, teaching, examination, research, extension programme, qualified teachers and infrastructure, are being maintained by the Private Educational Institutions in accordance with*

the guidelines issued by the Regulatory Bodies of the Central Government or the State Government or by the Central Government or the State Government from time to time. IN case of failure of the Educational Institution to meet the standards laid down, the Commission shall have the power to penalize the Educational Institutions under section 11 of the Act and in case of successive failure of an Institution to meet the standards, the Commission may recommended to the State Government/Regulatory Body for the winding up of the Institution.

(2) The Commission shall ensure that the admissions in the Private Educational Institutions are based on merit achieved in National Common Entrance Test or the State Common Entrance test or any other test as notified by the State Government and where there is no National Level Common Entrance Test, or State Level Common Entrance Test or any other test, the merit shall be determined strictly on the basis of the marks obtained in the qualifying examination.

(3) The Commission shall develop an appropriate mechanism for receipt and redressal of grievances of students and parents, and direct the private institution to set-up a proper Grievance Redressal mechanism for redressal of complaints reported to the Commission. Such complaints shall be addressed within the time fixed by the Commission with details of the steps taken by the institution to redress such complaint.

(4) The Commission may conduct inspections of Private Educational Institutions as and when required and may form expert committees, for inspections of Private Educational Institutions.

(5) The Commission shall have the power to monitor and regulate fees in Private Educational Institutions."

The Commission has been vested with the same powers as that of the Civil Courts under the Code of Civil Procedure in respect of the matters set out under Section 10 of the Act and further the Commission has been conferred the power to levy penalties on various claims.

18. It is not in dispute that the petitioner is a private education institution within the meaning of Section 2(c) of the Act and operating within the territorial jurisdiction of Himachal Pradesh and was thus amenable to the jurisdiction of respondent No. 2.

19. Now in so far as the second contention of the petitioner is concerned, even if it is assumed that the private respondents are no longer students that would not in any manner affect their right to approach respondent No. 2 for the redressal of the grievances. At the same time, this fact alone would not whittle down the jurisdiction or authority of respondent No. 2 to adjudicate upon the issue.

20. That apart, it would be noticed that the private respondents in para 1 of the complaint had categorically stated that they being students of the petitioner institute were competent to file and maintain the petition before respondent No. 2. It shall be apt to reproduce para 1 of the petition, which reads thus:-

"1. That the petitioners are permanent residents of the addresses mentioned in the memo of parties and being students of the respondents Institute at Shimla and being residents of Himachal Pradesh are competent to file and maintain the present petition before this Hon'ble Authority."

21. Notably, the petitioner has not disputed this position and has rather admitted the same to be a matter of record, as would be evident from para 1 of the reply, which reads thus:

"1.That the para 1 No. of the petition is a matter of record hence denied."

22. At this stage, it would also be noticed that one of the points for consideration before respondent No. 2 was as to whether the petitioner had in fact been granted permission by the UGC to run the institute as a distance education programme study centre and whether the petitioner had even obtained permission from the State Government. These questions were answered in the negative, as the petitioner failed to produce any permission granted either by the UGC or by the State Government.

23. This clearly establishes that the petitioner was concerned only with minting money and was least concerned with the prospects and future of the students. This is further evident from the fact that it was charging a fee which had not even been approved by the Sikkim Manipal University itself.

24. Education institution of the petitioner is no less than a commercial shop, where the aspiring needs of the students stand defeated due to the malpractices and frivolous activities of the petitioner. This is a classical example where the petitioner institute has presented an imaginary and illusory picture for making a successful career to the innocent students admitted in their institute, that too, by charging exorbitant fees and thereafter leaving them in the lurch to fend for themselves little knowing that even the courses undertaken by them may probably not even be recognized in the country. This practice is not only to be deprecated, but is also to be handled and dealt with a heavy hand.

25. In ***Prof. Yashpal and another Vs. State of Chhattisgarh and others, (2005) 5 SCC 420***, the Hon'ble Supreme Court has expressed its deep anxious and concern about the quality of education. It had also expressed its concern about mushrooming growth of fake education institutions. The relevant portion reads as under:-

> *"63. There is hardly any merit in the submission raised. The impugned Act which enables only a proposal of a sponsoring body to be notified as a University is not likely to attract private capital and a University so notified cannot provide education of any kind much less of good quality to a large body of students. What is necessary is actual establishment of institutions having all the infrastructural facilities and qualified teachers to teach there. Only such colleges or institutions which impart quality education allure the best students. Until such institutions are established which provide high level of teaching and other facilities like well equipped libraries and laboratories and a good academic atmosphere, good students would not be attracted. In the current scenario, students are prepared to go to any corner of the country for getting good education. What is necessary is a large number of good colleges and institutions and not Universities without any teaching facility but having the authority to confer degrees. If good institutions are established for providing higher education, they can be conferred the status of a deemed University by the Central Government in accordance with Section 3 of UGC Act or they can be affiliated to the already existing Universities. The impugned Act has neither achieved nor is capable of achieving the object sought to be projected by the learned counsel as it enables a proposal alone being notified as a University."*

26. Even otherwise, the issue raised in the present writ petitions is no longer *res integra*. The Hon'ble Supreme Court in Prof. Yashpal's case supra has clearly held that the

State Legislature can only make laws for its own State and not for whole of India. The relevant portion of the judgment is reproduced herein below:-

> *"60. Dr. Dhawan has also drawn the attention of the Court to certain other provisions of the Act which have effect outside the State of Chhattisgarh and thereby give the State enactment an extra territorial operation. Section 2(f) of the amended Act defines 'off-campus centre' which means a centre of the University established by it outside the main campus (within or outside the State) operated and maintained as its constituent unit having the university's complement of facilities, faculty and staff. Section 2(g) defines "off-shore campus" and it means a campus of the university established by it outside the country, operated and maintained as its constituent unit, having the university's complement of facilities, faculty and staff. Section 3(7) says that the object of the University shall be to establish main campus in Chhattisgarh and to have the study centres at different places in India and other countries. In view of Article 245 (1) of the Constitution, Parliament alone is competent to make laws for the whole or any part of the territory of India and the legislature of a State may make laws for the whole or any part of the State. The impugned Act which specifically makes a provision enabling a University to have an off-campus centre outside the State is clearly beyond the legislative competence of the Chhattisgarh legislature."*

27. That apart, the University Grants Commission (UGC) has framed the UGC (Establishment of and Maintenance of Standards in Private Universities) Regulations, 2003 and the same are applicable to private universities such as Sikkim Manipal University.

28. Regulation 3.3 of these regulations puts restriction on establishment of an University outside the State by any State. The same reads thus:-

> *"3.3. A private university established under a State Act shall operate ordinarily within the boundary of the State concerned. However, after the development of main campus, in exceptional circumstances, the university may be permitted to open off-campus centres, off-shores campuses and study centres after five years of its coming into existence, subject to the following conditions....."*

29. It has come in the order impugned herein that the UGC has not granted any permission to Sikkim Manipal University to open its study centre outside the State of Sikkim and therefore, in such eventuality the Sikkim Manipal University could not have extend its arms/activities beyond the State of Sikkim by setting up study centre outside the State. Therefore, what follows is that the Sikkim Manipal University constituted under the State Law passed by the legislature of the State of Sikkim, prima facie, could not have extra territorial authority, i.e. it cannot run, manage or supervise study centres outside the State of Sikkim.

30. Following the decision in Prof. Yashpal case (supra), the Hon'ble Supreme Court in ***Rai University Vs. State of Chattisgarh and others (2005) 7 SCC 330*** had clarified that *"institutions of the erstwhile private Universities, if otherwise eligible, may apply and seek affiliation with any other University which has jurisdiction over the area where the institution is functioning and is empowered under the relevant Rules and Regulations and other provisions of law applicable to the said University to grant affiliation".*

31. The issue thereafter came up before the Hon'ble Supreme Court in ***Annamalai University Represented by Registrar*** *versus* ***Secretary to Government,***

Information and Tourism Department and others (2009) 4 SCC 590 wherein it was held that the provisions of the UGC Act are binding on all universities whether conventional or open. They apply equally to Open Universities as also to formal conventional universities. It was further held that in the matters of higher education, it is necessary to maintain minimum standards of instructions and such minimum standards of instructions are required to be defined by the UGC. It is apt to quote relevant observations which read thus:-

> "40. The UGC Act was enacted by the Parliament in exercise of its power under Entry 66 of List I of the Seventh Schedule to the Constitution of India whereas Open University Act was enacted by the Parliament in exercise of its power under Entry 25 of List III thereof. The question of repugnancy of the provisions of the said two Acts, therefore, does not arise. It is true that the statement of objects and reasons of Open University Act shows that the formal system of education had not been able to provide an effective means to equalize educational opportunities. The system is rigid inter alia in respect of attendance in classrooms. Combinations of subjects are also inflexible.
>
> *41. Was the alternative system envisaged under the Open University Act was in substitution of the formal system is the question. In our opinion, in the matter of ensuring the standard of education, it is not. The distinction between a formal system and informal system is in the mode and manner in which education is imparted. UGC Act was enacted for effectuating co- ordination and determination of standards in Universities. The purport and object for which it was enacted must be given full effect.*
>
> *42. The provisions of the UGC Act are binding on all Universities whether conventional or open. Its powers are very broad. Regulations framed by it in terms of clauses (e), (f), (g) and (h) of sub-Section (1) of Section 26 are of wide amplitude. They apply equally to Open Universities as also to formal conventional universities. In the matter of higher education, it is necessary to maintain minimum standards of instructions. Such minimum standards of instructions are required to be defined by UGC. The standards and the co-ordination of work or facilities in universities must be maintained and for that purpose required to be regulated. The powers of UGC under Sections 26(1)(f) and 26(1)(g) are very broad in nature. Subordinate legislation as is well known when validly made becomes part of the Act. We have noticed hereinbefore that the functions of the UGC are all pervasive in respect of the matters specified in clause (d) of sub-section (1) of Section 12A and clauses (a) and (c) of sub-section (2) thereof.*
>
> *43. Indisputably, as has been contended by the learned counsel for the appellant as also the learned Solicitor General that Open University Act was enacted to achieve a specific object. It opens new vistas for imparting education in a novel manner. Students do not have to attend classes regularly. They have wide options with regard to the choice of subjects but the same, in our opinion, would not mean that despite a Parliamentary Act having been enacted to give effect to the constitutional mandate contained in Entry 66 of List I of the Seventh Schedule to the Constitution of India, activities and functions of the private universities and open universities would be wholly unregulated.*
>
> *44. It has not been denied or disputed before us that in the matter of laying down qualification of the teachers, running of the University and the matters provided for under the UGC Act are applicable and binding on all concerned. Regulations framed, as noticed hereinbefore, clearly aimed at the Open*

Universities. When the Regulations are part of the statute, it is difficult to comprehend as to how the same which operate in a different field would be ultra vires the Parliamentary Act. IGNOU has not made any regulation; it has not made any ordinance. It is guided by the Regulations framed by the UGC. The validity of the provisions of the Regulations has not been questioned either by IGNOU or by the appellant - University. From a letter dated 5.5.2004 issued by Mr. H.P. Dikshit, who was not only the Vice-Chancellor but also the Chairman of the DEC of IGNOU it is evident that the appellant - University has violated the mandatory provisions of the Regulations.

45. The amplitude of the provisions of the UGC Act vis-a`-vis the Universities constituted under the State Universities Act which would include within its purview a University made by the Parliament also is now no longer a res integra.

50. The UGC Act, thus, having been enacted by the Parliament in terms of Entry 66 of List I of the Seventh Schedule to the Constitution of India would prevail over the Open University Act.

51. With respect, it is difficult to accept the submissions of learned Solicitor General that two Acts operate in different fields, namely, conventional university and Open University. UGC Act, indisputably, governs Open Universities also. In fact, it has been accepted by IGNOU itself. It has also been accepted by the appellant - University.

55. The submission of Mr. K. Parasaran that as in compliance of the provisions contained in Regulation 7, UGC had been provided with information in regard to instructions through non-formal/distance education relating to the observance thereof by itself, in our opinion, would not satisfy the legal requirement. It is one thing to say that informations have been furnished but only because no action had been taken by UGC in that behalf, the same would not mean that an illegality has been cured. The power of relaxation is a statutory power. It can be exercised in a case of this nature.

56. Grant of relaxation cannot be presumed by necessary implication only because UGC did not perform its duties. Regulation 2 of the 1985 Regulations being imperative in character, non compliance thereof would entail its consequences. The power of relaxation conferred on UGC being in regard the date of implementation or for admission to the first or second degree courses or to give exemption for a specified period in regard to other clauses in the regulation on the merit of each case do not lead to a conclusion that such relaxation can be granted automatically. The fact that exemption is required to be considered on the merit of each case is itself a pointer to show that grant of relaxation by necessary implication cannot be inferred. If mandatory provisions of the statute have not been complied with, the law will take its own course. The consequences will ensue.

57. Relaxation, in our opinion, furthermore cannot be granted in regard to the basic things necessary for conferment of a degree. When a mandatory provision of a statute has not been complied with by an Administrative Authority, it would be void. Such a void order cannot be validated by inaction.

58. The only point which survives for our consideration is as to whether the purported post facto approval granted to the appellant - University of programmes offered through distance modes is valid. DEC may be an authority under the Act, but its orders ordinarily would only have a prospective

effect. It having accepted in its letter dated 5.5.2004 that the appellant - University had no jurisdiction to confer such degrees, in our opinion, could not have validated an invalid act. The degrees become invalidated in terms of the provisions of UGC ACT. When mandatory requirements have been violated in terms of the provisions of one Act, an authority under another Act could not have validated the same and that too with a retrospective effect."

32. At this stage, I may also refer to the Distance Education Council (DEC) guidelines for regulating the Establishment and Operation of Open and Distance Learning (ODL) Institutions in India issued by DEC. The Preamble to these guidelines clearly sets out the mischief that is sought to be remedied by these guidelines. The relevant portion whereof reads as under:-

"Of late, it has been seen that there is indiscriminate proliferation of Open and Distance Learning (ODL) Institutions in India. Even single-mode conventional universities are becoming dual mode to offer programmes in the distance mode. This has happened due to the fact that the formal system of face-to-face instruction has failed to cope up with the educational requirements of the ever-increasing number of aspiring students after plus two stage. At present more than 20% students of higher education in the Country are enrolled in the ODL system. What is disturbing to note is that distance mode has become purely commercial venture with little or no attention being paid to the quality of education offered to the learners. Many Universities awarding sub-standard certificate/diploma/degree programmes are not adhering to even the guidelines issued by the concerned regulatory bodies. In order to safeguard the interest of the students in India and to ensure the quality of education, the DEC has framed Guidelines, 2006 for regulating the establishment and operation of Open and Distance Learning (ODL), Institutions in India."

33. It would be evident from the above that the parent institutions shall not establish their study centres/regional centres outside their jurisdiction as specified in the parent institutions Act/MOA. Further in case of "deemed university" offering distance education programmes, the same will be confined to the state in which the main campus of the parent institution is located, except for programmes that are culturally and linguistically relevant even outside their State and for that explicit approval of DEC should be obtained for offering such programmes (guideline 3.3).

34. Guideline 9.2 further states that the Study Centres shall be opened only in affiliated and constituent colleges, and in such other academic institutions which the parent institution may deem fit. The Study Centre should be located only within the jurisdiction of the parent institution after signing MOU. In case of "deemed university", the study centres should be only in the State where its headquarter is located.

35. The blatant compromise with the standards of education by these franchisees/study centres etc. in fact compelled the DEC to issue a public notice dated 27th June, 2013 on courses/study centres/off-campuses and territorial jurisdiction of universities, which reads as follows:-

"<u>Public Notice</u>

On

<u>Courses/Study Centres/Off Campuses & Territorial Jurisdiction of Universities</u>

No.F.27-1/2012(CPP/II) 27th June, 2013

The Commission has come across many advertisements published in National Dailies offering opportunities for the award of university degrees through various franchise programmes conducted by certain private institutions. These private establishments claiming themselves as study centres or learning centres of different universities enroll students for various degree programmes and also claim to be responsible for teaching and conduct of examinations. The faculty and the infrastructure belong to these private agencies. The concerned university except providing syllabus and teaching materials has no mechanism to monitor and maintain the academic standards of teaching being imparted at these centres. This blatant compromise with the standards of education has led to widespread criticism. The Commission has taken a serious view of these misleading advertisements appearing in various newspapers:

It is, therefore, clarified for the information of all concerned, including students and parents that:-

a) a Central or State Government University can conduct courses through its own departments, its constituent colleges and/or through its affiliated Colleges;

b) a university established or incorporated by or under a State act shall operate only within the territorial jurisdiction allotted to it under its Act and in no case beyond the territory of the state of its location;

c) the private universities and deemed universities cannot affiliate any college or institution for conducting courses leading to award of its diplomas, degrees or other qualifications;

d) no University, whether central, state, private or deemed, can offer its programmes through franchising arrangement with private coaching institutions even for the purpose of conducting courses through distance mode.

e) all universities shall award only such degrees as are specified by the UGC and published in the official gazette.

f) the Universities shall conduct their first degree and Master's degree programmes in accordance with the regulations notified by the Commission in this regard.

In this connection, the students and the general public are also hereby informed of the following regulating provisions pertaining to different types of universities;

A. UGC Regulations on Private Universities

A private university established under a State Act shall be a unitary university. A private university may be permitted to open off campus centres, off shore campuses and study centres after five years of its coming into existence subject to the fulfillment of conditions as laid down under UGC (Establishment of & Maintenance of Standards in Private Universities) Regulations, 2003. As of now, the UGC has not granted permission to any Private University to establish off-campus/study centre.

B. UGC Regulations on Deemed Universities

A Deemed University shall operate only within its Headquarters or from those off campuses/off shore campuses which are approved by the Government of India through notification published in the official gazette.

In case of distance education programmes, no institution deemed to be university, so declared by the Govt. of India after 26th May, 2010 (date of publication of UGC (Institutions Deemed to be Universities) Regulations, 2010) is allowed to conduct courses in the distance mode.

The institutions deemed to be universities declared before 26th May, 2010 are not allowed to conduct courses in distance mode from any of its off-campus centres/off-shore campuses approved after 26th May, 2010.

Approval for new courses and extension of approval of the courses already run by the Deemed to be Universities under distance mode would be granted by the UGC subject to the fulfillment of conditions as laid down by the UGC.

The UGC has not granted approval to any deemed to be university to establish study centre.

Any information/clarification with regard to recognition of private Universities/Deemed Universities and the course offered by them may be obtained from JS (CPP-I) UGC, Bahadurshah Zafar Marg, New Delhi.

C. Distance Education programmes of the Central Universities and State Govt. Universities.

The Central/State Govt. Universities can conduct courses through distance mode in accordance with the provisions of their respective Act and after the approval of the UGC.

The information relating to recognized universities, list of specified degrees and all the relevant regulations/instructions/guidelines of the UGC are available on UGC website:www.ugc.ac.in.

The students are advised not to take admission in the unapproved Study Centres, Off-Campus Centres, Franchisee Institutions, Colleges/Institutions claiming to be affiliated with Private Universities or Deemed Universities.

Sd/-

(Akhilesh Gupta)

Secretary"

36. Not only this when the universities/deemed universities began issuing misleading advertisements by stating that their programmes were recognized by the UGC, then the UGC itself had to intervene and issued a public notice cautioning the students, parents and public in general regarding these misleading advertisements by issuing a public notice dated 04.06.2015 which reads thus:-

"UNIVERSITY GRANTS COMMISSION

BAHADUR SHAH ZAFAR MARG

NEW DELHI-110 002

***

PUBLIC NOTICE- DISTANCE EDUCATION PROGRAMME

F.No.11-5/2015 (DEB-III) Dated 04.06.2015.

It has come to the notice of the UGC that some Universities/Deemed to be Universities/Institutions are offering programs through Open & Distance Learning (ODL) mode in gross violation of the policy of the erstwhile DEC/UGC. These Universities/Deemed to be Universities/Institutions are issuing misleading advertisements by stating that their programmes are recognized by the UGC.

As per the present policy, State Universities (both Public & Private) cannot set up their off-campus/study centre outside the State where they have been established. And, even within the State, Private Universities are required to take prior permission of the UGC to establish their study centre/off- campus. Similarly, Deemed to be Universities are required to take prior permission of the UGC to establish any off-campus centre/study centre outside their main campus. It is pertinent to mention that No University/Institution Deemed to be University/Institution is permitted to offer Diploma/Bachelor/Master level programmes under ODL mode in Engineering & Technology. The policy of the UGC with regard to territorial jurisdiction and off-campuses/study centres has been clearly articulated in its Public Notice dated 27.06.2013, which is posted on the UGC website for the knowledge of the public. It may also be noted that the UGC has so far not accorded recognition to any university/institution to offer 'online' programmes.

Students, parents and public in general, are hereby, informed that the list of the recognized institutions (alongwith the courses), which are permitted to offer programmes through ODL mode is posted on the UGC's website and can be accessed from www.ugc.ac.in/deb. The qualifications acquired through ODL mode from a non-recognized institution of higher learning shall neither be recognized for the purpose of employment in government service nor for pursuing higher education.

Sd/-

Secretary, UGC"

37. At this stage, I may also take note of a very important development. The Sikkim Manipal University had approached the High Court of Sikkim by filing writ petition No.4 of 2013 challenging therein amongst other things the decision taken by Indira Gandhi National Open University in its 40th meeting dated 08.06.2012 wherein it was decided that State University could not have study centres outside the geographical limits of the State even if the State legislation permitted it to do so. Four questions were framed by the learned Court for consideration which read thus:

"(a) Does the UGC have supervening position upon the IGNOU, DEC and the Universities, both Private and Government funded, created under the State Acts?

(b) Can it be said that Regulations 2003 was never applied after it was framed and that UGC Regulation, 1985 continued to be in force?

(c) Would the letters issued to the Petitioner-University by the IGNOU and DEC in contravention to letter dated 29-12-2012, Annexure P29, of the Ministry of Human Resource Development, Respondent No.2, amount to abandonment of Regulations 2003?

(d) Can it, therefore, be said that it was permissible for the Universities of all categories to run DEP outside the territorial limits of the State?"

38. After detailed discussion, question No.(a) was answered in the affirmative. Thereafter questions No.(b) to (d) being inter-related were taken up together for consideration and thereafter even questions No.(b) to (d) were answered in favour of the respondents and all the prayers made in the writ petition, save and except prayer No.(a), were rejected by the Court vide its decision dated 26.06.2015. However, the University was

granted liberty to approach the concerned UGC and IGNOU for recognition of its programme through ODL mode.

39. Now, insofar as prayer No.(a) is concerned, the same reads thus:-

> *"(a) issue an appropriate writ, order or direction directing Respondent No.1 to expeditiously dispose of the Petitioner's application for continuation of recognition dated 10-07-2012;"*

Thus, it would be clear that insofar as the substantive relief of the University is concerned, the same was disallowed.

40. For completion of record, it may be mentioned that UGC did assail the aforesaid judgment before the Hon'ble Supreme Court in SLP(C) No.26223/2015 which was, however, dismissed on the ground that since the questions of law raised by the University were decided in favour of the UGC and it was only in the peculiar facts of the case as it had been noted by the High Court that relief had been granted to the students, who had undergone the distant learning courses, the Court declined to interfere. This would be evident from the order passed by the Hon'ble Supreme Court on 21.09.2015 which is reproduced herein under:-

> "*Applications for exemption from filing certified copy of the impugned judgment and application for permission to place additional documents on record are allowed.*
>
> *Insofar as the questions of law raised by the petitioner-University Grants Commission before the High Court were concerned, they have been decided in favour of the petitioner. However, in the peculiar facts of the case as noted by the High Court, relief is granted to the students who had undergone the distant learning courses. We are not inclined to interfere with those directions passed by the High Court on those facts.*
>
> *The special leave petitions are, therefore, accordingly, dismissed.*
>
> *Obviously, such an order would not be cited as a precedent in any other case."*

41. The petitioner is the so called franchisee of the Sikkim Manipal University based at Sikkim and claims to be running its study centre at Shimla. It is evident from the decisions of the Hon'ble Supreme Court in Prof. Yashpal's case, Rai University's case and Annamalai's case (supra) as also the guidelines framed by the DEC, the regulations framed by the UGC in 2003 which have also been taken note of in the judgment rendered in Prof. Yashpal's case that a private university established under the State Act can operate ordinarily within the boundaries of the State and it is only after the development of main campus that in exceptional circumstances the university may be permitted to open off-campus centres, off-shores campuses and study centres after five years of its coming into existence that too subject to various conditions.

42. This position has further been clarified in the public notice issued by the DEC on 27.06.2013 (supra) wherein it has again been clarified that a university established or incorporated by or under a State Act shall operate only within the territorial jurisdiction allotted to it under its Act and in no case can it operate beyond the territory of the State or its location. It has also been clarified that the private universities and deemed universities cannot affiliate any college or institution for conducting courses leading to award of its diploma, degrees or other qualifications and lastly it has been categorically made clear that no university, whether Central, State, Private or Deemed, can offer its programmes through

franchising arrangement with private coaching institutions even for the purpose of conducting courses through distance mode.

43. This issue stands further clarified in the public notice issued by the UGC on 04.06.2015 wherein it has been categorically brought to the notice of the public that in terms of the prevalent policy, State Universities (both Public and Private) cannot set up their off-campus/study centres outside the State where they have been established.

44. In view of the various pronouncements of the Hon'ble Supreme Court as taken note of in this judgment and in view of the various public notices issued by the UGC, it is absolutely crystal clear that the petitioner could not act as a franchisee of the Sikkim Manipal University, yet it made all endeavours to harass the private respondents by driving them to otherwise avoidable litigation. In such scenario, it is bounden duty of the Court to curb such kind of litigation. Such like petitions cannot be encouraged since the judicial system in the Country has already choked and such litigants are only consuming the Court's time for a wrong cause. 45. This issue has recently been considered in detail by a learned Division Bench of this Court in ***CWP No.4240 of 2015, titled as 'Om Prakash Sharma versus State of H.P. and others'***, decided on 19.04.2016, wherein it was held as under:-

> *"1. One of the reasons for overflow of Court dockets is the frivolous litigation in which the Courts are engaged by the litigants. Therefore, one of the greatest challenge before the judiciary today is to curb and tackle the frivolous litigation. The judicial system is being not only choked but flooded with false claims and scarce and valuable time of the Court is being consumed for a wrong cause. Undeniably, false claims are a huge strain on the judicial system.*
>
> *2. In a recent judgment in* ***Subrata Roy Sahara vs. Union of India, (2014) 8 SCC 470****, the Hon'ble Supreme Court observed that the Indian judicial system is grossly afflicted with frivolous litigation and ways and means need to be evolved to deter litigants from their compulsive obsession towards senseless and ill-considered claims. The Hon'ble Supreme Court discussed the menace of frivolous litigation in the following terms:*
>
> > *"191. The Indian judicial system is grossly afflicted with frivolous litigation. Ways and means need to be evolved, to deter litigants from their compulsive obsession, towards senseless and ill-considered claims. One needs to keep in mind, that in the process of litigation, there is an innocent sufferer on the other side, of every irresponsible and senseless claim. He suffers long drawn anxious periods of nervousness and restlessness, whilst the litigation is pending, without fault on his part. He prays for the litigation, from out of his savings (or out of his borrowings), worrying that the other side may trick him into defeat, for no fault of his. He spends invaluable time briefing counsel and preparing them for his claim. Time which he should have spent at work, or with his family, is lost, for no fault of his. Should a litigant not be compensated for, what he has lost, for no fault?....*
> >
> > *Xxx xxx xxx*
> >
> > *194. Does the concerned litigant realize, that the litigant on the other side has had to defend himself, from Court to Court, and has had to incur expenses towards such defence? And there are some litigants who continue to pursue senseless and ill-considered claims, to somehow or the other, defeat the process of law. …"*

17. It is rather shocking that the petitioner despite having been reprimanded by this Court in the first case has not learnt any lesson. Even at that stage this Court was constrained to observe that it was only in view of the persuasive submissions made by the learned counsel for the petitioner, apologetically for the misconceived averments and prayers that the writ petition is dismissed.

18.Thereafter again, this Court made serious observations against the petitioner's conduct and dismissed the petition being CWP No. 5922 of 2012 with costs of Rs.50,000/-. Yet, un-deterred the petitioner has approached this Court, that too, against the contents of a letter which only call upon him to furnish certain documents. But the inflated ego of the petitioner probably drives him to file the instant litigation. In such scenario, it is the bounden duty of the Court to curb such kind of litigation. Such like petitions cannot be encouraged since the judicial system in the country is already choked and such litigants are only consuming Courts time for a wrong cause.

19. It has to be remembered that the Court proceedings are sacrosanct and cannot therefore be permitted to be polluted. Judicial system cannot be allowed to be abused and brought to its knees by unscrupulous litigants.

20. This aspect of the matter has been elaborately dealt with by the Hon'ble Supreme Court in ***K.K.Modi vrs. K.N.Modi and others, reported in (1998) 3 SCC 573*** *has dealt in detail with the proposition as to what would constitute an abuse of the process of the Court, one of which pertains to re-litigation. It has been held at paragraphs 43 to 46 as follows:*

> *43. The Supreme Court Practice 1995 published by Sweet & Maxwell in paragraph 18/19/33 (page 344) explains the phrase "abuse of the process of the Court" thus: "This terms connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent improper use of its machinery and will in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation. . . . . .*
>
> *The categories of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed but depend on all the relevant circumstances. And for this purpose considerations of public policy and the interests of justice may be very material."*
>
> *44. One of the examples cited as an abuse of the process of Court is re-litigation. It is an abuse of the process of the Court and contrary to justice and public policy for a party to re-litigate the same issue which has already been tried and decided earlier against him. The re-agitation may or may not be barred as res judicata. But if the same issue is sought to be re-agitated, it also amounts to an abuse of the process of the Court. A proceeding being filed for a collateral purpose, or a spurious claim being made in litigation may also in a given set of facts amount to an abuse of the process of the Court. Frivolous or vexatious proceedings may also amount to an abuse of the process of Court especially where the proceedings are absolutely groundless. The Court then has the power to stop such proceedings summarily and prevent the time of the public and the Court from being wasted. Undoubtedly, it is a matter of Courts' discretion whether such proceedings should be stopped or not; and this discretion has to be exercised with circumspection. It is a jurisdiction which should be*

sparingly exercised, and exercised only in special cases. The Court should also be satisfied that there is no chance of the suit succeeding.

45. In the case of Greenhalgh v. Mallard (1947) 2 All ER 255, the Court had to consider different proceedings on the same cause of action for conspiracy, but supported by different averments. The Court held that if the plaintiff has chosen to put his case in one way, he cannot thereafter bring the same transaction before the Court, put his case in another way and say that he is relying on a new cause of action. In such circumstances he can be met with the plea of res judicata or the statement or plaint may be struck out on the ground that the action is frivolous and vexatious and an abuse of the process of the Court.

46.In Mcllkenny v. Chief Constable of West Midlands Police Force (1980) 2 All ER 227, the Court of Appeal in England struck out the pleading on the ground that the action was an abuse of the process of the Court since it raised an issue identical to that which had been finally determined at the plaintiffs ' earlier criminal trial. The Court said even when it is not possible to strike out the plaint on the ground of issue estoppel, the action can be struck out as an abuse of the process of the Court because it is an abuse for a party to re-litigate a question or issue which has already been decided against him even though the other party cannot satisfy the strict rule of res judicata or the requirement of issue estoppels.

21.Similarly, the Hon'ble Supreme Court in ***Kishore Samrite vs. State of Uttar Pradesh and others, reported in (2013(2) SCC 398****, has dealt in detail with "abuse of process of Court" in the following terms:*

Abuse of the process of Court :

"*31. Now, we shall deal with the question whether both or any of the petitioners in Civil Writ Petition Nos. 111/2011 and 125/2011 are guilty of suppression of material facts, not approaching the Court with clean hands, and thereby abusing the process of the Court. Before we dwell upon the facts and circumstances of the case in hand, let us refer to some case laws which would help us in dealing with the present situation with greater precision.*

32. The cases of abuse of the process of court and such allied matters have been arising before the Courts consistently. This Court has had many occasions where it dealt with the cases of this kind and it has clearly stated the principles that would govern the obligations of a litigant while approaching the court for redressal of any grievance and the consequences of abuse of the process of court. We may recapitulate and state some of the principles. It is difficult to state such principles exhaustively and with such accuracy that would uniformly apply to a variety of cases. These are:

32.1. Courts have, over the centuries, frowned upon litigants who, with intent to deceive and mislead the Courts, initiated proceedings without full disclosure of facts and came to the courts with 'unclean hands'. Courts have held that such litigants are neither entitled to be heard on the merits of the case nor entitled to any relief.

32.2. The people, who approach the Court for relief on an ex parte statement, are under a contract with the court that they would state

the whole case fully and fairly to the court and where the litigant has broken such faith, the discretion of the court cannot be exercised in favour of such a litigant.

32.3. The obligation to approach the Court with clean hands is an absolute obligation and has repeatedly been reiterated by this Court.

32.4. Quests for personal gains have become so intense that those involved in litigation do not hesitate to take shelter of falsehood and misrepresent and suppress facts in the court proceedings. Materialism, opportunism and malicious intent have over-shadowed the old ethos of litigative values for small gains.

32.5. A litigant who attempts to pollute the stream of justice or who touches the pure fountain of justice with tainted hands is not entitled to any relief, interim or final.

32.6. The Court must ensure that its process is not abused and in order to prevent abuse of the process the court, it would be justified even in insisting on furnishing of security and in cases of serious abuse, the Court would be duty bound to impose heavy costs.

32.7. Wherever a public interest is invoked, the Court must examine the petition carefully to ensure that there is genuine public interest involved. The stream of justice should not be allowed to be polluted by unscrupulous litigants.

32.8. The Court, especially the Supreme Court, has to maintain strictest vigilance over the abuse of the process of court and ordinarily meddlesome bystanders should not be granted "visa". Many societal pollutants create new problems of unredressed grievances and the Court should endure to take cases where the justice of the lis well-justifies it. [Refer : Dalip Singh v. State of U.P. & Ors. (2010) 2 SCC 114; Amar Singh v. Union of India & Ors. (2011) 7 SCC 69 and State of Uttaranchal v Balwant Singh Chaufal & Ors. (2010) 3 SCC 402].

33. Access jurisprudence requires Courts to deal with the legitimate litigation whatever be its form but decline to exercise jurisdiction, if such litigation is an abuse of the process of the Court. In P.S.R.Sadhanantham v. Arunachalam & Anr. (1980) 3 SCC 141, the Court held:

> *"15. The crucial significance of access jurisprudence has been best expressed by Cappelletti:*
>
> > *"The right of effective access to justice has emerged with the new social rights. Indeed, it is of paramount importance among these new rights since, clearly, the enjoyment of traditional as well as new social rights presupposes mechanisms for their effective protection. Such protection, moreover, is best assured be a workable remedy within the framework of the judicial system. Effective access to justice can thus be seen as the most basic requirement the most basic 'human-right' of a system which purports to guarantee legal rights."*
> >
> > .....
>
> *12. The further question which now arises is as to how to curb this tendency of abuse of process of court. As suggested in Kishore Samrita*

(supra), one of the ways to curb this tendency is to impose realistic or punitive costs. The Hon'ble Supreme Court in Ramrameshwari Devi and others Vs. Nirmala Devi and others, (2011) 8 Supreme Court Cases 249 took judicial notice of the fact that the courts are flooded with these kinds of cases because there is an inherent profit for the wrongdoers and stressed for imposition of actual, realistic or proper costs and it was held:-

> *"52. The main question which arises for our consideration is whether the prevailing delay in civil litigation can be curbed? In our considered opinion the existing system can be drastically changed or improved if the following steps are taken by the trial courts while dealing with the civil trials:*

A. *Pleadings are the foundation of the claims of parties. Civil litigation is largely based on documents. It is the bounden duty and obligation of the trial Judge to carefully scrutinize, check and verify the pleadings and the documents filed by the parties. This must be done immediately after civil suits are filed.*

B. *The court should resort to discovery and production of documents and interrogatories at the earliest according to the object of the Act. If this exercise is carefully carried out, it would focus the controversies involved in the case and help the court in arriving at the truth of the matter and doing substantial justice.*

C. *Imposition of actual, realistic or proper costs and/or ordering prosecution would go a long way in controlling the tendency of introducing false pleadings and forged and fabricated documents by the litigants. Imposition of heavy costs would also control unnecessary adjournments by the parties. In appropriate cases the courts may consider ordering prosecution otherwise it may not be possible to maintain purity and sanctity of judicial proceedings.*

D. *The court must adopt realistic and pragmatic approach in granting mesne profits. The court must carefully keep in view the ground realities while granting mesne profits.*

E. *The courts should be extremely careful and cautious in granting ex parte ad interim injunctions or stay orders. Ordinarily short notice should be issued to the defendants or respondents and only after hearing the parties concerned appropriate orders should be passed.*

F. *Litigants who obtained ex parte ad interim injunction on the strength of false pleadings and forged documents should be adequately punished. No One should be allowed to abuse the process of the court.*

G. *The principle of restitution be fully applied in a pragmatic manner in order to do real and substantial justice.*

H. *Every case emanates from a human or a commercial problem and the court must make serious endeavour to resolve the*

problem within the framework of law and in accordance with the well-settled principles of law and justice.

I. If in a given case, ex parte injunction is granted, then the said application for grant of injunction should be disposed of on merits, after hearing both sides as expeditiously as may be possible on a priority basis and undue adjournments should be avoided.

J. At the time of filing of the plaint, the trial court should prepare a complete schedule and fix dates for all the stages of the suit, right form filing of the written statement till pronouncement of the judgment and the courts should strictly adhere to the said dates and the said timetable as far as possible. If any interlocutory application is filed then the same be disposed of in between the said dates of hearing fixed in the said suit itself so that the date fixed for the main suit may not be disturbed."

46. In view of the aforesaid discussion, I not only find no merit in these petitions but am of the firm view that the same are absolutely frivolous and, therefore, deserve to be dismissed with costs. The petitions are accordingly dismissed with costs of `10,000/- each to be paid by the petitioner to the H.P. State Legal Services Authority (for short 'Authority') within a period of three months. On failure to do so, the Authority shall be competent to execute this judgment through the process of the Court. Registry is directed to send a copy of this judgment to the Authority.

However, the matter cannot be laid to rest here.

47. The private institutions cannot be permitted to operate like money minting institutions, rather it has to be ensured that they comply with all the rules, regulations and norms before they are granted permission to operate within the State of Himachal Pradesh. The innocent people of this State cannot be allowed to be duped any further.

48. History is witness to the fact that it is education alone, which is the backbone of progress of a country. Imparting education can never be equated with profit oriented business as it is neither commerce nor business and if it is so, then the regulatory controls by those at the helm of affairs have not only to be continued, but are also required to be strengthened.

49. The term 'education' would mean a process of developing and training the powers and capabilities of human being. Over a period of time, education has become a commodity in India. All the genres of society are so overly obsessed with education that it has devalued the real essence of education. Education is no more a noble cause but it has become a business, therefore, the paradigm shift, especially in the higher education from service to business is a matter of concern. The commercialization of education has a dreadful effect that is so subtle that it often goes unnoticed.

50. Mushroom growth of ill-equipped, understaffed and unrecognized educational institutions was noticed by the Hon'ble Supreme Court in ***State of Maharashtra*** *versus* ***Vikas Sahebrao Roundale and others (1992) 4 SCC 435*** and it was observed that the field of education had become a fertile, perennial and profitable business with the least capital outlay in some States and that societies and individuals were establishing such institutions without complying with the statutory requirements.

51. The Hon'ble Supreme Court in ***Morvi Sarvajanik Kelavni Mandal Sanchalit MSKM B.Ed. College*** *versus* ***National Council for Teachers' Education and others (2012) 2 SCC 16*** while rejecting the prayer of the institutions to permit students to continue in unrecognized institutions, observed that mushroom growth of ill-equipped, understaffed and unrecognized educational institutions has caused serious problems with the students who joined the various courses.

52. It is unfortunate that despite repeated pronouncements by the Hon'ble Supreme Court for over the past two decades deprecating the setting up of such institutions, the mushrooming of schools, colleges, universities, technical boards and institutions continues all over the State at times in complicity with the statutory authorities, who fail to check this process by effectively enforcing the statutory provisions.

53. Judicial notice can also be taken of the fact that there are various advertisements published day in and day out in print as also visual media offering various courses, whereby 8th fail student can appear in 10th class and similarly a 10th class fail student can appear in 12th class. All this unfortunately is happening right under the nose of the State Government. It is difficult to fathom and believe that the functionaries of the State would have no knowledge of the same or would not come across such misleading advertisements.

54. It is not difficult to understand that the education system in India is not only large but is also complex with more than 700 universities (736 as on 30.09.2015-UGCs) and more than 35000 affiliated colleges enrolling more than 20 millions students. In such scenario, the mushrooming of private universities has only led to a cut-throat competition leading to misleading advertisements which can only be termed to be persuasive, manipulative and exploitative to attract the widest possible audience. These institutes trap into their web the innocent, vulnerable and unsuspecting students. Their lucrative and mesmerizing advertisements hypnotize the students only to fall into an unknown world of uncertainties. Some institutes promise hundred percent placement, some claim excellent staff, some claim free wi-fi campus, some promise free transportation etc. But what should really matter is 'education'. This problem is further compounded by the proliferation of coaching institutes which have only made 'education' more dirty and murkier.

55. The State and the Central Government have enacted various laws to tackle this wide spread menace of commercialization of education and one such step in this regard was the promulgation of the H.P. Private Education Institutions (Regulation) Act, 1997 (for short 'Regulation Act, 1997) and thereafter the H.P. Private Educational Institutions (Regulatory Commission) Act, 2010.

56. Unfortunately not only the aforesaid statutes are opposed tooth and nail, but the provisions contained therein are implemented more in breach. This would be clearly evident from the fact that though Regulation Act was enacted in the year 1997, but the Rules therein came to be finally published only in the year 2003, that too with the intervention of this Court. Despite these rules in place the private education institutions do not comply with the provisions contained therein. The Private Education Institutions including schools do not have the requisite infrastructure, nor do they maintain the accounts and have further failed to constitute the parent teacher associations and as if that was not enough, would charge exorbitant fees.

57. It is shocking that the private institutions have been raising their assets after illegally collecting funds like building fund, development fund, infrastructure fund etc. It is high time these practices are stopped forthwith and there is a crack down on all these

institutions. Every education institution is accountable and no one, therefore, is above the law. It is not to suggest that the private education institutions are not entitled to their due share of autonomy as well as profit, but then it is out of this profit that the private education institutions, including schools are required to create their own assets and other infrastructure. They cannot under the garb of building fund etc. illegally generate funds for their "business expansion" and create "business empires".

58. That apart, it is the responsibility of the institution imparting education to set up proper infrastructure for the students and, therefore, the fee charged towards building fund is both unfair as well as unethical.

59. Thus, there is an urgent need for Government intervention, correcting the systematic anomalies or else if commercialization persists and continues to grow unabated, then anything and everything will only be aimed at exploiting and manipulating for profit insofar as the higher education is concerned. It is, therefore, high time that the respondent-State acts responsibly by conducting a fresh investigation of all these institutions.

60. In these given circumstances, the Chief Secretary to Government of Himachal Pradesh is directed to constitute a committee which shall carry out inspection of all the private education institutions at all levels i.e. schools, colleges, coaching centres, extension centres, (called by whatever name), universities etc. throughout the State of Himachal Pradesh and submit report regarding compliance of the H.P. Private Educational Institutions (Regulation) Act, 1997 within three months. Special emphasis and care shall be taken to indicate in the report as to whether the private institutions have the requisite infrastructure, parents teacher associations, qualified staff, whether these institutions are maintaining the accounts in terms of Rule 6 and are regularly submitting all the information in the forms prescribed under the Rules and are further charging the 'fee' as approved by the Govt. 61. The Committee shall further report regarding violations being carried out by the educational institutions with respect to the guidelines issued by the UGC from time to time as have otherwise been taken note of in this judgment and shall be free to report violation of any Act, Rule, statutory provisions, guidelines etc., irrespective of the fact that the same have been issued by the Central or the State Governments.

62. The Committee shall also keep in mind the provisions of the UGC Act, UGC (Establishment and Maintenance of Standards in Private Universities) Regulations, 2003, instructions issued by the UGC from time to time, more particularly, the public notices issued on 27.06.2013 and thereafter on 04.06.2015 quoted in extenso hereinabove. It shall specifically report as to whether any University/Deemed University/Institution is offering any programme through open and distance learning (ODL) in gross violation of the policy of the UGC and, at the same time also issuing misleading advertisements by stating that their programmes are recognized.

63. In the meanwhile, the respondent-State is directed to ensure that no private education institution is allowed to charge fee towards building fund, infrastructure fund, development fund etc.

64. In addition to this, the Principal Secretary (Education) is directed to issue mandatory orders to all educational institutions, whether private or government owned, to display the following detailed information on the notice board which shall be placed at the entrance of the campus and on their websites:-

i) Faculty and staff alongwith their qualifications and job experience (profile).

ii) Details of Infrastructure.

iii) Affiliation alongwith certificate (s) of affiliation.

iv) Details of Internship and placement.

v) Fees with complete breakup and details.

vi) Extra curricular activities with complete details.

vii) PTA-with address and telephone numbers of its members.

viii) Transport facilities with details.

ix) Age of the institute and its achievements (if any).

x) Availability of scholarships with complete details.

xi) List of alumni (s) alongwith complete addresses and telephone numbers.

The aforesaid information shall also be displayed on the website of all private educational institutions and in case any educational institution is currently not having its own website, the same shall be created within one month and immediately thereafter the aforesaid information would be displayed on the website.

65. Any violation of these directions shall be viewed seriously and shall constitute contempt of Court order.

66. List for compliance of the aforesaid judgment on **29.07.2016.**

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

H.P. Housing and Urban Development Authority through its Secretary-cum-Chief Engineer, Nigam Vihar, Shimla-2 (HP). ..Appellant/plaintiff.

Vs.

Tarsem Lal ..Respondent/defendant.

RSA No.: 281 of 2006
Reserved on : 22.04.2016
Date of Decision: 27.04.2016

Specific Relief Act, 1963- Section 38- **Code of Civil Procedure, 1908-** Section 100- Defendant had applied for the allotment of house on the basis of Hire Purchase Agreement- he had agreed to abide by the terms and conditions of the allotment as well as Hire Purchase Agreement- defendant had submitted a plan to carry out further constructions, which was approved with some modifications by the plaintiff- official of the plaintiff found that defendant was raising unauthorized construction- notice was issued to the defendant but he continued to carry out unauthorized construction- hence, suit for mandatory injunction was filed- defendant denied the claim of the plaintiff and stated that construction was raised in accordance with the approved site plan- trial court held that plaintiff had failed to prove that any unauthorized construction had been carried out by the defendant- appeal was also dismissed- held, in second appeal that substantial question of law means a question having substance, essential, real, of sound worth, important or considerable- proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or directly and substantially affects the rights of the parties- Court had come to the conclusion that plaintiff had failed to prove that

unauthorized construction had been carried out by the defendant- it was obligatory for the plaintiff to prove that construction was in violation of the approved site plan - in absence of any such material, court had rightly concluded that plaintiff had failed to prove the unauthorized construction- appeal dismissed. (Para-10 to 15)

Cases referred:

Santosh Hazari Vs. Purushottam Tiwari (2001) 3 Supreme Court Cases 179
Union of India Vs. Ibrahim Uddin and another (2012) 8 Supreme Court Cases 148

For the appellant : Mr. C.N. Singh, Advocate.
For the respondents : Mr. N.K. Thakur, Sr. Advocate, with Ms. Jamuna Devi, Advocate.

The following judgment of the Court was delivered:

***Ajay Mohan Goel, J.* :**

This Regular Second Appeal has been filed by the appellant against the judgment, dated 13.09.2005, passed by the learned Additional District Judge, Una in Civil Appeal No. 95/03 vide which learned Appellate Court has dismissed the appeal filed by the present appellant/plaintiff and upheld judgment, dated 02.08.2003, passed by learned Sub Judge 1st Class, Court No. II, Una, District Una, H.P.

2. Appellant/plaintiff- Himachal Pradesh Housing and Urban Development Authority had filed a suit for mandatory injunction for demolition of unauthorized construction with regard to MIG-II, House No.269, situated in H.P. Housing Board Colony at Rakkar, Tehsil and District Una. Its case was that the respondent-defendant had applied for allotment of a house on the basis of Hire Purchase Tenancy Agreement and he was allotted MIG-II House No. 269 vide letter, dated 25.03.1987. This was followed by execution of Hire Purchase Tenancy Agreement between the parties, in which the respondent-defendant had given an undertaking to abide by the terms and conditions of the allotment envisaged in the allotment letter as well as Hire Purchase Tenancy Agreement, which conditions, *inter alia,* included that in case any extension has to be carried out by the defendant, then the same can be done after the approval of the proposed construction, additions or alteration plan by the plaintiff. The defendant had submitted a plan to carry out further constructions, which was approved with some modifications by the appellant/plaintiff. In the month of December, 1994, the official of the plaintiff posted at Rakkar, Una visited the premises of the defendant and found that defendant was raising unauthorized construction on the portion shown with letters 'EFGHIJ' on the allotted land. The matter was reported to the Assistant Engineer of the plaintiff posted at Rakkar, Una, who issued a notice, dated 09.12.1994. But despite this, the defendant continued to carry out unauthorized construction. In these circumstances, the appellant/plaintiff filed the suit for mandatory injunction by demolition of the unauthorized construction.

3. In his written statement, the defendant denied that he had carried out any unauthorized construction on the portion shown with letters 'EFGHIJ' on the allotted land and that the addition and extension carried out were duly allowed by the plaintiff and such type of constructions were also allowed by the plaintiff in other houses constructed in the vicinity. He denied that any official of the plaintiff had visited his house, as alleged or that he had received any notice from the plaintiff.

4. In order to prove its case, plaintiff examined two witnesses. PW-1 Sh. K.K. Kalia, Assistant Engineer of the plaintiff stated that the defendant had sought permission to carry out extra construction, which permission was allowed. However, the defendant started carrying out unauthorized construction and his predecessor accordingly issued a notice to the defendant. But despite this, the defendant did not stop carrying out the unauthorized construction and he went on to complete the same. He further mentions that the unauthorized construction carried out by the defendant was in violation of the provisions of Hire Purchase Tenancy Agreement and the Rules. In his cross-examination, he has stated that he had not prepared any spot inspection report and there was no spot report of his predecessor with regard to unauthorized construction. The site plan was there, but the same was undated. He further deposed that he was not aware as to whether the notice issued to the defendant was received by him or not. He has also admitted that the construction carried out in House Nos. 270, 271 and 286 were similar. He expressed his ignorance to the fact as to whether notices had been issued to the owners of House Nos. 270,271 and 286. Similarly, PW-2 Achhar Singh, Junior Engineer, H.P. Housing Board, Nalagarh has stated that he had prepared the site plan Ex. P-7. In his cross-examination, he deposed that he has seen House Nos. 270, 271 and 286 and these houses were similar to the house of the defendant.

5. The plaintiff has placed reliance on Ex. P-3, Hire Purchase Agreement, sanction letter Ex. P2, site plans Ex. P4 and Ex. P5 to substantiate its case. On the other hand, the defendant examined his power of attorney Anil Kumar, who deposed that no unauthorized construction was carried out, as alleged.

6. The learned trial Court on the basis of the material placed on record concluded that the plaintiff had failed to prove that any unauthorized construction had been carried out by the defendant in violation of the Hire Purchase Tenancy Agreement or approved site plan. In appeal, the learned Appellate Court confirmed the findings of the learned Court below by holding that the learned trial Court had correctly come to the conclusion that the defendant had not raised any unauthorized construction and had not violated the Hire Purchase Tenancy Agreement. It was further held that the plaintiff had failed to prove as to what was the extent of the alleged unauthorized construction stated to have been raised by the defendant in contravention of the terms and conditions of the Hire Purchase Tenancy Agreement.

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

8. Mr. C.N. Singh, learned counsel for the appellant has strenuously argued that both the learned courts below have erred in coming to the conclusion that there was no unauthorized construction carried out by the defendant. According to him, the plaintiff had placed sufficient material on record to demonstrate that the construction carried out by the defendant was in excess of what was permitted and, therefore, was unauthorized.

9. On the other hand, Sh. N.K. Thakur, learned Senior Advocate appearing for the respondent has contended that there is neither any infirmity nor any perversity in the judgment passed by either of the Courts below. He has further argued that when both the Courts below have returned a finding that the defendant had not indulged in any unauthorized construction, then it was not open for the appellant to now raise this issue by way of a Second Appeal, because under Section 100 of the Code of Civil Procedure, only a substantial question of law can be raised. In the present case, there was no substantial question of law involved at all, leave aside a substantial question of law. As per him, whether or not the defendant had raised any unauthorized construction was a question of fact, which

stood conclusively decided in his favour by the two Courts below and it required no interference from this Court.

10. The Hon'ble Supreme Court in **Santosh Hazari** Vs. **Purushottam Tiwari** (2001) 3 Supreme Court Cases 179 has held that the phrase "substantial question of law", as occurring in the amended Section 100 is not defined in the Code. The word substantial, as qualifying "question of law", means- of having substance, essential, real, of sound worth, important or considerable. It is to be understood as something in contradistinction to – technical, of no substance or consequence, or academic merely. The proper test for determining whether a question of law raised in the case is substantial would be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by Apex Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.

11. Paragraph-14 of the said judgment reads as under:

> "14. A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis."

12. The Hon'ble Supreme Court in **Union of India** Vs. **Ibrahim Uddin and another** (2012) 8 Supreme Court Cases 148 has held as under:

> "59. Section 100 CPC provides for a second appeal only on the substantial question of law. Generally, a Second Appeal does not lie on question of facts or of law. In State Bank of India & Ors. v. S.N. Goyal, AIR 2008 SC 2594, this Court explained the terms "substantial question of law" and observed as under :
>
> "The word 'substantial' prefixed to 'question of law' does not refer to the stakes involved in the case, nor intended to refer only to questions of law of general importance, but refers to impact or effect of the question of law on the decision in the lis between the parties. 'Substantial questions of law' means not only substantial questions of law of general

importance, but also substantial question of law arising in a case as between the parties. ..... any question of law which affects the final decision in a case is a substantial question of law as between the parties. A question of law which arises incidentally or collaterally, having no bearing on the final outcome, will not be a substantial question of law. There cannot, therefore, be a straitjacket definition as to when a substantial question of law arises in a case." (Emphasis added)

60. Similarly, in Sir Chunilal V. Mehta & Sons Ltd. v. Century Spinning and Manufacturing Co. Ltd., AIR 1962 SC 1314, this Court for the purpose of determining the issue held:-

"The proper test for determining whether a question of law raises in the case is substantial, would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties....." (Emphasis added)

61. In Vijay Kumar Talwar v. Commissioner of Income Tax, New Delhi, (2011) 1 SCC 673, this Court held that, a point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be 'substantial' a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law 'involving in the case' there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. It will, therefore, depend on the facts and circumstance of each case, whether a question of law is a substantial one or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis." (See also: Rajeshwari v. Puran Indoria, (2005) 7 SCC 60).

62. The Court, for the reasons to be recorded, may also entertain a second appeal even on any other substantial question of law, not formulated by it, if the Court is satisfied that the case involves such a question. Therefore, the existence of a substantial question of law is a sine-qua-non for the exercise of jurisdiction under the provisions of Section 100 CPC. The second appeal does not lie on the ground of erroneous findings of facts based on appreciation of the relevant evidence.

63. There may be a question, which may be a "question of fact", "question of law", "mixed question of fact and law" and "substantial question of law." Question means anything inquired; an issue to be decided. The "question of fact" is whether a particular factual situation exists or not. A question of fact, in the Realm of Jurisprudence, has been explained as under:-

"A question of fact is one capable of being answered by way of demonstration. A question of opinion is one that cannot be so answered. An answer to it is a matter of speculation which cannot be proved by any available evidence to be right or wrong." (Vide: Salmond, on Jurisprudence, 12th Edn. page 69, cited in Gadakh Yashwantrao Kankarrao v. E.V. alias Balasaheb Vikhe Patil & ors., AIR 1994 SC 678).

64. In Smt. Bibhabati Devi v. Ramendra Narayan Roy & Ors., AIR 1947 PC 19, the Privy Council has provided the guidelines as in what cases the second appeal can be entertained, explaining the provisions existing prior to the amendment of 1976, observing as under:-

> "..... that miscarriage of justice means such a departure from the rules which permeate all judicial procedure as to make that which happen not in the proper sense of the word 'judicial procedure' at all. That the violation of some principles of law or procedure must be such erroneous proposition of law that if that proposition to be corrected, the finding cannot stand, or it may be the neglect of some principle of law or procedure, whose application will have the same effect. The question whether there is evidence on which the Courts could arrive at their finding, is such a question of law.
>
> 'That the question of admissibility of evidence is a proposition of law but it must be such as to affect materially the finding. The question of the value of evidence is not sufficient reason for departure from the practice....."

65. In Suwalal Chhogalal v. Commissioner of Income Tax, (1949) 17 ITR 269, this Court held as under:-

> "A fact is a fact irrespective of evidence, by which it is proved. The only time a question of law can arise in such a case is when it is alleged that there is no material on which the conclusion can be based or no sufficient evidence."

66. In Oriental Investment Company Ltd. v. Commissioner of Income Tax, Bombay, AIR 1957 SC 852, this Court considered a large number of its earlier judgments, including Sree Meenakshi Mills Ltd., Madurai v. Commissioner of Income Tax, Madras, AIR 1957 SC 49, and held that where the question of decision is whether certain profit is made and shown in the name of certain intermediaries, were, in fact, profit actually earned by the assessee or the intermediaries, is a mixed question of fact and law. The Court further held that inference from facts would be a question of fact or of law according as the point for determination is one of pure fact or a "mixed question of law and fact" and that a finding of fact without evidence to support it or if based on relevant or irrelevant matters, is not unassailable.

67. There is no prohibition to entertain a second appeal even on question of fact provided the Court is satisfied that the findings of the courts below were vitiated by non-consideration of relevant evidence or by showing erroneous approach to the matter and findings recorded in the court below are perverse. (Vide: Jagdish Singh v. Nathu Singh, AIR 1992 SC 1604; Smt. Prativa Devi (Smt.) v. T.V. Krishnan, (1996) 5 SCC 353; Satya Gupta (Smt.) @ Madhu Gupta v. Brijesh Kumar, (1998) 6 SCC 423; Ragavendra Kumar v. Firm Prem Machinary & Co., AIR 2000 SC 534; Molar Mal (dead) through Lrs. v. M/s. Kay Iron Works Pvt. Ltd., AIR 2000 SC 1261; Bharatha Matha & Anr. v. R. Vijaya Renganathan & Ors., AIR 2010 SC 2685; and Dinesh Kumar v. Yusuf Ali, (2010) 12 SCC 740).

68. In Jai Singh v. Shakuntala, AIR 2002 SC 1428, this Court held that it is permissible to interfere even on question of fact but it may be only in "very exceptional cases and on extreme perversity that the authority to examine the same in extenso stands permissible it is a rarity rather than a

regularity and thus in fine it can thus be safely concluded that while there is no prohibition as such, but the power to scrutiny can only be had in very exceptional circumstances and upon proper circumspection." Similar view has been taken in the case of Kashmir Singh v. Harnam Singh & Anr., AIR 2008 SC 1749."

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

"Whether the two Courts below have not appreciated the evidence on record correctly while returning the finding that the plaintiff has failed to prove the allegation that unauthorized additions have been made by the respondent-defendant to his house No. 269?

14. A perusal of the judgments passed by both the Courts below will demonstrate that after taking into consideration the evidence led by the plaintiff, the learned Courts below have come to the conclusion that the plaintiff has failed to prove that any unauthorized construction was carried out by the defendant.

15. In my view, in order to prove its case, it was incumbent upon the plaintiff to have had placed on record material to suggest as to what actually could have been constructed as per Hire Purchase Tenancy Agreement by the defendant, what was the actual permission granted in his favour by the plaintiff, when he moved an application for making additional construction and what was actually constructed by him on the spot which was in violation of the approvals granted in his favour by the plaintiff. There is no such material placed by the plaintiff on record. In the absence of the same, in my view, both the Courts below have rightly come to the conclusion that the plaintiff has failed to prove that any unauthorized construction has been carried out by the defendant. The plaintiff has miserably failed to discharge its onus in this regard. The witnesses produced by it have also not been able to prove its case. Similarly, the documentary evidence led by it is also sketchy and has failed to substantiate its claim. Therefore, it cannot be said that the evidence on record has not been correctly appreciated by the Courts below. Substantial question of law is answered accordingly.

16. In view of the above, I do not find any merit in this appeal and the same is dismissed. No order as to costs.

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

Himachal Pradesh Horticulture Produce Marketing and Processing Corporation Limited ...Appellant/Applicant.

Versus

Smt. Kanta Devi and another ...Respondents.

CMP (M) No. 688 of 2015
Date of order: 27.04.2016

Limitation Act, 1963- Section 5- Applicant has sought condonation of delay of three years, five months and twenty three days in filing the present Letters Patent Appeal- judgment was pronounced on 31.10.2011- civil review petition was filed which was dismissed on 23.7.2012- LPA was filed which was withdrawn on 23.6.2014 with liberty to file fresh

appeal- appeal was filed on 21.8.2014- held, that applicant had made all efforts to get rid of the judgment but had failed to do so- he had sufficient cause for condonation of delay- delay condoned. (Para-4 to 7)

Present: Mr. Ashwani Sharma, Advocate, for the appellant applicant.

Mr. H.K. Paul, Advocate, for respondent No. 1.
Mr. Shrawan Dogra, Advocate General, with Mr. Anup Rattan, Additional Advocate General, and Mr. J.K. Verma, Deputy Advocate General, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

By the medium of this limitation petition, the appellant-applicant has sought condonation of delay of three years, five months and twenty three days, which has crept-in in filing the present Letters Patent Appeal, on the grounds taken in the memo of the limitation petition.

2. Respondent No. 1 has filed the objections. Respondent No. 2 has chosen not to contest the limitation petition and the right of respondent No. 2 to file objections was closed in terms of order, dated 3rd November, 2015.

3. Heard.

4. We are of the considered view that the appellant-applicant has carved out a sufficient cause for condoning the delay for the following reasons:

5. The judgment was made by the Writ Court in CWP No. 787 of 2010 on 31st October, 2011, constraining the appellant-applicant to file Civil Review Petition No. 115 of 2012, which was dismissed on 23rd July, 2012. Feeling aggrieved, the applicant-appellant questioned the same by the medium of LPA No. 404 of 2012, which was withdrawn on 23rd June, 2014, with liberty to file fresh appeal. Thereafter, the appeal in hand came to be filed on 21st August, 2014.

6. Thus, it can be said that the appellant-applicant has made all efforts to get rid of the impugned judgment but has failed at all stages.

7. Having said so, the appellant-applicant has carved out a sufficient cause for condoning the delay in filing the present Letters Patent Appeal. Accordingly, the delay is condoned. The application is disposed of.

8. Appeal is taken on Board. Registry to diarize the same.

9. Issue notice. Mr. H.K. Paul, Advocate, and Mr. J.K. Verma, learned Deputy Advocate General, waive notice on behalf of respondent No. 1 and respondent No. 2, respectively. List for consideration on **14th July, 2016.**

****

BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J.

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

Criminal Appeal No. 10 of 2013
Judgment reserved on : 22.4.2016
Date of Decision : April 27, 2016

Indian Penal Code, 1860- Section 304 (Part-II)- Accused owns an apple orchard- his son had sold the crop to contractor H, who had directed his employees C and D to carry the apple boxes to the road- they engaged the services of a mule contractor and went to the orchard – accused pelted stones at them without any provocation- one cement brick hit deceased causing injuries- deceased succumbed to the injuries and died at the spot – accused was tried and convicted by the trial Court- held, in appeal that deceased had died as a result of injury sustained by him on vital portion- it was duly proved that injury could have been caused with the brick- weapon of offence was recovered from the spot in the presence of independent witnesses- crop was sold to the contractor which was to be plucked, packed and transported/carried by the Contractor- Contractor had plucked and packed the crop and he had a right to remove the crop- accused had given him beatings without any reason- evidence was rightly appreciated by the trial Court- further, considering the age of the accused, the sentence reduced to the period already undergone. (Para-9 to 16)

For the appellant : Mr. Anoop Chitkara, Legal Aid Counsel for the appellant.
For the respondent : Mr. R. S. Verma, Addl. Advocate General with Mr. Puneet Rajta, Dy. A.G. for the respondent.

The following judgment of the Court was delivered:

Sanjay Karol, J.

This jail appeal stands preferred by the appellant-accused Kuldeep Singh, assailing the judgment dated 29.11.2012, passed by learned Addl. Sessions Judge, Fast Track Court, Chamba, District Chamba, H.P., in Sessions Trial No. 29/12/11, titled as *State of H.P. vs. Kuldeep Singh,* whereby he stands convicted for having committed an offence punishable under the provisions of Section 304 (Part-II) of the Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of 7 years and pay fine of Rs.20,000/- and in default thereof to further undergo rigorous imprisonment for a period of six months.

2. It is the case of prosecution that accused owns an apple orchard at a place known as Baloli. For the year 2010 his son Sukhjinder Singh (PW-15), had sold the crop to contractor Hari Singh (PW-9). On 8.9.2010, the said Contractor had directed his employees Chuhru Ram (PW-1) and Dhian Singh (deceased) to carry the apple boxes to the road. As such, they engaged the services of a mule contractor and at about 9.30 a.m., went to the orchard. There, without any provocation or sufficient cause, accused pelted stones at them. One cement brick directly hit deceased Dhian Singh on his head causing injuries. The matter was immediately brought to the notice of Vipan Kumar (PW-8) who telephonically

informed the police. Report (Ext. PW-12/A) was recorded and police party headed by Inspector Brij Mohan (PW-16) rushed to the spot where statement of Chuhru Ram, under the provisions of Section 154 Cr.P.C. (Ext.PW-1/A) was recorded on the basis of which F.I.R. No. 83/2010, dated 8.9.2010 (Ext. PW-12/B) came to be registered against the accused at Police Station Tissa, Distt. Chamba, under the provisions of Section 302 IPC. Unfortunately Dhian Singh succumbed to the injuries and died on the spot. Police conducted the investigation and after preparation of the inquest reports (Ext. PW-8/A and 8/B), sent the dead body for post mortem which was conducted by Dr. Rishi Puri (PW-2) who opined the deceased to have died as a result of head injury leading to fracture of the occipital bone, resulting into hemorrhage of brain leading to shock and death. The accused was arrested. With the completion of investigation, which prima facie revealed complicity of the accused in the alleged crime, challan was presented in the Court for trial.

3. Accused was charged for having committed an offence punishable under the provisions of Section 302 IPC, to which he did not plead guilty and claimed trial.

4. In order to prove its case, in all, prosecution examined sixteen witnesses and statement of the accused under Section 313 Cr. P.C. was also recorded, in which he took the defence of innocence and defending his property i.e. apples being stolen by the deceased. In defence accused tendered copy of order dated 21.7.2010 (Ext. D-1) passed by Civil Judge (Senior Division) Chamba in CMA No. 84/2010, titled as Kuldip Singh vs. Sukhjinder Singh & others.

5. Appreciating the material on record, including the testimonies of the witnesses, trial Court convicted the accused for having committed an offence punishable under the provisions of Section 304 (Part-II) IPC and sentenced as aforesaid. Hence, the present appeal.

6. Heard learned counsel appearing on both the sides and perused the record.

7. Mr. Anoop Chitkara, learned legal aid counsel for the appellant assails the judgment on the grounds that: (i) While convicting the accused, trial Court seriously erred in correctly and completely appreciating the testimonies of the prosecution witnesses, rendering the conviction to be illegal also resulting into travesty of justice; and (ii) in the alternative and in any event, the sentence imposed is harsh and much on the higher side.

8. On the other hand, Mr. R. S. Verma learned Addl. Advocate General assisted by Mr. Puneet Rajta, learned Dy. A.G. appearing for the respondent-State, supports the judgment for the reasons set out therein.

9. From the testimony of Dr. Rishi Puri (PW-2) who conducted the post mortem on the deceased and proved the port mortem report (Ext. PW-2/B), it is quite apparent that deceased Dhian Singh died as a result of injuries sustained by him on his vital portion i.e. occipital bone. The Doctor found the following injuries on the body of the deceased:

> "1. There was fracture on occipital bone. No corresponding injury was seen.
>
> 2. There were multiple abrasions in an area of 10 x 10 cms. on right side of chest.
>
> 3. There was swelling on right eye. On examination haematoma was present on around right eye which was black in colour.
>
> 4. Lacerated wound of 1 x 0.5 CM. over chin with clotted blood was present."

The Doctor has opined the case of death to be internal hemorrhage of brain leading to shock and death. That injuries on the body of the deceased could have been inflicted with a brick stands proven by this expert.

10. That the dead body of the deceased was recovered from the spot i.e. orchard/house of the accused stands proven on record through the testimony of Ram Singh (PW-7).

11. Weapon of offence i.e. brick stands recovered from the spot in the presence of independent witness Vipin Kumar (PW-8) as also Naresh Kumar (PW-3). Version of the Investigating Officer Inspector Brij Mohan (PW-16) stands sufficiently corroborated by these witnesses.

12. From the unrebutted testimony of Sukhjinder Singh (PW-15), it is evidently clear that the crop for the year in question was sold by him to contractor Hari Singh (PW-9) and from whom he had taken advance of Rs.25,000/-. The crop was to be plucked, packed and transported/carried by the Contractor. The witness was extensively cross examined but however, his credit could not be impeached. No doubt he admits of having strained relations with his father (i.e. the accused) and pendency of civil litigation *inter se* them, wherein interim order was passed restraining him from interfering with the property in question, but then the factum of the crop having been sold also stands corroborated by Hari Singh (PW-9) and Chuhru Ram (PW-1). No challenge was laid to the rights of Hari Singh, to whom also no information of such litigation stood furnished. Also, it has not come on record that the accused took any steps for initiating proceedings against his son for having violated any interim order passed by a Civil Court.

13. The incident in question took place on 8.9.2010 at about 9.30 a.m. as is evident from the testimony of Churhu Ram (PW-1), Naresh Kumar (PW-3) and Duni Chand (PW-4). From the conjoint reading of the testimonies of these witnesses it is evidently clear that the crop stood plucked by the workers of Contractor Hari Singh. Also it was packed by them and the boxes kept in the verandah of the house. It is not even suggested to these witnesses that their testimony to the aforesaid effect is false or incorrect. Now if the Contractor had plucked and packed the crop, he had all the right to remove the same from the orchard. Significantly when the deceased and Chuhru Ram went with the mules to carry the apple boxes, without warning, accused started pelting bricks and one such brick hit the deceased on his head, causing injury on a vital part which proved to be fatal in nature. The incident was witnessed by Chuhru Ram, Naresh Kumar and Duni Chand. Duni Chand (PW-4) in his unrebutted testimony has deposed that "*The brick hit on the neck of Dhian Singh as a result he fell down facing mouth on the ground*".

14. As such, in the teeth of such cogent, convincing and consistent evidence on record, it cannot be said that the trial Court erred in correctly and completely appreciating the testimonies of the prosecution witnesses. Findings of conviction and reasoning adopted cannot be said to be erroneous, perverse or illegal. It be only observed that State has not preferred any appeal assailing the findings returned by the trial Court. In any event from the record, it cannot be inferred that the accused had intent of murdering the deceased.

15. Coming to the second submission, Court is of the considered view that the sentence imposed is slightly harsh and requires to be reduced. The accused, aged about 60 years, had no prior animosity with the deceased, Chuhru Ram or for that matter Contractor Hari Singh. He was in litigation with his son who allegedly sold the apple produce without his consent. As per the version of the Investigating Officer Inspector Brij Mohan (PW-16), accused did not try to abscond. He willfully and voluntarily associated himself during

investigation and fully cooperated with the Investigating Officer. Even during trial and pendency of the present appeal, accused has maintained good conduct. As such order qua sentence needs to be modified.

16. Record reveals that since the date of his arrest i.e. 8.9.2010, accused has been in custody till date. He has suffered incarceration for more than five and a half years. As such the sentence is reduced to the period of imprisonment already undergone by the accused. Insofar as the sentence in default for non payment of fine is concerned, it is reduced from six months to one month.

17. Hence, with the modification in the sentence part of the judgment of the trial Court, appeal stands partly allowed and disposed of, so also pending applications, if any. Release warrants, if any, be prepared accordingly.

18. Copy of judgment be supplied immediately. Registrar (Judicial) to ensure compliance.

Records of the Court below be immediately sent back.

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

Smt. Manu Goel W/o Sh. Ashok Goel & others. ....Plaintiffs.

Versus

Tarsem Chand Jain & others. ....Defendants.

C.S. No. 96 of 2010
Decision reserved on 6.4.2016.
Decision announced on 27.4.2016.

Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002- Section 13(4)- Authorized Officer of bank had taken possession of suit property relating to the loan amount and had issued possession cum sale notice under SARFAESI Act- SARFAESI Act 2002 is a special Act and jurisdiction of Civil Court is barred- however, relief of declaration to the effect that reconstituted partnership deeds are wrong illegal and result of fraud can be granted only by the Civil Court- hence, jurisdiction of the civil Court to entertain entire civil suit is not barred. (Para-7 to 11)

For the plaintiffs:	Mr. Bimal Gupta, Sr. Advocate with Mr. Vineet Vasishat, Advocate.
For defendants No. 1 to 3.	Mr. Arvind Sharma, Advocate.
For defendant No.4.	Ex-parte.

The following judgment of the Court was delivered:

P.S. Rana, Judge.

Decision upon preliminary issue No.9:

Hon'ble Division Bench of Himachal Pradesh High Court in OSA No. 11 of 2011 title Manu Goel and others vs. Tarsem Chand Jain and others decided on 19.8.2014

directed to decide issue No. 9 as preliminary issue. In compliance to direction of Hon'ble Division Bench dated 19.8.2014 issue No.9 is decided as preliminary issue.

Brief facts of the case:

2. In Civil Suit No. 96 of 2010 title Manu Goel & others vs. Tarsem Chand Jain & others plaintiffs have sought relief for declaration to the effect that reconstituted partnership deeds dated 9.2.2007, 10.9.2007, 15.12.2007 and 17.12.2007 entered between plaintiffs and defendant No.1 are wrong illegal and result of fraud played upon plaintiffs by defendants No. 1 and 2. It is pleaded that reconstituted partnership deeds are not binding upon plaintiffs and further declaration sought that plaintiffs are in fact partners of defendant No.3 and consequential relief of possession sought directing defendants No. 1 and 2 to handover vacant and peaceful possession of property of defendant No.3 to plaintiffs free from all encumbrances. Further declaration sought that pledging of sale deed dated 27.9.2003 property of co-defendant No.3 with co-defendant No.4 is wrong illegal and is result of fraud played upon plaintiffs. Further declaration sought that notice under Section 13 (2) of SARFESI Act 2002 dated 29.9.2010 and act of defendant No.4 in taking possession of the property of co-defendant No.3 on 9.12.2010 and thereafter publication of possession-cum-sale notice dated 16.12.2010 be held as wrong illegal and not binding upon plaintiffs and be set aside. Further decree of permanent prohibitory injunction restraining defendants No. 1, 2 and 4 from alienating or transferring or selling the property of co-defendant No.3 sought. In alternative relief for recovery of Rs. 3,28,23,000/- (Rupees three crores twenty eight lac twenty three thousand) along with interest at the rate of 18% also sought.

3. Per contra written statement filed on behalf of co-defendants No. 1 to 3 pleaded therein that suit of the plaintiffs is not maintainable. It is pleaded that plaintiffs have executed reconstituted deeds in favour of defendants No. 1 to 3 voluntarily and handed over possession by assigning all the rights and liabilities and now they cannot wriggle out from their acts. It is further pleaded that plaintiffs have no cause of action against co-defendants No. 1 to 3. It is further pleaded that UCO bank co-defendant No.4 has obtained possession of suit property owned by co-defendant No.3 under the SARFASI Act 2002 and at present all assets of co-defendant No.3 are in possession of co-defendant No.4. It is further pleaded that Civil Court has no jurisdiction to entertain and try the present suit. It is further pleaded that remedy available to plaintiffs is only under the SARFAESI Act 2002. It is further pleaded that proper court fee not filed and suit of plaintiffs is barred by law of limitation act.

4. Per contra separate written statement filed on behalf of co-defendant No.4 UCO Bank pleaded therein that civil suit is not maintainable against co-defendant No.4 in view of SARFAESI Act 2002. It is further pleaded that as per Section 34 of the SARFAESI Act 2002 jurisdiction of Civil Court is barred relating to proceedings initiated under SARFAESI Act 2002. It is further pleaded that no injunction by Civil Court could be granted relating to proceedings initiated under SARFAESI Act 2002 as per Section 34. It is further pleaded that suit property is mortgaged with co-defendant No.4 bank and bank has already proceeded in consonance with procedure of SARFAESI Act 2002. It is further pleaded that when defendants failed to repay the outstanding loan amount within the stipulated period then co-defendant No.4 took possession of mortgaged property on 9.12.2010 under Section 13 (4) of SARFAESI Act 2002. It is further pleaded that possession-cum-sale notice dated 15.12.2010 was delivered to defendants as per SARFAESI Act 2002. It is further pleaded that plaintiffs have remedy under Section 17 of the SARFAESI Act 2002 before Debts Recovery Tribunal having jurisdiction in the matter. It is further pleaded that plaintiffs and co-defendants No. 1 and 2 have inter-se dispute relating to reconstituted deeds and agreements. It is pleaded that civil suit is not maintainable against co-defendant No.4 UCO

Bank. It is further pleaded that plaintiffs have also sought alternative relief of recovery of Rs. 3,28,23,000/- (Rupees three crores twenty eight lac and twenty three thousand) against other co-defendants. It is further pleaded that defendants No. 1 to 3 on 8.1.2008 have deposited with co-defendant No.4 UCO Bank the original title deed and created equitable mortgage of the suit property relating to loan of Rs. 7,16,23313.27 including interest upto June 2010. It is further pleaded that co-defendants No. 1 to 3 also confirmed equitable mortgaged of suit property in favour of co-defendant No.4 UCO Bank on 10.1.2008. It is further pleaded that plaintiffs have no cause of action against co-defendant No.4 i.e. UCO Bank.

5. On 19.7.2012 following issues were framed:

1. Whether plaintiffs are entitled to decree of declaration that the reconstituted partnership deeds dated 9.2.2007, 10.9.2007, 15.12.2007 and 17.12.2007 entered into between the plaintiffs and defendants No.1 and 2 are wrong, illegal and are result of fraud played upon the plaintiffs by defendants No. 1 and 2 and as such these aforesaid reconstituted partnership deeds are not binding on the plaintiffs? OPP.
2. Whether plaintiffs are entitled to decree of declaration that the plaintiffs are in fact partners of defendant No.3? OPP
3. Whether plaintiffs are entitled to decree of possession directing the defendants No. 1 and 2 to handover the vacant and peaceful possession of the property of defendant No.3 to the plaintiffs free from all encumbrances by declaring the plaintiffs as partners of defendant No.3.? OPP.
4. Whether plaintiffs are entitled to decree of declaration that pleading of sale deed dated 27.9.2003, property of defendant No.3 with defendant No.4 is wrong, illegal and is a result of fraud prayed upon plaintiffs? OPP.
5. Whether notice under Section 13 (2) of SARFAESI Act dated 29.9.2010, the act of defendant No.4 in taking possession of the property of defendant No.3 on 9.12.2010 and thereafter publication of possession cum sale notice on 16.12.2010 are wrong, illegal and not binding on the plaintiffs and liable to be set aside? OPP.
6. Whether plaintiffs are entitled for decree of permanent prohibitory injunction restraining defendants No. 1, 2 and 4 from alienating or transferring or selling the property of defendant No.3? OPP.
7. Whether the plaintiffs in alternative are entitled to recover Rs. 2,52,41,000/- on account of principal amount and Rs. 75,82,000/- (Rs. 1,05,82,000/- Rs. 30,00,000/-) after adjusting Rs. 30 lacs received by the plaintiffs on account of interest @ 18% per annum on the principal amount upto 30.11.2010 total amounting to Rs. 3,28,23,000/- alongwith future interest at the agreed rate of 18% per annum from the date of filing of the suit till the date of its realization from defendants? OPP.
8. Whether the plaint does not disclose any cause of action and is liable to be rejected under Order 7 Rule 11 of Code of Civil Procedure? OPD 1 to 3.

9. Whether this Hon'ble Court has no jurisdiction to entertain and try the present suit in view of the provisions of SARFAESI Act? OPD-4.

10. Whether plaintiffs suit hopelessly barred by time? OPD 1 to 3.

11. Whether suit of the plaintiffs is not maintainable as alleged in preliminary objection No.1? OPD 1 to 3.

12. Whether the suit of the plaintiffs is liable to be dismissed as alleged in preliminary objection No.4? OPD.

13. Whether the suit is not maintainable against defendants No. 1 to 3? OPD 1 to 3.

14. Relief.

6. After decision of OSA No. 19 of 2011 dated 19.8.2014 none appeared on behalf of co-defendant No.4 UCO bank in Civil Suit and co-defendant No. 4 UCO bank proceeded ex-parte. Final hearing upon preliminary issue No.9 concluded. Entire record carefully perused. Issue No.9 is purely issue of law.

Findings upon preliminary issue No.9:

7. Authorized Officer of UCO Bank Zonal Office Chandigarh has taken possession of suit property under SARFAESI Act 2002 relating to loan amount under Section 13 (2) and issued possession cum sale notice on dated 15.12.2010 of SARFAESI Act 2002. It is well settled law that SARFAESI Act 2002 is a special Act. As per Section 34 of SARFAESI Act 2002 jurisdiction of Civil Court is barred relating to proceedings initiated under SARFAESI Act 2002. Section 34 of SARFAESI Act 2002 is quoted in toto:-

> "34. **Civil court not to have jurisdiction.-** No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which a Debts Recovery Tribunal or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act or under the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)."

8. It is well settled law that when there is conflict between general law and special law then special law always prevail. Suit property was mortgaged with UCO Bank co-defendant No.4 and equitable mortgage was created qua loan amount advanced by UCO Bank. Authorized Officer UCO Bank Zonal Office Chandigarh on dated 15.12.2010 has given possession cum sale notice under Section 13 (2) of SARFAESI Act 2002. As per Section 17 of SARFAESI Act 2002 there is right to appeal before Debts Recovery Tribunal.

9. In the present civil suit plaintiffs have sought relief that reconstituted partnership deeds dated 9.2.2007, 10.9.2007, 15.12.2007 and 17.12.2007 are wrong and illegal and are result of fraud. It is well settled law that as per Section 34 of Specific Relief Act 1963 suit for declaratory decree can be filed relating to any legal character or to any rights as to any property. Section 34 of Specific Relief Act 1963 is quoted in toto:

> "**34. Discretion of court as to declaration of status or right.-** Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so,

Explanation.- A trustee of property is a "person interested to deny" a title adverse to the title of someone who is not in existence, and for whom, if in existence, he would be a trustee."

10. As per Section 37 of SARFAESI Act 2002 application of other laws not barred. Section 37 of SARFAESI Act 2002 is quoted in toto:

"**37. Application of other laws not barred.-** The provisions of this Act or the rules made thereunder shall be in addition to, and not in derogation of, the Companies Act, 1956 (1 of 1956), the Securities Contracts (Regulation) Act, 1956 (42 of 1956), the Securities and Exchange Board of India Act 1992 (15 of 1992), the Recovery of Debts due to Banks and Financial Institutions Act, 1993 (51 of 1993) or any other law for the time being in force."

11. It is held that SARFAESI Act 2002 is in addition to any other law and is not derogation to other law. In view of the fact that SARFAESI Act 2002 is in addition to other law and is not derogation to other law it is held that entire civil suit of plaintiffs is not barred. It is held that jurisdiction of civil court relating to proceedings under SARFAESI Act 2002 is barred under Section 34 of SARFAESI Act 2002. Preliminary issue No. 9 is decided accordingly.

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

Smt. Savitri. ...Appellant

Versus

Smt. Mahanti and others. ...Respondents

RSA No. 403 of 2002
Date of decision: 27.4.2016

Specific Relief Act, 1963- Section 34- Plaintiff filed a suit for declaration to the effect that the sale deed executed by the original plaintiff in favour of defendant was illegal, null and void as she was deaf and dumb - she could not understand her good and bad, and she was born mentally ill- suit was filed through next friend- defendant denied the claim of the plaintiff- suit was dismissed by the trial Court- appeal was also dismissed- held, in second appeal that deaf and dumb person would not necessarily be an idiot- no material was placed on record to show that vendor was an idiot- defendants examined 5 witnesses to prove that deceased was more intelligent than stated by the plaintiff- trial Court and Appellate Court had rightly dismissed the suit- appeal dismissed. (Para-7 to 16)

Case referred:

State of Rajasthan Vs. Darshan Singh (2012) 5 SCC 789

For the Appellant: Mr.R.K. Gautam, Senior Advocate with Mr.Gaurav Gautam, Advocate.

For the Respondents: Mr. Sanjeev Kuthiala, Advocate.

The following judgment of the Court was delivered:

Tarlok Singh Chauhan J. (oral).

The plaintiff/appellant (herein after referred to as plaintiff), has preferred the instant Regular Second Appeal under Section 100 of the Code of Civil Procedure against the concurrent findings recorded by the Courts below, whereby her suit for declaration with consequential relief of permanent prohibitory injunction and in the alternative for possession came to be dismissed.

2. The predecessor-in-interest of the plaintiff filed a suit for declaration to the effect that the sale deed dated 27.12.1995 executed by the original plaintiff Smt.Shardho in favour of defendant was illegal, null and void and in the alternative a decree for possession was prayed for.

3. Briefly stated the case of the plaintiff was that the suit land as shown in para 1 of the plaint was owned and possessed by deceased plaintiff, who was her mother. It was claimed that the original plaintiff was deaf and dumb and could not understand her good and bad, as she was born mentally ill. Smt. Savitri, the present appellant claimed herself to be the next friend of the plaintiff and on coming to know on 27.12.1995 that the defendant had got a sale deed registered in his favour by obtaining thumb impression of Shardho, filed the suit for declaring the sale deed as illegal, null and void.

4. The defendants/respondents opposed the suit by filing written statement, wherein preliminary objections regarding lack of maintainability of the suit was taken. On merits, it was asserted that Smt.Sawan Dei was also born to the plaintiff Shardho from the loin of Sobhu, resident of village Kasla. Plaintiff used to reside with her husband Sobhu and daughter Sawan Devi in village Kasla. Natural guardian of Smt. Shardho, her husband and daughter were present at the time of execution of the sale deed and were looking after the interest of Smt. Shardho for all intends and purposes. Since Smt. Shardho was residing with her husband, therefore, the suit land was not beneficial to Smt. Shardho, hence she sold the same in favour of the defendant. It was averred that the suit in fact was filed with malafide intention to extract money from the defendant. The defendant has already paid a sum of Rs.16,000/- and the Sub Registrar had explained the deed to the executants who understood the same and thereafter the deed was registered. Hence it was prayed that the suit be dismissed.

5. Replication denying the contents of the written statement affirming those of the plaint was filed. On 11.10.1996, the learned trial Court framed the following issues:-

> *"1. Whether the sale deed dated 27.12.1995 executed by the plaintiff in favour of the defendant is void, illegal, inoperative, ineffective document, as alleged? OPP*
>
> *2. Whether the plaintiff is entitled for the relief of injunction? OPP*
>
> *3. Whether the suit is not maintainable? OPD*
>
> *4. Whether the plaintiff have no cause of action and locus standi to file the present suit? OPD*
>
> *5. Whether this suit is not properly valued for the purpose of Court fee? OPD*
>
> *6. Relief."*

6. After recording the evidence and evaluating the same, the learned trial Court dismissed the suit, constraining the plaintiff to file an appeal before the first Appellate

Court, which too vide judgment and decree dated 24.11.2001 came to be dismissed. Undeterred, the plaintiff has filed the instant appeal, which on 5.9.2002 came to be admitted on the following substantial question of law:-

> *"Whether both the Courts below have misread and misappreciated the oral and documentary evidence on record to come to the conclusion that the sale deed dated 27.12.1995 executed by Smt. Shardho in favour of defendant Chhittar was not illegal, null and void, for the reason that she lacked mental faculty?"*

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

7. At the outset it may be noticed that there is a general misconception that a deaf and dumb person is essentially an idiot. This misconception requires to be dispelled and this fact has been duly noticed by the Hon'ble Supreme Court in ***State of Rajasthan Vs. Darshan Singh (2012) 5 SCC 789*** in the following terms:-

> *"26. The object of enacting the provisions of Section 119 of the Evidence Act reveals that deaf and dumb persons were earlier contemplated in law as idiots. However, such a view has subsequently been changed for the reason that modern science revealed that persons affected with such calamities are generally found more intelligent, and to be susceptible to far higher culture than one was once supposed. ....."*

8. In view of the aforesaid exposition of law and even generally otherwise, a deaf and dumb person would not essentially be an idiot, rather as observed by the Hon'ble Supreme Court, it has been revealed that the persons affected with such calamities are generally more intelligent, and to be susceptible to far higher culture than one was once supposed.

9. The plaintiff has miserably failed to place on record any material, which may suggest even remotely that Smt.Shardho was an idiot, though there is ample amount of evidence on record to suggest that she was deaf and dumb. Though the plaintiff as PW-1 and another witness Sh.Dhani Ram, PW-2 did try to lead oral evidence to the effect that Shardho was not only deaf and dumb, but idiot, but no concrete proof in this regard has been placed by them.

10. Whereas, the defendants have examined as many as five witnesses, whose statements clearly establish on record that the deceased Shardho was far more intelligent then what is sought to be made out by the plaintiffs.

11. DW-1 Chhittru had stated that Shardho Devi was his mother in law and she was married with Sh. Bhallu. He further stated that after the death of Sh.Bhallu her property devolved upon his wife Mohandi and Savitri. He further stated that Shardho Devi had thereafter remarried with Sobhu and they had a daughter Sawan Dei. He further stated that Shardho used to reside in village Kalsa and told him to purchase the land. He went to village Kalsa and the land was agreed to be sold for a consideration of Rs.16,000/-. He further stated that the husband and son in law of Shardho were present on the spot. He acknowledged that Shardho was deaf and dumb, but the Petition Writer has read over the contents of sale deed with signs in the presence of marginal witnesses. He further stated that Shardho had admitted the contents of sale deed as correct and marked her thumb impression in the presence of the marginal witnesses before the Sub Registrar, who attested the deed and also appended the certificate therein as contemplated under the Indian Registration Act.

12. DW-2, Baga Ram Chowdhari, the then Sub Registrar had stated that he has seen the original sale deed Ex. D-1 and further stated that the contents of this deed has been read over to the vendor and vendee, who after admitting the contents thereof had put their thumb impressions on the same. He further stated that he had also given the certificate on the sale deed as required under the Registration Act in the case of a deaf and dumb executant.

13. DW-3, Ram Prakash, petition writer, Nalagarh stated that he had seen the sale deed Ex. D-1, which had been written by him at the instance of Shardho. He further stated that the contents of the sale deed were explained to Shardho by him by way of signs.

14. DW-4, Ishar Singh has stated that document Ex. D-1 was prepared in his presence and he has signed the same as marginal witness. He further stated that Shardho was explained the contents of document by way of signs in the presence of her son in law and daughter. He further stated that she had marked her thumb impression after admitting the contents of the sale deed to be correct and thereafter the document was presented before the Sub Registrar and Rs.10,000/- was paid to the vendor in presence of Sub Registrar, whereas a sum of Rs.6,000/- were already paid earlier.

15. DW-5, Smt. Sawan Devi is the daughter of Shardho Devi and stated that Shardho Devi along with her husband had been residing at village Kasla. She further deposed that Shardho could properly understand and communicate by language of signs and further stated that she had visited her husband at the time of execution of sale deed and the contents thereof had been explained to the petition writer and the Sub Registrar by the vendor Shardho by way of sign language. This is the entire evidence led by the parties.

16. As already observed earlier, the appellant has failed to place on record any evidence, which may even remotely suggest that Shardho lacked mental faculty or the same were impaired or that she did not understand the contents of the documents she was executing. Once it is so, then the transaction affected by, cannot be impeached and be termed as illegal, much less null and void. The substantial question of law is accordingly answered.

In view of the aforesaid discussion, there is no merit in this appeal and the same is accordingly dismissed, leaving the parties to bear their costs.

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

Hussain Mohammed w/o late Sh. Noor Mohammed & Others .....Petitioners/Defendants

Versus

Gurdas s/o Sh. Masandu .....Non-petitioner/Plaintiff

Review Petition No. 31/2016
Reserved on : 20th April 2016
Date of order: 28th April 2016

Code of Civil Procedure, 1908- Order 47 Rule 1- Section 114- High Court had ordered that evidence on additional issues framed by the Appellate Court will be recorded by the Appellate Court itself- it was further ordered that only two chances will be given to each of the parties to produce their evidence- appeal will be disposed of within three months- review

petition was filed pleading that there was no necessity to frame the additional issues- there is dispute between the parties on which issues were rightly framed by the Appellate Court- once the issues had been framed, it was obligatory to give opportunity to both parties to lead evidence- there was no error apparent on the face of the record- petition dismissed.

(Para-12 to 16)

Cases referred:

Kaniz Fatima and another vs. Shah Naim Ashraf DB, AIR 1983 Allahabad 450

Col. Avtar Singh Sekhon vs. Union of India & Others, AIR 1980 Apex Court 2041

Chandra Kanta and another vs. Sheik Habib, AIR 1975 Apex Court 1500

For petitioners/defendants: Mr. N. K. Thakur, Sr. Advocate with Ms. Jamna Thakur, Advocate

For non-petitioner/plaintiff: Mr. Sunny Modgil, Advocate

The following order of the Court was delivered:

P. S. Rana, J. (Oral)

Present review petition is filed under Order 47 Rule 1 read with Section 114 CPC for review of order dated 25.02.2016 passed in CMPMO No.81 of 2015 title Hussain Mohammed & Others vs. Gurdas.

Brief facts of the case:

2. Plaintiff Gurdas filed a suit for declaration to the effect that plaintiff is exclusive owner in possession of the land measuring 0-24-27 hectares comprised in Khewat No.14 min Khatauni No.48 min Khasra Nos. 398, 399, 400 to 402, 404 and 405 as recorded in jamabandi for the year 1995-96 situated in Mauza Kotla Tehsil Amb Distt. Una (H.P.). Plaintiff sought declaration that the entry appearing in the name of defendants in the column of ownership and cultivation showing them to be exclusive owner in possession of the suit land is wrong, illegal, void ab-initio and has no effect on the right, title or interest of the plaintiff. Plaintiff also sought declaration that defendants be restrained from causing any sort of interference i.e. changing the nature and character and cutting and removing the trees and from alienating the suit land in any manner and in alternative plaintiff sought relief of possession also.

3. Per contra written statement filed on behalf of defendants/ petitioners pleaded therein that suit is not maintainable and plaintiff is estopped by his act and conduct to file the present suit. It is pleaded that suit is not filed within time. It is pleaded that plaintiff has no cause of action and locus-standi to file the present suit. It is pleaded that jurisdiction of the Civil Court is barred. It is pleaded that the suit land is coming in possession of the defendants since long since the time of their ancestors and it is pleaded that the ancestors of defendants were non-occupancy tenants. Prayer for dismissal of the suit sought.

4. As per pleadings of the parties learned trial Court framed following issues on dated 20.11.1999 and 28.7.2010:

1. Whether the plaintiff is exclusive owner in possession of the suit land as alleged? ……OPP.
2. Whether entry in favour of defendants in the revenue record showing them as exclusive owners in possession of the suit land is wrong and illegal as alleged? …….OPP.

3. Whether plaintiff is entitled to the relief of permanent prohibitory injunction? .....OPP.

4. Whether plaintiff is entitled to the alternative relief of possession of the suit land? .....OPP.

4A. Whether defendants are in settled possession of the suit land as alleged? .....OPD.

5. Whether suit is not maintainable? .....OPD.

6. Whether plaintiff is estopped by his act and conduct to file this suit? .....OPD.

7. Whether suit is within time? ....OPP.

8. Whether plaintiff has no cause of action? ....OPD.

9. Whether the jurisdiction of this Court is barred as alleged? .....OPD.

10. Relief.

5. Learned Trial Court decided issues Nos. 1 to 4 in negative and learned trial Court decided issues Nos. 4A and 5 in affirmative. Learned trial Court decided issue No. 7 in negative and learned trial Court decided issue No. 8 in affirmative. Learned trial Court held issue No. 6 not pressed and learned trial Court dismissed the suit filed by the plaintiff.

6. Feeling aggrieved against the judgment and decree passed by learned trial Court dated 19th August 2010 plaintiff Gurdas filed appeal RBT No. 71/2013/2010. Learned First Appellate Court on dated 20th February 2015 framed following additional issues:

1(a). Whether plaintiff was tenant at Will on payment of rent in respect of the suit land, as alleged. ....OPP.

1(b). Whether predecessor-in-interest of the defendants was inducted as non-occupancy tenant on payment of rent qua the suit land, as alleged? ....OPP.

5(a). Whether the suit is bad for non-joinder of necessary parties, as alleged? .....OPD.

7. Learned First Appellate Court directed the learned Trial Court to give findings in accordance with law relating to additional issues and learned First Appellate Court further directed the learned Trial Court to return the findings to the Appellate Court on or before 31.08.2015.

8. Feeling aggrieved against the order dated 20th February 2015 of learned First Appellate Court petitioners/defendants Hussain Mohammed and others filed CMPMO No.81 of 2015 before H. P. High Court and on 25.02.2016 H. P. High Court ordered that evidence will be recorded by learned First Appellate Court himself upon additional issues framed by learned First Appellate Court and order of learned First Appellate Court was modified to this extent only. It was further ordered by the H. P. High Court that learned First Appellate Court will give maximum two chances to each of the parties to produce their evidence in respect of issues to be proved by respective parties as appeal is pending since 2010 and is old targetted appeal. It was further ordered by the H. P. High Court that learned First Appellate Court will dispose of the appeal within three months after receipt of the file. It was further ordered by the H. P. High Court that file of learned First Appellate Court would be immediately transmitted to the learned First Appellate Court alongwith certified copy of the order.

9. Feeling aggrieved against the order dated 25th February 2016 petitioners/defendants filed present review petition.

10. Court heard learned Advocate(s) appearing on behalf of petitioners/defendants and non-petitioner/plaintiff and Court also perused the entire records carefully.

11. Following points arise for determination in the present review petition:

1) Whether review petition filed by the petitioners/ defendants is liable to be accepted as mentioned in memorandum of grounds of review petition?

2) Final order.

Findings upon point No.1 with reasons:

12. Submission of learned Advocate appearing on behalf of petitioners that there was no need to frame additional issue i.e. issue No.1(a) by learned First Appellate Court because parties have led evidence knowing fully well the case of each other and on this ground review petition be accepted is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that as per Order XIV of Code of Civil Procedure 1908 issue arises when a material proposition of fact or law is affirmed by one party and denied by other. As per Order XIV Rule 3 each material proposition affirmed by one party and denied by other party shall form subject of distinct issue. In the present case plaintiff has pleaded status of tenancy at will on payment of rent and defendants have disputed status of plaintiff in written statement. There is dispute inter se parties relating to status of tenancy. It is held that learned First Appellate Court has rightly framed additional issues as per pleading of parties. It is held that issue of tenancy is issue of fact and not issue of law. It is well settled law that when issue of fact is framed by the Court then opportunity should be given to both parties to adduce evidence in affirmative and in rebuttal. It was held in case reported in AIR 1983 Allahabad 450 title **Kaniz Fatima and another vs. Shah Naim Ashraf** DB that if no issue is framed on question of fact then recording of finding thereon is impermissible. Court is of the opinion that framing of additional issue No.1(a) as framed by learned First Appellate Court is essential in the present case in order to decide the appeal properly and effectively and in order to impart substantial justice inter se parties.

13. Submission of learned Advocate appearing on behalf of petitioners that there was no need to frame additional issue i.e. issue No.1(b) by learned First Appellate Court because issue No.1(b) is covered under issue No.4(a) is rejected being devoid of any force for the reasons hereinafter mentioned. Court has carefully perused issues No.1(b) and 4(a). Issues No. 1(b) and 4(a) are two distinct issues. Issue No.4(a) is relating to settled possession and issue No.1(b) is relating to induction of non-occupancy tenancy. It is held that concept of settled possession and concept of induction of non-occupancy tenancy are two different concepts under the provisions of law. It is held that learned First Appellate Court has rightly framed issue No.1(b) on the basis of pleading of parties in the ends of justice.

14. Submission of learned Advocate appearing on behalf of petitioners that there was no need to frame additional issue i.e. issue No.5(a) by learned First Appellate Court relating to non-joinder of necessary parties is rejected being devoid of any force for reasons hereinafter mentioned. It is proved on record that learned Trial Court did not frame any issue relating to non-joinder of necessary parties. It is proved on record that plea of non-joinder of necessary parties was pleaded in the pleadings. It is well settled law that suit could be dismissed for non-joinder of necessary parties as per Order 1 Rule 9 of Code of Civil Procedure 1908 vide amendment w.e.f. 01.02.1977. It is held that learned First Appellate Court has rightly framed additional issue of non-joinder of necessary parties in the

present case in order to decide the appeal properly and effectively and in order to impart substantial justice inter se parties.

15. Submission of learned Advocate appearing on behalf of petitioners that evidence already adduced was sufficient to decide the case and there was no need to give opportunity to the parties to lead evidence upon additional issues is rejected being devoid of any force for the reasons hereinafter mentioned. It is well settled law that issues are of two kinds (i) Issues of law (ii) Issues of fact. It is well settled law that issues of law can be addressed directly without adducing any oral and documentary evidence. It is well settled law that when issues of fact are framed then Court is under legal obligation to give opportunity to both parties to lead evidence in affirmative and in rebuttal to prove issues of fact because it is well settled law that issues of fact is always proved by way of adducing oral and documentary evidence by the parties. In the present case additional issues framed by learned First Appellate Court are issues of fact and are not issues of law. It is well settled law that object of framing of issues is to direct attention of the parties to the main question of fact or law to be decided. Even as per Order XIV Rule 5 of Code of Civil Procedure 1908 Court may at any time before passing decree can amend the issues or frame additional issues on such terms as Court thinks fit for determining the matter in controversy between parties. It is well settled law that for proper determination of the matter in controversy between parties duty is cast upon the Court to frame proper issues before recording decision on the point.

16. A review is not a routine procedure. Court cannot review its earlier order unless Court is satisfied that material error manifest on the face of the record occurred. It is well settled law that there should be an error apparent on the face of the record to review earlier decision. It is well settled law that review does not permit the Court to rehear the matter as an appellate forum. Review is permissible only when there is miscarriage of justice or when error is apparent on the face of record. It is held that there is no miscarriage of justice in the present case. It is held that there is no error apparent on the face of the record in the previous order dated 25.02.2016 in the present case. See AIR 1980 Apex Court 2041 title **Col. Avtar Singh Sekhon vs. Union of India & Others.** See AIR 1975 Apex Court 1500 title **Chandra Kanta and another vs. Sheik Habib.** In view of above stated facts point No.1 is answered in negative.

Point No.2 (Final Order).

17. In view of findings upon point No.1 above review petition is dismissed. Certified copy of the order be transmitted to learned First Appellate Court and learned Trial Court for compliance. No order as to costs. Review Petition No. 31/2016 is disposed of. Pending application(s) if any also disposed of.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. ... Appellant
Versus
Dalip Singh and others ... Respondents

Cr. Appeal No. 582 of 2008
Reserved on: 13.04.2016
Date of decision: 28.04.2016

Indian Evidence Act, 1872- Section 32- Deceased had made two dying declarations- in her first statement, she stated that she was burning Bhatti- as soon as she increased the oil in the Bhatti, all of a sudden, the fire flamed up and engulfed her body- in her second statement, she stated that accused had beaten her and set her on fire – held, that Court has to scrutinize the dying declarations to find out if each one of them passes the test of trustworthiness- if there are more than one dying declarations and there is no inconsistency between them, all can be used against the accused for proving the guilt - Court has to examine dying declaration to find out whether it is voluntary, truthful, made in a conscious state of mind without being influenced by any person- in case of more than one dying declarations, the intrinsic contradictions are extremely important- accused had brought the deceased to the hospital- her statement was recorded by the police and bears the signature of Medical Officer- she was conscious, co-operative and well oriented in time and space- deceased was all alone when inquiry was made from her- when her second statement was recorded , parents of the deceased were present- the parents of the deceased had impressed upon the police to register the case- Doctor in whose presence, second statement was made was not examined- hence, it is difficult to rely upon the dying declaration-accused was rightly acquitted. (Para-11 to 21 and 23 to 27)

Cases referred:
Jaishree Anant Khandekar Vs. State of Maharashtra, (2009) 11 SCC 647
State of Karnataka Vs. Shariff, 2003) 2 SCC 473 and (1982) 1 SCC 700
Mohanlal Gangaram Gehani Vs. State of Maharashtra, (1982) 1 SCC 700
Tapinder Singh Vs. State of Punjab and another (AIR 1970 S.C. 1566)
Dandu Lakshmi Reddy Vs. State of A.P. (1999) 7 SCC 69
Sanjay Vs. State of Maharashtra (2007) 9 SCC 148
Puran Chand Vs. State of Haryana (2010) 6 Supreme Court Cases 566
State of A.P. Vs. Raj Gopal Asawa and another, (2004) 4 Supreme Court Cases 470.
State of A.P. Vs. M. Madhusudhan Rao, (2008) 15 SCC 582

For the appellant: Mr. V.S. Chauhan, Addl. Advocate General with Mr. J.S. Guleria, Assistant Advocate General.
For the respondents: Mr. Lakshay Thakur, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

This appeal has been filed by the State against judgment passed by the learned Sessions Judge, Mandi, in Sessions Trial No. 13 of 2006 dated 30.04.2008, vide which learned trial Court has acquitted the accused persons by holding that the prosecution has failed to prove the case against them for the offences mentioned beyond reasonable doubt.

2. We have heard the learned counsel for the parties at length and have also gone through the record.

3. The case of the prosecution was that deceased Pawna Devi was married to accused Dalip Singh about 8 years back as per Hindu rites and ceremonies. Though she was treated properly by her in-laws initially for a period of 3 years but thereafter their behaviour towards her became rude and cruel. Deceased Pawna Devi also gave birth to two sons who at the relevant time were 5 years and 3 years old respectively. The

accused demanded Palkin, fridge and Batlohi from the parents of the deceased who were not able to fulfill the said demands. On this account, the deceased was subjected to beating by the accused who were also accusing the deceased of not performing her household duties properly. Parents of Pawna Devi reported the matter to the Gram Panchayat and Pradhan Gram Panchayat with other respectable persons unsuccessfully tried to prevail upon the accused. On 16.03.2005, deceased was abused and beaten up by her husband on the ground that she was not properly preparing the meals. On 17.08.2005 at around 5.00 A.M. the deceased was again abused and subjected to beatings by her husband. In these circumstances, Pawna Devi committed suicide by setting herself ablaze. After the incident, the deceased was taken in burnt condition by her husband and other persons to CHC Sarkaghat. An application was moved for medical examination of Pawna Devi by HC Rajender (PW-11) and Pawna Devi was accordingly examined by Dr. M.R. Verma (PW-9). MLC Ext. PH was issued after the examination by the Doctor and Rajender Pal made entry in Daily Diary No. 9. Statement of Pawna Devi was recorded vide Ext. PJ on the basis of information given to the police by the Doctor. As the condition of Pawna Devi was critical, she was referred to Zonal Hospital Mandi. Information was received from the Doctor of Zonal Hospital Mandi on 29.08.2005 that a lady in burnt condition wants to make statement and accordingly Kashmir Singh (PW-12) was deputed to visit the Zonal Hospital Mandi, who recorded the statement of Pawna Devi in the presence of Medical Officer on duty vide Ext. PN. On the basis of said statement, the S.H.O. registered case against the accused. Pawna Devi was referred to IGMC Shimla, who later on succumbed to the burn injuries.

4. In support of its case, the prosecution examined in all 14 witnesses. PW-1, PW-2 and PW-3, all hail from the village of the accused. PW-4 is the mother of the deceased. P-5 is the Ward Panch of Gram Panchayat Dhalwan. PW-6 is the father of the deceased. PW-7 was the Pradhan of Gram Panchayat Dhalwan. PW-8 is the Doctor who conducted the postmortem examination of the dead of the deceased. PW-9 is the Doctor who attended the deceased when she was brought to the hospital by the accused with the alleged history of burn injuries on 18.08.2005. PW-10 is the grand-father of the deceased. PW-11 had moved application Ext.PH/1 for the medical examination of Pawna Kumari and to seek the opinion of the Medical Officer on 18.08.2005. PW-12 recorded the statement of the deceased on 29.08.2005. PW-13 is the Investigating Officer and PW-14 had visited the shop-cum-house of the deceased Pawna Kumari on 18.08.2005 and taken into possession pieces of burnt clothes. He had also deputed H.C. Kashmir Singh to record the statement of Pawna Kumari.

5. PW-4 Smt. Savitri Devi, mother of the deceased has stated that her daughter was married to accused Dalip Singh about 8 years ago and after her marriage, she used to live in the house her in-laws. She often used to complain of maltreatment and beatings at the hands of the accused. The deceased gave birth to a son after 3 years. The mother-in-law of the deceased was demanding fridge and Batlohi and other accused, namely, Promila Devi and Jay Kumar (brother and sister-in-law of the deceased) used to nag the deceased for bringing insufficient dowry. She further stated that she reported the matter to their local Panchayat as well as to Pradhan Sunil Kumar and Ward Panch Dei Rani, who tried to prevail upon the accused but were not successful. Her daughter was subjected to great torture and about 10 days prior to her death, she herself had left her daughter in her matrimonial house alongwith her husband. Ward Panch Dei Rani and Pradhan Sunil also accompanied the deceased to her matrimonial house. She advised the accused to mend their behaviour towards her daughter. On 18.08.2005 she came to know that her daughter died of burn injuries caused by the

accused. Thereafter, she alongwith her husband came to Zonal Hospital Mandi. Her daughter had died on account of maltreatment given to her by the accused.

6. PW-6 Shri Vidhi Chand, father of the deceased, has stated that his daughter was married to the accused Dalip about 7 years prior to the death and after 3 years of marriage, accused started maltreating his daughter as they w ere demanding palquin, batlohi and fridge. He was not in a position to fulfill the demands as he has other daughters also. Whenever her daughter used to come to his house, she was complaining of maltreatment and beatings. 15-20 days before her death, the deceased had visited his house and told that the accused was demanding cash i.e. one fixed deposit of Rs.20,000/-, which had matured at the relevant time. She was insisting that the said money would be used for education and welfare of the children and as such, cash should not be given to the accused. He visited the house of the accused at least 10 times with Pradhan Sunill and Dei Rani. The accused always gave assurance to mend their behaviour but after 3-4 days they again used to start maltreating the deceased. He also made complaint to P.P. Bladwara wherein accused entered into a compromise and assured not to maltreat his daughter. The deceased suffered from burn injuries on 18.08.2005 and was brought to Zonal Hospital Mandi and he also came to Zonal Hospital Mandi. The condition of his daughter was critical. He alongwith Ranvir Singh came to the office of Deputy Commissioner, Mandi and made complaint. His daughter informed him in the hospital that the accused have poured kerosene oil on her body and put her on fire. This was done as the deceased had not given them Rs.20,000/-.

7. PW-10 Shri Sukh Ram, grand-father of the deceased, had also stated that Pawna was married to accused Dalip Singh about 7 years prior to the incident and though she was treated properly for 3 years by the accused. However, thereafter they started maltreating her and harassing her for not bringing sufficient dowry. After 3 years of marriage he alongwith Pradhan Sunil and Ward Panch Dei Rani took the deceased to the house of the accused and advised the accused to mend their behaviour. However, the deceased was again given beatings by the accused and accordingly, the matter was reported by them at P.O. Hatli. This was followed by a compromise between the accused and them and Sunil Pradhan and Dei Rani were also present at that time. The deceased was treated properly for about a month but thereafter, again the accused started maltreating her and Pawna came to his house. A local Panchayat was arranged at his house which was attended by Pradhan Sunil and Pradhan of the accused and again Pawna was sent to the house of the accused on the assurance given by the accused for treating her properly. On 18.08.2005 he came to know from Sunil Pradhan that his grand-daughter was killed by the accused by pouring kerosene oil on 18.08.2005. He stated that this was done as their other demands could not be fulfilled.

8. Thus, the case of the prosecution was that Pawna Devi was subjected to maltreatment and beatings by the accused for brining insufficient dowry. This maltreatment commenced after 3 years of the marriage as the demands of dowry could not be met because the parents of the deceased were poor. PW-4, PW-6 and PW-10 have also deposed in the same line.

9. In the present case, the deceased had given two statements on different dates after occurrence of the incident. Her first statement is Ext.PJ dated 18.08.205. In the said statement, the deceased had mentioned that on 18.08.2005 she was burning the Bhatti at around 6.0 A.M. As soon as she increased the oil in the said Bhatti, all of a sudden, the fire flamed up and engulfed her body. At the relevant time Madan Kumar son of Shri Jind Ram was present there who called accused Dalip Kumar after hearing her cries and they saved her from burning and brought her to RH Sarkaghat for treatment.

She further stated that the incident was a result of her carelessness and no other person was responsible for the same and she did not intend to initiate any proceedings in this regard.

10. Her second statement has been recorded on 20.08.205, Ext. PN. In this statement, the deceased had stated that her husband, sister-in-law Kaushalya Devi and mother-in-law were maltreating her for almost 3 years and were physically abusing her and they used to say that the deceased was not doing any work and they used to level various allegations against her. She complained this to the Panchayat and the Panchayat also tried to explain the accused. Even on 16.08.2005 her husband physically assaulted her and verbally abused her on the ground that she was not preparing meals properly. On 17.08.2005 around 5.00 A.M. again her husband physically and verbally abused her and as a result, getting fed up with the atrocities of her husband, mother-in-law, brother-in-law and sister-in-law, she had set herself ablaze by pouring kerosene oil on her. The statement she had given on 17.08.205 was under the pressure of her husband and that she was giving this particular statement in her full senses.

11. At this stage, it is relevant to refer to Section 32 of Indian Evidence Act. Section 32(1) reads as under:-

> "32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-
>
> (1) When it relates to cause of death - When the statement is made by a person as to the cause of his death, or to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be he nature of the proceeding in which the cause of his death comes into question."

12. It is well settled position of law that in case there are more than one dying declarations then the Court has to scrutinize all of them to find out if each one of them pass the test of trustworthiness. The Court also must further find whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. The Apex Court has consistently held that there can be more than one dying declarations and if there is no inconsistency between them, all can be used against the accused for proving the guilt. **[Jaishree Anant Khandekar Vs. State of Maharashtra**, (2009) 11 SCC 647, **State of Karnataka Vs. Shariff**, 2003) 2 SCC 473 and (1982) 1 SCC 700, **Mohanlal Gangaram Gehani Vs. State of Maharashtra**, (1982) 1 SCC 700.**]** The Apex Court has further held in the case of **Tapinder Singh Vs. State of Punjab and another** (AIR 1970 S.C. 1566) that if the dying declaration is acceptable as truthful then even in the absence of other corroborative evidence, the Court can act upon it and convict the accused. The following observations are made by the Apex Court in Para-5 of the judgment:-

"(5) The dying declaration is a statement by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death and it becomes relevant under S. 32 (1) of the Indian Evidence Act in a case in which the cause of that person's death comes into question. It is true that a dying declaration is not a deposition in court and it is neither made on oath nor is the presence of the accused. It is, therefore, not tested by cross-examination on behalf of the accused. But a dying declaration is admitted in evidence by way of an exception to the general rule against the admissibility of hearsay evidence, on the principle of necessity. The weak points of a dying declaration just mentioned merely serve to put the court on its guard while testing its reliability, by imposing on it an obligation to closely scrutinise all the relevant attendant circumstances. This Court in Kushal Rao v. State of Bombay, 1958 SCR 552 at pp. 568-569 = (AIR 1958 SC 22 at pp. 28-29) laid down the test of reliability of a dying declaration as follows : "On a review of the relevant provisions of the Evidence Act and of the decided cases in the different High Courts in India and in this Court, we have come to the conclusion, in agreement with the opinion of the Full Bench of the Madras High Court, aforesaid, (1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated; (2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made; (3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence; (4) that a dying declaration stands on the same footings as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence; (5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and (6) that in order to test the reliability of a dying declaration, the Court has to keep in view the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.

Hence in order to pass the test of reliability a dying declaration has to be subjected to a very close scrutiny, keeping in view the fact that the statement has been made in the absence of the accused who had no opportunity of testing the veracity of the statement by cross-examination. But once the court has come to the

conclusion that the dying declaration was the truthful version as to the circumstances of the death and the assailants of the victim, there is no question of further corroboration. If, on the other hand, the Court, after examining the dying declaration in all its aspects, and testing its veracity, has come to the conclusion that it is not reliable by itself, and that it suffers from an infirmity, then, without corroboration it cannot form the basis of a conviction. Thus, the necessity for corroboration arises not from any inherent weakness of a dying declaration as a piece of evidence, as held in some of the reported cases, but from the fact that the court, in given case, has come to the conclusion that that particular dying declaration was not free from the infirmities referred to above or from such other infirmities as may be disclosed in evidence in that case."

This view was approved by a Bench of five Judges in Harbans Singh, v. State of Punjab, (1962) Supp 1 SCR 104 = (AIR 1962 SC 439). Examining the evidence in this case in the light of the legal position as settled by this Court we find that the dying declaration was recorded by the Magistrate within four hours of the occurrence. It is clear and concise and sounds convincing. It records :

"Today at 4.45 p.m. my Sandhu (wife's sister's husband) Tapinder Singh fired shots with his pistol at me in the presence of Harnek Singh, Sher Singh and Gurdial Singh at the taxi stand. He suspected that I had illicit relations with his wife. Tapinder Singh injured me with these fire shots."

Considering the nature and the number of injuries suffered by the deceased and the natural anxiety of his father and others present at the spot to focus their attention on efforts to save his life we are unable to hold that he had within the short span of time between the occurrence and the making of the dying declaration been tutored to falsely name the appellant as his assailant in place of the real culprit and also to concoct a non-existent motive for the crime. It is unnecessary for us to refer to the earlier declarations contained in Ex. PM, Ex. DC and Ex. PH/13 because the one recorded and proved by the Magistrate seems to us to be acceptable and free from infirmity. If the dying declaration is acceptable as truthful then even in the absence of other corroborative evidence it would be open to the court to act upon the dying declaration and convict the appellant stated therein to be the offender. An accusation in a dying declaration comes from the victim himself and if it is worthy of acceptance then in view of its source the Court can safely act upon it. In this case, however, we have also the evidence of eye witnesses Gurdial Singh, (P. W. 7), Harnek Singh (P. W. 8) and Sher Singh (P. W. 9) whose testimony appears to us to be trustworthy and unshaken. No convincing reason has been urged on behalf of the appellant why these three witnesses and particularly the father of the deceased should falsely implicate the appellant substituting him for the real assailant. It is not a case in which, along with the real culprit, someone else, with whom the complainant has some scores to settle, has been added as a co-accused. The only argument advanced on behalf of the appellant was that the deceased was shot

> at somewhere also and not at the place where the prosecution witnesses allege he was shot at. It was emphasised that these three witnesses were not present at the place and time where the occurrence actually took place. This submission is, in our view, wholly unfounded and there is absolutely no material in support of it on the existing record. The probabilities are clearly against it. The fact that Hari Singh, A. S. I. (P. W. 2) went to the place of occurrence and from there he learnt from someone that the injured person had been taken to Dayanand Hospital clearly negatives the appellant's suggestion. The fact that the A. S. I. did not remember the name of the person who gave this information would not detract from its truth. On the contrary it appears to us to be perfectly natural for the A. S. I. in those circumstances not to attach much importance to the person who gave him this information. And then, the short duration within the injured person reached the hospital also shows that those who carried him to the hospital were close-by at the time of the occurrence and the suggestion that Gurdial Singh (P. W. 7), Harnek Singh (P. W. 8) and Sher Singh (P. W. 9) must have been informed by someone after the occurrence does not seem to us to fit in with the rest of the picture. We are, therefore, unable to accept the appellant's suggestion that the deceased was shot at somewhere else away from the place of the occurrence as deposed by the eye witnesses."

13. The Apex Court in **Dandu Lakshmi Reddy Vs. State of A.P.** (1999) 7 SCC 69 has held that when the sphere of scrutiny of the dying declaration is a restricted area, the Court cannot afford to sideline such a material divergence relating to this very occasion of the crime. Either the context spoken to in one was wrong or that in the other was wrong. Both could be reconciled with each other only with much strain as it relates to the opportunity for the culprit to commit the offence. Adopting such a strain to the detriment of the accused in a criminal case is not a feasible course.

14. The Apex Court has further held in **Sanjay Vs. State of Maharashtra** (2007) 9 SCC 148, as under:

> "[12] In our opinion this appeal deserves to be allowed by giving the benefit of doubt to the appellant. The only evidence against the appellant are the three alleged dying declarations of the appellant's wife Seema. In the first dying declaration Seema stated that while she was pumping the stove it suddenly burst and her saree caught fire. She shouted loudly and then her husband rushed towards her and extinguished the fire by pouring water on her. This is the first dying declaration and nothing has been alleged against the appellant in it. Rather it shows that the appellant tried to save his wife Seema. In the subsequent dying declaration Seema is said to have stated that she poured kerosene on her in person and set herself ablaze because she was angry with her husband.
>
> [13] The prosecution version is that the subsequent dying declarations made by Seema alleging that she committed suicide because there used to be quarrels between her and her husband (the appellant) are corroborated by two letters alleged to have been written by Seema to her parents. The first letter (Ex.28) appears to be dated 24.1.1994. It shows that her husband (the appellant) does not

behave properly with her, he daily returns home late at night in a drunken state and because of it there used to be quarrels between her and the appellant. She also expressed in the said letter that the appellant was also willing to give her divorce. Seema expressed that she felt repentful as she married the appellant of her own will. She further expressed that she felt no charm in leading such life.

[14] Another letter (Ex.29) is dated 26.7.1994 i.e. about five months before the incident of suicide. The said letter reiterates the same state of affairs mentioned in the earlier letter (Ex.28). The evidence of PW-1 Vimal (the mother of Seema) and PW-2 Wamanrao (the father of Seema) corroborates the unhappiness faced by Seema. Hence it is alleged that the so called first written dying declaration (Ex.51) would not render the voluminous evidence untrustworthy.

[15] The trial court, as well as High Court, were of the view that the evidence on record shows there was cruelty on the part of the appellant which drove his wife to suicide.

[16] In our opinion in view of the different dying declarations it would not be safe to uphold the conviction of the appellant and we have to give him the benefit of doubt. It cannot be said in this case that the prosecution has proved the appellant's guilt under Section 306 I.P.C. of abetting the suicide beyond reasonable doubt."

15. The Apex Court has further held in **Puran Chand Vs. State of Haryana** (2010) 6 Supreme Court Cases 566, that the Courts below have to be extremely careful when they deal with a dying declaration as the maker thereof is not available for the cross-examination which poses a great difficulty to the accused person. It has been further held that a mechanical approach in relying upon a dying declaration just because it is there is extremely dangerous. The Court has to examine a dying declaration scrupulously with a microscopic eye to find out whether the dying declaration is voluntary, truthful, made in a conscious state of mind and without being influenced by the relatives present or by the investigating agency who may be interested in the success of investigation or which may be negligent while recording the dying declaration. The Apex Court has further observed that number of times, a young girl or a wife who makes the dying declaration could be under the impression that she would lead a peaceful, congenial, happy and blissful married life only with her husband and, therefore, has tendency to implicate the inconvenient parents-in-law or other relatives. Number of times the relatives influence the investigating agency and bring about a dying declaration. Therefore, the dying declarations recorded by the investigating agencies have to be very scrupulously examined and the court must remain alive to all the attendant circumstances at the time when the dying declaration comes into being. When there are more than one dying declarations, the intrinsic contradictions in those dying declarations are extremely important. It cannot be that a dying declaration which supports the prosecution alone can be accepted while the other innocuous dying declarations have to be rejected. Such a trend will be extremely dangerous. However, the courts below are fully entitled to act on the dying declarations and make them the basis of conviction, where the dying declarations pass all the above tests. It has been further held that it is extremely difficult to reject a dying declaration merely because there are few factual errors committed. The Court has to weigh all the attendant circumstances and come to the independent finding whether the dying declaration was properly recorded and whether it was voluntary and truthful. Once the court is convinced that the dying declaration is so recorded, it may be acted upon and can be made a basis of conviction. The courts

must bear in mind that each criminal trial is an individual aspect. It may differ from the other trials in some or the other respect and, therefore, a mechanical approach to the law of dying declaration has to be shunned.

16. The Apex Court has done a comparative study of laws of various countries on the point of dying declaration in **Jaishree Anant Khandekar Vs. State of Maharashtra**, (2009) 11 SCC 647. The relevant Paras 17, 18, 20, 21,22, 23 and 24 of the said judgment are reproduced below:-

> "17. The law relating to dying declaration is an exception to the hearsay rule. The rationale behind admissibility of a dying declaration was best expressed, not in any judgment, but in one of the soliloquies in Shakespeare's King John, when fatally wounded Melun wails:
>
> `Have I met hideous
> death within my view,
> Retaining but a quantity of life,
> Which bleeds away
> even as a form of wax,
> Resolveth from his figure
> 'gainst the fire?
> What in the world should
> make me now deceive,
> Since I must lose the use of
> all deceit?
> Why should I then be false
> since it is true
> That I must die here
> and live hence by truth?'
> (See King John, Act V, Scene IV.)
>
> 18. Both Taylor and Wigmore in their treatise on Evidence took refuge to the magic of Shakespeare to illustrate the principles behind admissibility of dying declaration by quoting the above passage.
>
> 20. The test of admissibility of dying declaration is stricter in English Law than in Indian Law. Sir James Fitzjames Stephen in 1876 brought out a `Digest of the Law of Evidence' and its introduction is of considerable interest even today. The author wrote that English Code of Evidence is modelled on the Indian Evidence Act of 1872. In the words of the author:
>
> "In the autumn of 1872 Lord Coleridge (then Attorney General) employed me to draw a similar code for England. I did so in the course of the winter, and we settled it in frequent consultations. It was ready to be introduced early in the Session of 1873. Lord Coleridge made various attempts to bring it forward, but he could not succeed till the very last day of the Session. He said a few words on the subject on the

5th August, 1873, just before Parliament was prorogued. The Bill was thus never made public, though I believe it was ordered to be printed.

It was drawn on the model of the Indian Evidence Act and contained a complete system of law upon the subject of evidence."

21. In that book, Article 26 sums up the English law relating to dying declaration as under:-

"Article 26. Dying Declaration as to Cause of Death . - A declaration made by the declarant as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, is deemed to be relevant only in trials for the murder or manslaughter of the declarant; and only *when the declarant is shown, to the satisfaction of the judge, to have been in actual danger of death, and to have given up all hope of recovery at the time when his declaration was made.*

Such a declaration is not irrelevant merely because it was intended to be made as a deposition before a magistrate, but is irregular."

(emphasis supplied)

22. In Section 32(1) of the Indian Evidence Act the underlined portion is not there. Instead Section 32 (1) is worded differently and which is set out:

"32. Cases in which statement of relevant fact *by person who is dead or cannot be found, etc., is relevant - Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured, without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases:-*

(1) When it relates to cause of death - When the statement is made by a person as to the cause of his death, or to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be he nature of the proceeding in which the cause of his death comes into question."

(emphasis supplied)

23. The Privy Council in the case of Nembhard Vs. The Queen, 1982 (1) The All England Law Reports 183 (Privy Council), while hearing an appeal from the Court of Appeal of Jamaica, made a comparison of the English Law and Indian Law by referring to

the underlined portions of Section 32(1) of the Indian Evidence Act at page 187 of the report. Sir Owen Woodhouse, speaking for the Privy Council, pointed out the different statutory dispensation in Indian Law prescribing a test of admissibility of dying declaration which is distinct from a common law test in English Law.

24. Apart from an implicit faith in the intrinsic truthfulness of human character at the dying moments of one's life, admissibility of dying declaration is also based on the doctrine of necessity. In many cases victim is the only eye witness to a crime on him/her and in such situations exclusion of the dying declaration, on hearsay principle, would tend to defeat the ends of justice. American Law on dying declaration also proceeds on the twin postulates of certainty of death leading to an intrinsic faith in truthfulness of human character and the necessity principle."

17. The Hon'ble Supreme Court has further held in **State of A.P. Vs. Raj Gopal Asawa and another**, (2004) 4 Supreme Court Cases 470. Para-10 of the said judgment is reproduced below:-

"(10) Section 113-B of the Evidence Act is also relevant for the case at hand. Both Section 304-B, I. P. C. and Section 113-B of the Evidence Act were inserted as noted earlier by the Dowry Prohibition (Amendment) Act, 43 of 1986 with a view to combat the increasing menace of dowry deaths. Section113-B reads as follows :-

"113-B. Presumption as to dowry death.- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.

Explanation.- For the purposes of this section 'dowry death' shall have the same meaning as in Section 304-B of the Indian Penal Code (45 of 1860)."

The necessity for insertion of the two provisions has been amply analysed by the Law Commission of India in its 21st Report dated 10th August, 1988 on 'Dowry Deaths and Law Reform'. Keeping in view the impediment in the pre-existing law in securing evidence to prove dowry related deaths, legislature thought it wise to insert a provision relating to presumption of dowry death on proof of certain essentials. It is in this background presumptive Section 113-B in the Evidence Act has been inserted. As per the definition of 'dowry death' in Section 304-B, I. P. C. and the wording in the presumptive Section 113-B of the Evidence Act, one of the essential ingredients, amongst others, in both the provisions is that the concerned woman must have been "soon before her death" subjected to cruelty or harassment "for or in connection with the demand of dowry". Presumption under Section 113-B is a presumption of law. On proof of the essentials mentioned therein, it becomes obligatory on the Court to raise a presumption that the accused caused the dowry

death. The presumption shall be raised only on proof of the following essentials :

(1) The question before the Court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B, I. P. C.).

(2) The woman was subjected to cruelty or harassment by her husband or his relatives.

(3) Such cruelty or harassment was for, or in connection with any demand for dowry.

(4) Such cruelty or harassment was soon before her death."

18. This Court in **State of Himachal Pradesh Vs. Kartar Singh** has elaborately dealt with this issue i.e. how the Court is to scrutinize dying declarations where there are more than one. (Please see **Cri. Appeal No. 76 of 2000** titled **State of Himachal Pradesh V. Kartar Singh** decided on 03.11.2010). In the said case, this Court has upheld the acquittal of the accused persons by holding that there was nothing on record to suggest that the accused willfully conducted in a manner so as to drive the deceased to commit suicide and/or harass the deceased with a view to coerce her with any unlawful demand.

19. The Apex Court in **State of A.P. Vs. M. Madhusudhan Rao**, (2008) 15 SCC 582 has held as under:-

"It is plain that as per clause (b) of the Explanation, which, according to learned counsel for the State is attracted in the instant case, every harassment does not amount to "cruelty" within the meaning of Section 498-A, I.P.C. The definition stipulates that the harassment has to be with a definite object of coercing the woman or any person related to her to meet an unlawful demand. In other words, for the purpose of Section 498-A I.P.C. harassment simpliciter is not 'cruelty" and it is only when harassment is committed for the purpose of coercing a woman or any other person related to her to meet an unlawful demand for property etc., that it amounts to 'cruelty" punishable under Section 498-A, I.P.C."

20. Applying the aforesaid number of laws, we shall deal with the two dying declarations.

21. It is not a disputed fact that the accused husband brought the deceased to the hospital. It is also not in dispute that PW-9 Dr. M.R. Verma had informed the police about the incident and PW-11 H.C. Rajinder Pal entered this information in the daily diary Ext. PK and thereafter went to the hospital and moved application Ext. PH/1 for medical examination of the deceased and to seek the opinion of the Medical Officer. It is also not disputed that PW-11 recorded the statement of Pawna [Ext. PJ] and obtained MLC Ext. PH from the Medical Officer.

22. PW-1 Madan Kumar has deposed that he was at the shop of accused Dalip on 18.08.2005 around 6.00 A.M. He went there to have tea. Accused asked his wife to prepare tea and thereafter he took tea. Accused went out to ease in nearby fields and he made payment to Pawna Kumari and left the shop. After covering some distance he heard the cries of Pawna and he came back to the shop and found that the deceased was on fire. Since accused was not there he rushed towards the fields and called

Dalip. By the time he came back alongwith Dalip, co-villagers had extinguished the fire from the body of Pawna and then he came back to his house from the spot. PW-2 Shri Balwant Singh has also stated that on 18.08.2005 he was at home and he heard the cries of Pawna Kumari. He immediately went towards the shop of Pawna Kumari and found her body on fire. He tried to extinguish the same with boru. In the meantime, Sarita also came, who helped him in doing so and put clothes on the born body of Pawna Kumari. Accused Dalip was not present there at the relevant time. He came there late. Pawna Kumari was thereafter removed to RH Sarkaghat for treatment. PW-3 has deposed that Pawna Kumari was known to her and on 18.08.2005 around 6.00 A.M. she heard the cries of Pawna Kumari and rushed towards her house. She covered the body of Pawna with her own Dupatta and the fire on the body was extinguished by Balwant. Accused Dalip also came there and Pawna in burnt position was taken to RH Sarkaghat. Incidentally no one has seen deceased pouring oil on herself though place of incidence is a shop.

23. Coming back to the two statements made by the deceased, the first statement Ext. PJ was made on 18.08.2005 i.e. on the date of the incident. PW-9 Dr. M.R. Verma has stated that the statement of the deceased Ext. PJ was recorded by the police in the hospital and which bears his signatures. As per him, patient Pawna Kumari stated that "**while increasing kerosene supply to bhatti by mechanical controller on 18.08.2005 at 6.00 A.M., there was sudden flow of high flaming and her tricot clothes caught fire and she got the burn injuries. She further stated that no other person was involved in this context and it was an incident.**" He has further stated that when the deceased gave the statement, she was conscious, co-operative and well oriented in time and space. He has also stated that the parents of the deceased were not present at that time. In his cross-examination, he has mentioned that he did not find the deceased at that time under any pressure and she was all alone when he made enquiries from her. Thus, from the statement of the said witness, it emerges that at the time when the deceased had recorded her first statement on 18.08.2005 she was conscious, co-operative and well oriented and the statement was not made under any pressure. He has further stated that Pawna was all alone when she made this statement. From this, it can be safely inferred that her husband was not present with her when she made the statement.

24. On the other hand, in the second statement of the deceased which was recorded on 20.08.2005, she has completely resiled from what was stated by her in her previous statement. In this statement, she has mentioned that the accused were maltreating her for almost 3 years and were physically abusing her and they used to say that the deceased was not doing any work and they used to level various allegations against her. She complained this to the Panchayat and the Panchayat also tried to explain them. Even on 16.08.2005 her husband physically assaulted her and verbally abused her on the ground that she was not preparing proper meals. On 17.08.2005 around 5.00 A.M. again her husband physically and verbally abused her and as a result getting fed up with the atrocities of her husband, mother-in-law, brother-in-law and sister-in-law, she had set herself ablaze by pouring kerosene oil on her. The statement she had given on 17.08.2005 was under the pressure of her husband and that she was giving this particular statement in her full senses.

25. It is not in dispute that the second statement has been given by the deceased in the presence of her parents. PW-11 H.C. Rajinder Pal who recorded the first statement has mentioned in his cross-examination that Ext. PJ was recorded as per the version of Pawna (deceased), who voluntarily made the statement. He has further stated that it is correct that the parents of the deceased impressed upon the police to register

a case under Sections 498-A, 306 IPC. The second statement has been recorded by PW-12 H.C. Kashmir Singh. He has deposed that he recorded the statement of Pawna Kumari in the presence of the Medical Officer on duty at Zonal Hospital Mandi. He further says that he does not know the name of the Medical Officer on duty who has put his signatures on Ext. PN at point 'A' to 'A'. The prosecution has not produced any material on record to demonstrate that at the time when the second statement of the deceased was recorded, she was in a condition to record her statement. The Doctor in whose presence the statement is alleged to have been recorded has also not been examined by the prosecution. Further, keeping in view the fact that the second statement was recorded in the presence of the parents of the deceased the factum of the said statement having been made under the duress or force of the parents of the deceased cannot be ruled out. The evidence produced by the prosecution with regard to maltreatment and cruelty allegedly met out to the deceased by the accused is that of the mother of the deceased Smt. Savitri Devi PW-4, her father Shri Vidhi Chand PW-6 and her grand-father Shri Sukh Ram PW-10. Besides this PW-5 Smt. Dei Rani, who was ward Panch of Gram Panchayat Dhalwan and PW-7 Shri Sunil Kumar, who at the relevant time was Pradhan of the Gram Panchayat Dhalwan, have also deposed to this effect. However, in his cross-examination PW-7 has stated that he did not disclose to the police recording his talks with the deceased on 18.08.2005 to the effect that the deceased while being brought to Zonal Hospital Mandi on a vehicle told him that she was being maltreated by the accused, as such, she doused kerosene oil on her body and put herself on fire. None of the above persons have given any specific date and/or timing of the alleged maltreatment meted out to the deceased by the accused. Incidentally, there is no mention of the demand of Batlohi in the statement made by PW-4 under Section 161 Cr.P.C. Though, father of the deceased had made general statement that his daughter used to complain of beatings and maltreatment at the hand of the accused and when she visited his house 15-20 days before the date of the incidence, she had informed him that the accused was demanding cash of FDR of Rs.20,000/-, however, a perusal of the FIR will demonstrate that there is no mention of the said demand in the same. In our opinion, the prosecution has failed to prove specific instances of maltreatment and beatings meted out to the deceased by the accused. The prosecution has further failed to establish as to what was that actual conduct of the accused which instigated the victim to commit suicide.

26. Section 32(1) of the Evidence Act is an exception to general principle of law that hearsay evidence is not admissible until and unless said evidence has been tested by way of cross-examination and is found to be creditworthy. Dying declaration made by a person has a special sanctity as at that solemn moment a person is not likely to give an untrue statement. However, at the same time, the dying declaration has also to be tested on the touchstone of credibility and acceptability. This is more so in view of the fact that the accused do not get an opportunity of questioning veracity of the statement by way of cross-examination. The law on the subject as declared by the Hon'ble Supreme Court has already been referred above.

27. In the present case, the first dying declaration was made on 17.08.2005 and the Doctor in whose presence this declaration was made has categorically mentioned that the deceased was in disposing mind and was not under the influence of anyone when she had given her statement. The prosecution has not been able to place any material on record to suggest that the said statement was either a forced statement or a procured one. On the other hand, as far as the second dying declaration is concerned, neither there is any endorsement of any Doctor on the said declaration nor there is any certificate produced on record by the prosecution of any Doctor that the deceased was in a disposing position to give the said statement. Further, it is not in dispute that the statement was

recorded in the presence of the parents of the deceased. Incidentally, in the second dying declaration dated 20.08.2005, the date of incident is recorded as 17.08.2005, whereas the incident has admittedly taken place on 18.08.2005. This Court is alive to the situation that the attestation from Doctor is not necessary at the time of recording of the statement but keeping in view the peculiar circumstances in which the second statement was got recorded, the non-obtaining of certificate from a Doctor to the effect that the deceased was in a position to record her statement, raises suspicions about the truthfulness and trustworthy of the contents of the second dying declaration. In these circumstances, according to us, it cannot be said that the prosecution has established its case against the accused persons beyond any reasonably doubt. Probability of the accused having instigated the alleged offence cannot be a substitute for certainty.

28. Further, a perusal of the judgment passed by the learned trial Court makes it clear that the learned trial Court has gone into all these aspects of the matter in detail. The conclusion arrived at by the learned trial Court according to us is correct. The learned Additional Advocate General has not been able to persuade us as to why we should differ from the judgment passed by the learned trial Court. The accused have had the advantage of having been acquitted by the Court below and according to us, it cannot be said that the Court below has not correctly appreciated the evidence on record or that acquittal of the accused persons has resulted into travesty of justice. No ground for interference is called for. The present appeal is dismissed. Bail bonds, if any, furnished by the accused are discharged.

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BEFORE HON'BLE MR. JUSTICE SANJAY KAROL, J. AND HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

State of H.P. ... Appellant
Versus
Narian Singh and others ... Respondents

Cr. Appeal No. 297 of 2007
Reserved on: 19.04.2016
Date of decision: 28.04.2016

Indian Penal Code, 1860- Section 498 A and 304-B- L was married to accused N- she was subjected to beatings and maltreatment on account of demand of dowry- case was registered by her against the accused which was compounded- vehicle of accused N met with an accident- accused asked the deceased to bring an amount of Rs.50,000/- from her parents- she was again subjected to beatings and maltreatment by the accused persons and it was suspected by the complainant that his daughter was done to death by the accused persons due to non fulfilling the demands of dowry- accused were tried and acquitted by the trial Court- held, in appeal that there was discrepancy regarding the demand of dowry- according to P, deceased was beaten prior to her death, but no injuries were found on her person- no complaint was made to the police or gram Panchayat regarding beatings- there are contradictions in the testimonies of prosecution witnesses- evidence was rightly appreciated by the trial Court- prosecution case was not proved beyond reasonable doubt – appeal dismissed. (Para-10 to 19)

Case referred:
Surinder Singh Vs. State of Haryana, (2014) 4 Supreme Court Cases 129

For the appellant:	Mr. R.S. Verma, Mr. V.S. Chauhan, Addl. Advocate Generals and Mr. Vikram Thakur, Deputy Advocate General.
For the respondents:	Mr. Bimal Gupta, Senior Advocate with Mr. Vineet Vashista, Advocate.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J.:

The present appeal has been filed by the State against judgment passed by learned Additional Sessions Judge (Fast Track), Kullu, in Sessions Trial No. 109/04, RBT. Sess. Trial No. 6/05, dated 24.04.2007, vide which learned trial Court has acquitted the accused persons for offences under Section 498 A and 304-B, I.P.C.

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

3. The case of the prosecution was that a complaint was filed by Sangat Ram, an agriculturist, who was having 8 daughters and one son. Deceased (Lata) his daughter was married to accused Narian Singh as per Hindu rites. Out of the said wedlock, accused Narian Singh and deceased had one son and even at the time of her death, the deceased was in family way. Deceased was subjected to beatings and maltreatment on account of demand of dowry by the accused but the complainant was not able to meet the dowry demands of the accused persons as he was a poor man. Earlier also, a case was registered under Section 498A I.P.C. against the accused by deceased Lata when she was subjected to cruelty. However, this case was compounded during the course of trial. About 3 months back, the vehicle of accused Narian Singh met with an accident and the accused asked the deceased to bring an amount of Rs.50,000/- from her parents, to which demand, the deceased showed her reluctance. As a result, the deceased was subjected to beatings and maltreatment by the accused persons and it was suspected that his daughter was done to death during the intervening night of 22/23.08.2004 by the accused persons as the deceased was not able to meet their illegal demands of dowry. FIR was registered at Police Station Kullu on 23.08.2004, copy of which is Ext. PW10/A.

4. In order to prove its case, the prosecution in all examined 12 witnesses. The accused examined two witnesses in defence. PW-1 Sangat Ram is father of the deceased. PW-2 Savitri Devi is the mother of the deceased. PW-3 Poonam is the younger sister of the deceased. PW-4 Dr. Sonam Chhering had conducted the postmortem of the dead body of the deceased alongwith Dr. Sumedh Kaul. PW-5 Trilok Singh was the Pradhan of Gram Panchayat Bhuin. PW-6 Karan Rai Singh had photographed the dead body on the intervening night of 22/23.08.2004 in village Suibhra on the request of the police. PW-7 HHC Mohar Dass has placed on record the Daily Diary of P.P. Bhuntar pertaining to the month of August, 2004. PW-8 H.C. Roop Singh was posted as MHC in Police Station Kullu since September, 2003 and on 23.08.2004 S.I. Bhup Ram, Police Post Bhuntar, had deposited 5 sealed parcels duly sealed with the seal of Zonal Hospital Kullu aongwith a letter of Doctor and sample seal with him in the Malkhana. PW-9 Constable Pratap Singh had deposited the case property in F.S.L. Junga on 26.08.2004. PW-10 Inspector Badri Singh has recorded FIR on the basis of the statement of Sangat Ram, which statement was recorded by S.I. Bhup Ram. PW-11 S.I. Bhup Ram was posted as

Incharge P.P. Bhuntar. PW-12 Devinder Thakur was posted as Additional Superintendent of Police at the relevant time and he had recorded the statements of Sangat Ram and Mela Ram under Section 161 Cr.P.C. and also carried out partial investigation of the case. DW-1 Narender Sharma is Record Keeper, General Record Room, Kullu (D.C. Office), who had brought the record of case titled State Vs. Narian Singh etc. decided on 05.08.2005. Badri Singh who was the S.H.O. of Police Station Kullu, was also examined by the accused as DW-2.

5. PW-1 Sangat Ram, father of the deceased, has stated that deceased was married with Narian Singh in the year 2001. The marriage was solemnized as per Hindu customs and rites. Only after 18 days of her marriage, the deceased was beaten up by the accused persons and turned out of her matrimonial house, upon which, she came back to the house of her father. It was disclosed by the deceased that beatings were given to her on the ground that she had not brought any cash on account of dowry during her marriage, whereas, the accused had spent Rs.70,000/- for solemnization of the marriage of accused Narian Singh with the deceased. He further states that thereafter accused Nihala Ram, father of accused Narian Singh came to his house alongwith ward Panch Sarvan Kumar of Suibhra and Pradhan of Gram Panchayat Bhuin Trilok Singh alongwith his other relatives. He further deposed that Nihala Ram in the presence of above mentioned persons stated that the accused do not want to keep the deceased in their house as the deceased neither used to listen to them nor she was performing her work properly. On this, Pradhan of the Gram Panchayat and Ward Panch made Nihala Ram to understand that the deceased was newly married and with the passage of time she would also work and pay heed to them. Accordingly, on the intervention of the said persons he sent their daughter to her matrimonial house, who was left there by his wife Savitra Devi and his mother Parmi Devi. After one month, the deceased again came back to his house. He further mentioned that the deceased used to visit his house sometimes after 15 days and sometimes after one month. However, she used to complain to them that the accused persons were maltreating her for not bringing dowry in cash and kind. This continued for about 2-3 years and in the meanwhile, the deceased gave birth to a male child, who was aged 1½ years when Lata Devi died. The deceased had also made a complaint in the regard in between at Police Post Bhuntar when she was to deliver her child. He further states that his son-in-law accused Narian Singh was having a jeep, which he used to drive himself. He further deposed that he visited the house of accused after the marriage of his daughter only once. He has further mentioned that the marriage of deceased Lata Devi was solemnized from the old house of Nihala Ram but after solemnization of marriage, Lata Devi was residing in the new house of the accused, which was at a distance of 70-80 Meters from the old house. He has further mentioned that even after the filing of the case by Lata Devi, her husband used to maltreat her on the ground that despite the fact she was residing with him, she had filed a case against him. The deceased was brought to the Court and the case was compromised and withdrawn. The same was withdrawn 6-7 days prior to her death. His daughter Poonam had visited the deceased in the house of the accused about 6-7 days prior to her death, which he later qualified by stating that she may have visited her deceased's sister 7-10 days before her death or 3-4 days before hear death or a week earlier. When Poonam returned back from the house of the deceased, she disclosed that accused Narian Singh was beating Lata Devi. Jeep of the accused had met with an accident for which he was demanding money from Lata Devi. This accident had taken place one or two months before the death of the deceased. The factum of death of the deceased was disclosed to him by Sodhu Ram, younger brother of accused Nihala Ram, Sarvan, Panch and his brother at about 2.30 A.M. on 22nd August, 2004. He was intimated that Lata Devi died due to hanging. He reached the house of accused at around 3.30 A.M. accompanied by his brother Mela Ram, Mast Ram and other persons.

When they were proceeding to the house of the accused, police met them in the way to the house of the accused and they were carrying dead body of Lata in a vehicle to dead body house. Thereafter, he returned back to his house and at about 7.00 A.M. went to P.P. Bhuntar and reported the matter to police.

6. PW-2 Savitra Devi, mother of the deceased, has stated that after 15 days of marriage of the deceased with accused Narian Singh, she visited her parents' house and disclosed that the accused had started quarrelling with her and gave her beatings on the ground that she had not brought anything in dowry. The deceased had further disclosed that she was being maltreated by Nihala Ram, Sunehru Devi, Narian Singh, Soma Devi, Rambha and Anita. After about 15 days, Nihala Ram came with Ward Panch Sarvan and Pradhan of the Panchayat alongwith Dila Ram, Rama Nand to their house. In presence of the above mentioned persons, Nihala Ram accused stated that he had spent Rs.70,000/- to 75,000/- on the marriage of Narian Singh but the parents of the deceased had not given anything in cash or dowry to them and betrayed them and hence they did not intend to take the deceased with them. On this, Pradhan Gram Panchayat Tarlok Singh made accused Nihala Ram to understand that since Lata Devi had been married to his son, hence he should take Lata Devi with him. The members of the Panchayat also asked them to leave their daughter in the house of the accused. Therefore, on the following day she alongwith her mother-in-law accompanied her daughter and left her in her matrimonial house. Thereafter, the deceased used to visit their house after interval of 15-20 days and every time she disclosed that the accused were proclaiming that they had not been given anything by the parents of the deceased in dowry. Her son-in-law accused Narian Singh was having a jeep, which he used to drive himself, the deceased used to complain that as no money or dowry had been given, therefore, she used to be maltreated by the accused. Once the deceased had complained that she was also beaten by her sister-in-law and once she complained that she was given beatings by her father-in-law Nihala Ram. At another occasion, she had complained that she had been given beatings by her husband Narian Singh. The deceased had also reported the matter to the police at P.P. Bhuntar, which matter was compromised later on. She has further deposed that the deceased had lodged another complaint also, which matter was compromised in the Police Post itself. One or two months prior to her death, Lata Devi had disclosed to them that the jeep of accused Narian Singh had met with an accident and the accused had asked her to bring money for the repair of jeep and demanded Rs.50,000/- as her parents had not given anything in dowry. She further stated that about after one month from the date of marriage, accused Narian Singh had demanded Rs.35,000/- for depositing installments of the purchase of jeep in the bank. This demand was on the ground that they have not given any money in dowry. She has further stated that they are poor persons, they were not in a position to pay Rs.35,000/- or Rs.70,000/- as she had 8 daughters and one son. Her daughter Poonam had visited deceased about 3 days prior to her death. Poonam disclosed on her return that Narian Singh accused had given beating to Lata Devi and that Narian Singh accused had proclaimed on her asking that as the deceased has not brought anything with her in dowry she would receive only beating and nothing else. She has further stated that her daughter died because the accused maltreated her for not bringing dowry.

7. PW-3 Poonam is the younger sister of the deceased. She has stated that after 15-18 days of the marriage of the deceased, she had returned to their house and disclosed that her father-in-law and mother-in-law were stating that she had brought very less dowry. The deceased had also disclosed that her husband, parents-in-law and sister-in-law Soma Devi used to beat her. The deceased remained at her parents house for sometime and thereafter her father-in-law came to their house alongwith the Ward Panch

and the Pradhan of Gram Panchayat and some other relatives. In front of the above named persons, accused Nihala Ram stated that he had spent Rs.70,000/- for the marriage of his son, whereas the deceased had not brought anything in dowry. Therefore, he mentioned that, he would not take the deceased back. On this, the Pradhan of the Gram Panchayat Shri Tarlok Singh made him understand that the demand was neither proper nor it was justified and that he should take back his daughter-in-law. Thereafter on the following day, her mother and grand-mother accompanied the deceased to her matrimonial house and left her there. She has further deposed that whenever the accused used to maltreat the deceased, she used to visit her parental house and complain about this maltreatment. The deceased each time disclosed that the maltreatment was for bringing no money and dowry. She has further stated that her parents are very poor and having many children and hence they are not in a position to meet out the demands of the accused persons. She has also deposed that in between once deceased disclosed that her parents in-laws and husband had asked her to bring an amount of Rs.35,000/- for making payment of loan installment. She has also deposed that when her sister was in family way and 29th was the date of delivery given by the Doctor, she was beaten up by the accused on 25th of that month and ousted from her matrimonial house on the demand of dowry. Next day, they went to the matrimonial house of her deceased sister to collect her clothes where she was again beaten up by the accused persons. On this, her deceased sister reported the matter to the police and a case was lodged against the accused. However, since the deceased was residing with the accused persons in their house, hence she withdrew the case from the Court in the hope that the accused persons will treat her properly. The case was withdrawn from the Court about 5-6 days prior to her suicide. Poonam has further deposed that on 19.08.2004 she visited house of her deceased sister and stayed overnight in her house. In her presence accused Narian Singh gave beatings to the deceased sister mercilessly and at that time again the accused had made demand of cash, dowry in the pretext of repair of his jeep. The information of her sister having committed suicide was received in their house on the intervening night of 22/23.08.2004.

8. PW-5 Trilok Singh, Pradhan of Gram Panchayat Bhuin, has stated that he knew the accused persons as they belong to his Panchayat. He has further deposed that village Jarat where Sangat Ram resides, falls in his Panchayat. Accused Narian Singh was married with Lata Devi in the year 2001. In February, 2002, accused Nihala Ram visited him and disclosed that his daughter-in-law Lata Devi had gone to the house of her parents on the festival of Lohri but did not return back. He also disclosed that his son Narian Singh visited the house of in-laws but despite this, she did not accompany him. Thereafter, PW-5 alongwith his Ward Panch Sarvan Singh accompanied Nihala Ram accused to the house of Sangat Ram and they got the matter compromised between the parties and on account of that compromise Lata Devi came to the house of the accused on the following day. He has further mentioned that on 22.08.2004 Narian Singh and Ward Panch Sarvan visited him at about 11.00 P.M. and Narian Singh disclosed that his wife had died by hanging herself with Dupata to a fan in his house. Narian Singh asked him to visit the spot but he refused and advised him to report the matter to the police. It was around midnight when the police came on the spot and he associated the police.

9. Thus, it can be inferred that as per the prosecution, the deceased committed suicide on account of maltreatment meted out to her by the accused which include demands of dowry and physical abuse inflicted on her by the accused on the pretext that the deceased had not brought dowry with him.

10. Before proceeding any further, it is relevant to take note of the fact that here is a case which admittedly is of unnatural death and the death has taken place within 7 years of the marriage of the deceased.

11. Section 113-B of the Evidence Act, 1872 reads as under:-

> "**113-B. Presumption as to dowry death.** - When the question is whether a person has committed the dowry death of a woman, and it is shown that soon before her death such woman has been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the court shall presume that such person had caused the dowry death.

12. Section 304-B of the IPC reads as under:-

> "**304-B. Dowry death**. – (1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called 'dowry death', and such husband or relative shall be deemed to have caused her death."

13. The Hon'ble Supreme Court in ***Surinder Singh Vs. State of Haryana***, (2014) 4 Supreme Court Cases 129, has held as under:-

> "17. Thus, the words 'soon before' appear in Section 113B of the Indian Evidence Act, 1872 and also in Section 304B of the IPC. For the presumptions contemplated under these Sections to spring into action, it is necessary to show that the cruelty or harassment was caused soon before the death. The interpretation of the words 'soon before' is, therefore, important. The question is how 'soon before'? This would obviously depend on facts and circumstances of each case. The cruelty or harassment differs from case to case. It relates to the mindset of people which varies from person to person. Cruelty can be mental or it can be physical. Mental cruelty is also of different shades. It can be verbal or emotional like insulting or ridiculing or humiliating a woman. It can be giving threats of injury to her or her near and dear ones. It can be depriving her of economic resources or essential amenities of life. It can be putting restraints on her movements. It can be not allowing her to talk to the outside world. The list is illustrative and not exhaustive. Physical cruelty could be actual beating or causing pain and harm to the person of a woman. Every such instance of cruelty and related harassment has a different impact on the mind of a woman. Some instances may be so grave as to have a lasting impact on a woman. Some instances which degrade her dignity may remain etched in her memory for a long time. Therefore, 'soon before' is a relative term. In matters of emotions we cannot have fixed formulae. The time-lag may

differ from case to case. This must be kept in mind while examining each case of dowry death.

18. In this connection we may refer to judgment of this Court in Kans Raj v. State of Punjab, where this Court considered the term "soon before". The relevant observations are as under: (SCC pp. 222-23, para 15)

> "15. ... 'Soon before' is a relative term which is required to be considered under specific circumstances of each case and no straitjacket formula can be laid down by fixing any time-limit. This expression is pregnant with the idea of proximity test. The term "soon before" is not synonymous with the term "immediately before" and is opposite of the expression "soon after" as used and understood in Section 114, Illustration (a) of the Evidence Act. These words would imply that the interval should not be too long between the time of making the statement and the death. It contemplates the reasonable time which, as earlier noticed, has to be understood and determined under the peculiar circumstances of each case. In relation to dowry deaths, the circumstances showing the existence of cruelty or harassment to the deceased are not restricted to a particular instance but normally refer to a course of conduct. Such conduct may be spread over a period of time. If the cruelty or harassment or demand for dowry is shown to have persisted, it shall be deemed to be "soon before death" if any other intervening circumstance showing the non- existence of such treatment is not brought on record, before such alleged treatment and the date of death. It does not, however, mean that such time can be stretched to any period. Proximate and live link between the effect of cruelty based on dowry demand and the consequential death is required to be proved by the prosecution. The demand of dowry, cruelty or harassment based upon such demand and the date of death should not be too remote in time which, under the circumstances, be treated as having become stale enough."
>
> Thus, there must be a nexus between the demand of dowry, cruelty or harassment, based upon such demand and the date of death. The test of proximity will have to be applied. But, it is not a rigid test. It depends on facts and circumstances of each case and calls for a pragmatic and sensitive approach of the court within the confines of law."

14. Thus, it is evident that for the purposes contemplated in Section 113-B of the Evidence Act 1872 and Section 304-B I.P.C., to spring into action, it is necessary to demonstrate that cruelty or harassment was caused soon before the death. Therefore, the interpretation of the words "soon before" assumes great significance and importance and these words have to be interpreted keeping in view the facts and circumstances of each case. The question obviously will be how "soon before" her death such woman was subjected by the accused to cruelty or harassment for or in connection with demand for dowry. The cruelty or harassment will differ from case to case and it will obviously be

relating to the mindset of people which will also vary from person to person. Besides cruelty being both mental and/or physical it can also be verbal or emotional.

15. In the context of the present case, it is not disputed that PW-1, PW-2 and PW-3 are very closely related to the deceased. In these circumstances, their statements have to be minutely scrutinized in order to ascertain their trustworthiness and truthfulness. Because the death has taken place within 7 years from the date of the marriage of the accused, this does not mean that the presumption as contemplated in Section 304-B I.P.C. will not have to be substantiated by the prosecution by placing on record cogent and reliable material.

16. In the present case, PW-1 father of the deceased has stated that when the deceased initially came back to his house after about 18 days of her marriage, she complained that she was being maltreated for not bringing any cash on account of dowry, whereas the accused had spent Rs.70,000/- for solemnizing the marriage. He has further stated that when Nihala Ram came to his house alongwith other persons, said Nihala Ram was complaining that the deceased will not be taken back to his house as she was neither working properly nor listening to them. When this statement is compared with that of PW-2 Savitra Devi with regard to the same incident, it is found that Savitra Devi in her deposition has stated that when Nihala Ram came to their house alongwith Panchayat Pradhan Trilok Singh, Ward Panch Sarvan and others, he stated that he had spent an amount of Rs.70,000/- to Rs.75,000/- on the marriage of Narian Singh but the parents of the deceased did not give anything in cash or dowry to them and hence they do not want to take back the deceased with them. Thus, the version of the both main witnesses of the prosecution with regard to the above said incident is different. In our opinion, the variation cannot be termed to be a minor one. Not only this, a perusal of the first information report will demonstrate that there is no mention about this Rs.70,000/- in the same. PW-2 and PW-3 have mentioned in their statements that the accused had demanded an amount of Rs.35,000/- from the deceased in order to pay a loan installment. No such averment has been made in his statement by the father of the deceased PW-1. Exts. DB and DC are the complaints made by the deceased dated 25.01.2003 and 24.01.2003 respectively. A perusal of Exts. DB and DC will demonstrate that though in this complaint there are allegations of verbal abuse inflicted upon the deceased by the accused, however, there is no mention of her being physically abused by the accused. PW-1 has mentioned that his daughter Poonam had visited the house of the deceased a few days before she committed suicide and on her return, Poonam had intimated him that the deceased was being beaten up by Narian Singh who was demanding money from her as the jeep of the accused had met with an accident. On the other hand, PW-2 Savitra Devi gives a total different narration. She has stated that about one or two months before her death, the deceased had visited them and disclosed that the jeep of accused Narian Singh had met with an accident and he was asking her to bring money for the repair of the jeep and was demanding Rs.50,000/- in this regard. This was followed by another demand after one month for an amount of Rs.35,000/- for depositing the installment of the purchase of the jeep. Incidentally, PW-5 Trilok Singh, Pradhan of the Gram Panchayat, who happens to be an independent witness of the prosecution, has stated in his cross-examination that when Nihala Ram had visited him in February, 2002, he had disclosed that he wanted to bring the deceased to her marital house. He has further stated in his cross-examination that Nihala Ram had not demanded any dowry in his presence nor parents of Lata Devi had stated or talked about any type of beating given to Lata Devi by her in-laws or husband. He has also admitted that Nihala Ram and his family reside in a separate house and accused Narian Singh resides in a separate house. He has also mentioned in his cross-examination that the parents of the deceased never complained to

him regarding any demand for dowry or bringing less dowry or beating or harassment by the accused persons. He stated that it is correct that Nihala Ram never demanded any money from the parents of Lata Devi.

17. PW-4 Dr. Sonam Chhering, who conducted the postmortem of the deceased, has stated that ligature mark about 6 cm long obliquely placed between angle of mandible on left extending towards right side about 2 cm below angle of mandible on right side. The mark was about 1.5 cm wide. The colour of the ligature mark was brownish red in colour. She has further deposed that no other injury mark was found on the person of Smt. Lata Devi which further belies the fact that the deceased was subjected to physical abuse before her death as has been alleged by the prosecution on the basis of the testimony of PW-1, PW-2 in general and PW-3 in particular.

18. Further, as per PW-3, she had visited the house of the deceased about 3 days before her death and the deceased was given beatings by accused Narian Singh in her presence. Why the parents of the deceased or her sister did not take up the issue of the deceased being given persistent physical abuse by the accused with any appropriate authority, has also not been cogently explained by the prosecution. Rapat Ext. DA also does not disclose that the deceased was subjected to any physical abuse by the accused. The allegation primarily is to the effect that the accused are verbally abusing the deceased. One more important aspect of the matter is that PW-1, PW-2 and PW-3 have all stated that the deceased used to visit her parental house after 15-20 days and every time when she used to go back to her parents, she was consistently complaining about the behaviour of the accused towards her. However, it is a matter of record that except the complaints filed by the deceased, her parents or her sister had never made any grievance in this regard either to police or Gram Panchayat etc., which is evident from the deposition of PW-5, who has also mentioned in his statement that when immediately after her marriage the deceased had come back to her parental house, her father-in-law had visited him and told him that his daughter-in-law had gone to her parental house for Lohri and thereafter had not returned back. On this particular deposition, PW-5 has not been confronted by the prosecution, especially in view of the fact that the version of PW-1, PW-2 and PW-3 with regard to this incident was totally different.

19. There are vital contradictions and inconsistencies in the statements of PW-1, PW-2 and PW-3. All these witnesses are close relatives of the deceased. The prosecution has failed to clarify as to why there are contradictions and inconsistencies in the depositions of these three witnesses. On the other hand, PW-5 has stated that no demand for dowry was raised by the accused in his presence nor any complaint was made to him by the parents of the deceased in this regard. There is no reason as to why we should not believe the testimony of the said witness, who happens to be the Pradhan of the concerned Gram Panchayat. In this background, at the most the conduct of the accused persons create a suspicion that their alleged acts might have resulted in the deceased taking extreme step of committing suicide, however, this suspicion cannot be made the basis to convict them. The prosecution has failed to establish beyond reasonable doubt that the accused are guilty of the offences alleged against them. Besides going through the records of the case, we have also at length gone through the judgment passed by the learned trial Court. The learned trial Court has in detail dealt with all aspects of the matter and has minutely scrutinized the evidence placed on record by the prosecution. It has after due deliberation and due application of mind come to the conclusion that the prosecution has failed to bring home the guilt against the accused persons beyond reasonable doubt. We agree with the said conclusion arrived at by the learned trial Court. According to us also, the prosecution has failed to drive home the guilt

against the accused persons beyond reasonable doubt and as such, in our view also, they are entitled to the benefit of doubt. Therefore, we agree with the findings recorded by the learned trial Court and dismiss the appeal being without merit. Bail bonds, if any, furnished by the accused are discharged.

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

State of Himachal Pradesh ...Appellant
Versus
Pawan Kumar ...Respondent

Criminal Appeal No. 357 of 2010
Judgment Reserved on : 13.04.2016
Date of Decision: April 28, 2016

Indian Penal Code, 1860- Section 376- Prosecutrix and accused had developed proximity with each other- accused had committed sexual intercourse with the prosecutrix without her consent by administering alcohol in cold drink- accused had promised prosecutrix to marry her and had continued physical relations with the prosecutrix- prosecutrix conceived and abortion was carried out by the accused by administering some medicine- compromise was effected in which accused promised to marry the prosecutrix- however, after compromise, family members of the accused refused to marry the prosecutrix with the accused- accused was tried and acquitted by the trial Court- held, in appeal that prosecutrix had told the Doctor that she was pregnant but the development of the child was not proper- she had told another Doctor that she had noticed slight bleeding - on sonography missed abortion was doubted- however, prosecutrix had not reported back to the Doctor- prosecutrix had approached the Doctor to verify the termination of pregnancy- possibility of prosecutrix aborting herself cannot be ruled out- prosecutrix had not complained for almost three years despite conceiving and suffering three abortions- FIR was lodged against the accused after due deliberations- prosecutrix was in relationship with the accused and had been allowing access to the accused at her residence in the absence of her mother without any resistance - she had even stayed with the accused- prosecutrix was 21 years old and was prudent enough to understand the consequences of relationship- hence, prosecution version that accused had raped the prosecutrix is not believable- accused was rightly acquitted by the trial Court. (Para-11 to 20)

For the appellant: Mr. V.S. Chauhan, Addl. Advocate General with Mr. J. S. Guleria, Astt. Advocate General.
For the respondent : Mr. Sanjeev Bhushan, Senior Advocate with Ms. Abhilasha, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur, J.

In the present case, the respondent-accused had been acquitted of the offences punishable under Section 376 of the Indian Panel Code by the learned Sessions

Judge, Solan, vide judgment dated 23.02.2010 after undergoing Sessions trial No. 13-S/7 of 2009, in case FIR No. 237, dated 05.11.2008, Police Station, Sadar Solan. The aforesaid judgment has been assailed by the State in the present appeal.

2. Shri V.S. Chauhan, learned Additional Advocate General has argued that there are sufficient grounds and evidence on record to punish the respondent-accused under Section 376 IPC and learned trial Court has failed to appreciate and consider the evidence on record in right perspective.

3. On the contrary, the learned counsel defending the respondent-accused has supported the judgment passed by the learned trial Court and has argued that no grounds have been made out in the appeal warranting the interference of this Court.

4. We have heard the respective counsel and have also gone through the record.

5. As per the prosecution, PW-11 prosecutrix and respondent-accused had developed proximity with each other after introduction through sister of the respondent-accused in a visit to the house of the respondent accused in May, 2005. As per the prosecutrix, after 3-4 months the respondent-accused had committed sexual intercourse with her without her consent by administering alcohol in cold drink in a residence of his friend, near New Bus Stand, Solan where she had visited on invitation of the respondent-accused to attend birthday party of a friend of respondent-accused, whereas, no such party had been found by the prosecutrix on that place. As per prosecution story thereafter respondent-accused had promised and had been promising the prosecutrix to marry her and with such assurance had been continuing physical relations with the prosecutrix. The respondent-accused had been visiting the prosecutrix at her residence, in the beginning at Shimla and lateron, at Chambaghat District Solan. Out of this relation, the prosecutrix had conceived pregnancy thrice prior to alleged last abortion in the month of September, 2008 allegedly caused by the respondent-accused administering some medicine in golgappa on 25.09.2008, consumed by the prosecutrix in good faith which was offered by the respondent-accused. On a complaint of the prosecutrix in the month of October, 2008, the respondent-accused was called in the Police Station, Sadar, Solan and a compromise had been reduced into writing on 16.10.2008 according to which the respondent-accused had agreed to marry the prosecutrix on 02.11.2008. The said compromise had been signed and witnessed by the mother of the prosecutrix (PW-12) and Up Pradhan, Gram Panchayat Seri (PW-4) Shri Laxmi Dutt Sharma. It has been stated by the prosecution witnesses that the prosecutrix, her mother alongwith her friend and one Bittu had visited the house of respondent-accused with request to solemnize marriage of the respondent-accused with prosecutrix. However, the family of the respondent-accused and the respondent-accused had refused to marry the prosecutrix. Thereafter, the prosecutrix has lodged FIR No.237, dated 05.11.2008, in Police Station, Sadar Solan. After putting the challan in the trial Court, the prosecution examined as many as 16 witnesses. Perusal of evidence indicates that PW-1 Shashi Bala the friend of mother of prosecutrix, PW-4 Laxmi Dutt Sharma Up Pradhan Gram Panchayat Seri, PW-11 Prosecutrix, PW-12 Vimla Devi, mother of the prosecutrix are the relevant witnesses for considering the merit of the appeal.

6. In her examination-in-chief, PW-11 prosecutrix has reiterated the version stated in the FIR. She has also stated in examination-in-chief that even prior to the last termination of pregnancy in September 2008, the respondent-accused had to suffer abortion three times. She had further stated that she wanted to save last pregnancy but the respondent-accused visited her house in the absence of her mother and offered golgappa and after consumption of golgappa, the prosecutrix had suffered stomach pain and bleeding resulting termination of pregnancy.

7. PW-12 Vimla Devi stated that she had found the prosecutrix receiving telephone calls during night in the year 2008 and on inquiry the prosecutrix had disclosed that respondent-accused wanted to marry the prosecutrix. Lateron, she had found the respondent-accused at her residence but she had admonished him when he had touched her feet, wept and had sought time of six months to marry the prosecutrix. On avoiding marriage by respondent-accused and detecting pregnancy of the prosecutrix, she had visited the house of the accused-respondent alongwith prosecutrix, cousin of prosecutrix and her friend whose name was not known to her. According to her, father of the accused-respondent had conveyed that they will to visit her home for deciding the issue of marriage. She has stated that the respondent-accused, his father, two sisters and brother in law had visited her house in the evening on the same day at 8.00 PM and offered money to close the chapter refusing to marry the prosecutrix. However, the said offer was rejected by her as prosecutrix and the respondent-accused were in love with each other. It was also deposed by her that the respondent-accused had administered something to the prosecutrix in her absence at her residence which had resulted bleeding to the prosecutrix and the prosecutrix had been taken to Dr. Maria, Maria Medical and Diagnostic Centre, the Mall, Shimla and thereafter abortion took place. Thereafter complaint was made to the police and the respondent-accused agreed to solemnize marriage on 02.11.2008 which was reduced into writing vide compromise dated 16.10.2008 Ex. PW-4/A. On failure to marry, the prosecutrix had lodged FIR against the respondent-accused on 05.11.2008.

8. PW-1 Shashi Bala has deposed that she was residing all alone at Sanjauli and the prosecutrix had come to her house about one and half years back followed by the respondent-accused in the evening. She has stated that after dinner, both the respondent-accused and prosecutrix had stayed in one room for night by stating that their marriage was likely to be performed. This witness was informed by the mother of the prosecutrix after 3-4 months that the prosecutrix was pregnant. She has stated that she had visited the house of respondent-accused with PW-11 prosecutrix, PW-12 mother of prosecutrix and one driver of the car. From the statement of PW-1, a new fact has been introduced which had never been stated by PW-11 or PW-12 at the time of making complaint to the police or during the investigation or while deposing during trial.

9. PW-12 Shashi Bala claims her to be friend of PW-12 Vimla Devi and visiting to house of the respondent-accused with PW-12 whereas PW-12 has stated that she did not know the name of friend accompanying her to the house of respondent-accused. It is also unnatural and unbelievable that PW-12 Vimla Devi does not know the name of her friend accompanying her to the house of the respondent- accused especially when so called friend had also been examined as witness as PW-1 in support of prosecution case.

10. Prosecutrix PW-11 and PW-12 her mother have deposed that that the respondent-accused and his family members were refusing to marry and offering money to close the chapter and threatening to change the DNA report. However, the conduct of the prosecutrix enjoying the company of respondent-accused voluntarily and accepting golgappa offered by him, without any hesitation despite alleged previous history of unwilling abortion, is unbelievable in normal course, particularly, in strained relations.

11. The prosecution is relying on the compromise Ex. PW-4/A, signed by the respondent-accused in presence of witness PW-12 mother of the prosecutrix and PW-4 Up Pradhan of the Panchayat. PW-4 is an independent witness. On scrutiny of statement of witnesses the said compromise cannot be said to be executed with free consent and possibility of signing the said compromise under pressure cannot be ruled out as the PW-4 Shri Laxmi Dutt Sharma has admitted in the cross-examination that prosecutrix was threatening to the respondent-accused not to permit him to solemnize marriage with the girl

with whom the engagement of the respondent- accused had taken place and the prosecutrix was pressurizing the respondent-accused for marriage, whereas, the respondent-accused was not willing to marry with the prosecutrix. PW-4 has further stated that the respondent-accused had told him that he was not having sexual relations with the prosecutrix but was only known to her on account of her visits in his house with his sister. PW-4 has further admitted that the compromise had been executed under pressure of police and others. Therefore, this compromise cannot be considered as a valid piece of evidence for convicting the respondent- accused.

12. It also transpires from scrutiny of evidence that the respondent-accused had been called to Police Station on some complaint by the prosecutrix and her mother in October, 2008 and thereafter matter was compromised vide compromise dated 16.10.2008 Ex. PW-4/A. No such complaint has been placed on record by the prosecution nor any Police Official present at that time had been cited as witness nor disclosed or examined in the Court. These circumstances are also against prosecution.

13. In statements Ex. D-3 made by PW-12 before the police, she has clearly stated that when they were asking the respondent- accused and his family to marry the prosecutrix, then, the family members had clearly stated that they will not solemnize the marriage with prosecutrix and they had threatened to perform DNA test which reflects that the respondent-accused and his family was sure that pregnancy is not on account of physical relations of respondent-accused and prosecutrix.

14. The facts as narrated by the prosecutrix to the PW-2 Dr. Anju Maddan, PW-3 Dr. Anita Sood and PW-14 Asha Maria are also cast doubts on the prosecution story. The prosecutrix had visited PW-3 Dr. Anita Sood on 29th October, 2008 and had stated that she was having pregnancy but the development of the child was not proper. However, on ultra soundgraphy no pregnancy was found whereas while reporting to PW-14 Dr. Asha Maria on 26.09.2008, prosecutrix had complained missing of period and slight bleeding and on sonography pregnancy was detected and missed abortion was doubted. However prosecutrix had not reported back to the Doctor as advised. On 5.11.2008, the prosecutrix had stated to Dr. Anju Maddan that she had suffered abortion around 26.09.2008. From perusal of deposition of PW-2, PW-3 and PW-14, it appears that immediately after detection of abortion, the same had been managed to be aborted and to verify the termination PW-3 Dr. Anita Sood had been approached pretending no knowledge of abortion, whereas before PW-2 Dr. Anju Maddan, she had specifically stated that abortion had taken place around 26.09.2008. Possibility of aborting herself after threatenings of the family of the respondent accused to get the DNA test conducted cannot be ruled out to wash away the best evidence available to ascertain the truth. In such facts and circumstances, it is also suspicions that who was interested in abortion and who had caused the same.

15. PW-13 had investigated the matter who has admitted that prosecutrix had failed to identify the spot and house where she was allegedly assaulted after administering alcohol in cold drink. As per him, the prosecutrix had taken the police to a building known as Anand Complex, saying that the place of occurrence was one quarter inside the said Complex. However, in cross-examination, he has admitted that on the Top Floor of Anand Complex, there is a Shopping Complex, below that Commercial Hall, below that a Marriage Hall and on the Ground Floor, there is a paid parking. At the time of alleged incident, the prosecutrix being young girl of 22 years, was having enough prudence to identify the place of alleged occurrence. Therefore, failure to identify the alleged place of occurrence also goes against the prosecution.

16. It has come on record that the prosecutrix had not complained for almost three years despite conceiving and suffering three abortions during this period. Such a conduct casts serious doubt on the prosecution story. It appears that FIR against respondent-accused lodged after due deliberations by arranging the facts and story as per suitability of the prosecutrix on not succumbing of the respondent-accused to pressurize the prosecutrix to marry her.

17. Rape is not only crime against the basic human right of victim violating her right guaranteed under Article 21 of the Constitution of India but also a crime against the entire Society. It is will settled law that unblemished and reliable statement of prosecutrix is sufficient to convict an accused. However, in case the of rape, onus is always on prosecution to prove the guilt of accused by leading credible evidence. It is also cardinal principles of Criminal Jurisprudence that when two views are possible, the view beneficial to the accused is to be followed.

18. The testimony of prosecutrix should be appreciated in background of entire case. In the present case, in the testimony of prosecutrix, it has been come on record that she has alleged that she was in relationship with the accused and had been allowing access to the accused at her residence in the absence of her mother without any resistance and had even stayed over night with him and the prosecutrix had been continuing to do so despite knowing that the accused was duping her. A woman of the age of prosecutrix i.e. around 21 years is prudent enough to understand the consequences of relationship as alleged by her. It was not a single instance that the prosecutrix was pregnant and the respondent-accused had not been marrying her despite alleged assurances. Conviction of an accused on the testimony of prosecutrix must be based upon a testimony inspiring confidence. As discussed supra, it is un-believable that despite bitterness in relation and denial to marry her, the prosecutrix had been enjoying company of the accused and accepting golgappa. On the basis of the conduct of prosecutrix and other material on record including the statements of doctors, there are sufficient grounds to discredit the statement of prosecutrix. In these circumstances, it can be safely presumed that relationship as alleged was not being continued by the prosecutrix for assurance of marriage but for other reasons, which do not constitute an offence. In entire circumstances of the present case, the testimony of the prosecutrix is un-believable and is not of worth credence.

19. Other official witnesses are of no help to prosecution case as the depositions of the prosecutrix and other relevant witnesses do not inspire confidence to establish the committal of alleged offence against the respondent-accused.

20. Having perused the testimony of the prosecution witnesses on record, it cannot be said that prosecution has been able to prove its case, beyond reasonable doubt, by leading clear, cogent, convincing and reliable material on record. The Court below, in our considered view, has correctly and completely appreciated the evidence so placed on record by the prosecution. It cannot be said that the judgment of trial Court is perverse, illegal, erroneous or based on incorrect and incomplete appreciation of material on record resulting into miscarriage of justice. Therefore, acquittal of respondent-accused cannot be said to have resulted into travesty of justice, hence, no interference is warranted in instant case.

For all the aforesaid reasons, present appeal, devoid of any merit, is dismissed, so also pending applications, if any. Bail bonds, if any, furnished by the accused are discharged. Records of the Court below be immediately sent back.

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

Himachal Road Transport Corporation and Anr. .....Appellants

Versus

Anup Kumar and others ..... Respondents

FAO No.394 of 2010.
Decided on : 29.04.2016

Motor Vehicles Act, 1988- Section 166- Appellant contended that the amount of compensation was excessive- Deceased was aged 59 years at the time of accident- he was a B-Class government contractor- his monthly income was not less than 50,000/- - Tribunal had taken the income of the deceased as Rs.15,000/-, which was on the lower side- multiplier of 9 was applied, which is correct – compensation cannot be said to be excessive- appeal dismissed. (Para-4 to 7)

For the appellants: Mr.Jagdish Thakur, Advocate.

For the respondents: Mr.Y.P. Sood and Mr.Surya Parkash, Advocate, for respondents No.1 to 3.
Mr.J.R. Poswal, Advocate, for respondent No.4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice

Subject matter of this appeal is the award, dated 1st June, 2010, passed by the Motor Accident Claims Tribunal (II), Shimla, H.P., (for short, the Tribunal), in Claim Petition No.56-S/2 of 2006, titled Anup Kumar and others vs. Himachal Road Transport Corporation and others, whereby the claim petition was allowed and compensation to the tune of Rs.11,00,000/-, alongwith interest at the rate of 7% per annum from the date of filing of the claim petition till payment, was awarded in favour of the claimants, (for short, the impugned award).

2. Neither the claimants nor the driver challenged the impugned award on any count, thus, the same has attained finality so far as it relates to them. Feeling aggrieved, the Himachal Road Transport Corporation (for short, the HRTC), has challenged the impugned award on the sole ground that the compensation amount awarded by the Tribunal is on the higher side.

3. Thus, the only question needs to be determined in this appeal is – Whether the amount of compensation awarded by the Tribunal is excessive?

4. The answer is in the negative for reasons enumerated hereunder. The entire controversy revolves around issue No.2.

5. The Tribunal has made discussion, and rightly so, in paragraphs 9 to 14 of the impugned award. The deceased, at the time of accident, was 59 years of age, was a B-Class government contractor and, as pleaded, his monthly income was not less than Rs.50,000/- from all sources including from agriculture. The Tribunal, after exercising guess work and making deductions, held that the monthly income of the deceased was not less than Rs.15,000/-. Though the income assessed by the Tribunal appears to be on the lower side in view of the income certificate Ext.PW-7/A, however, since the claimants have not questioned the same, therefore, the same is reluctantly upheld.

6. The Tribunal, keeping in view the age of the deceased, which was 59 years at the time of accident, has rightly applied the multiplier of 9.

7. In view of the above discussion and keeping in view the facts of the case, I am of the considered view that the Tribunal, while awarding compensation, has rightly made the assessment, which findings require no interference by this Court.

8. Having said so, the impugned award is upheld and the appeal is dismissed. The Registry is directed to release the compensation amount in favour of the claimants through their bank accounts strictly in terms of the impugned award.

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

Smt. Kanta Devi and another .....Appellants.

Versus

Smt. Rita Devi and others ....Respondents

FAO (MVA) No. 220 of 2010
Date of decision: 29th April,2016

Motor Vehicles Act, 1988- Section 166- Income of the deceased was Rs.3800/- and his age was 26 years at the time of the accident- Tribunal has applied multiplier of '15', which is just and appropriate- claimants cannot claim that insurer should have been made liable to pay compensation – appeal dismissed. (Para-4 to 7)

For the appellants: Mr. J.L. Bhardwaj, Advocate.

For the respondents: Mr. B.S. Chauhan, Sr. Advocate with Mr. Vaibhav Tanwar, Advocate for respondents No. 1 to 3.
Mr. V.S. Chauhan, 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 5.3.2010, made by the Motor Accident Claims Tribunal Shimla, H.P. in MACC No. 23-S/2 of 2008, titled *Smt. Kanta Devi and another versus Smt. Rita Devi and others*, for short "the Tribunal", whereby compensation to the tune of Rs.4 lacs alongwith interest @ 9% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Insurer, driver and owner have not questioned the impugned award on any ground. Thus, it has attained finality so far as it relates to them.

3. The appellants have questioned the impugned award on the ground of adequacy of compensation.

4. Claimants have averred in the claim petition that the monthly income of the deceased was Rs.3800/- and his age was 26 years at the time of the accident. The Tribunal

has made the discussion from paras 19 to 21 of the impugned award and applied the multiplier of "15" which is just and appropriate multiplier, as per the law applicable.

5. The Tribunal, keeping all the facts in view has awarded Rs.4 lacs in favour of the claimants which, on the face of it, is just and appropriate, cannot be said to be inadequate in any way. Rather one half was to be deducted towards personal expenses of the deceased because he was a bachelor.

6. The learned counsel for the appellants argued that the insurer has to be saddled with the liability. I wonder how the claimants can advance such arguments. The claimants have only to receive compensation whether from the owner or from the insurer as awarded by the Tribunal on facts and law applicable. This Court in FAO No. 412 of 2009 dated 4th December, 2015 titled *Sh. Sandeep Thakur versus Smt. Khema Sharma and others* has already discussed this issue. It is apt to reproduce para 4 of the said judgment herein.

> *"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."*

7. The owner and the insurer have not questioned the impugned award. Thus, this question cannot be thrashed in this appeal. Viewed thus, the arguments advanced by the learned counsel for the appellants is devoid of any force, hence rejected.

8. Having said so, the impugned award is upheld and the appeal is dismissed alongwith pending application if any.

9. Send down the record forthwith, after placing a copy of this judgment.

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

Kashmiro Devi & another .....Appellants

Versus

Rang Lal & others ...Respondents

FAO No. 305 of 2010
Decided on : 29.04.2016

Motor Vehicles Act, 1988- Section 166- Deceased was aged 22 years at the time of accident- he was earning Rs. 3,000/- per month and Rs. 30/- pay day as daily allowance- income of the deceased can be taken as approximately Rs. 4,000/- per month- half of the amount is to be deducted towards personal expenses of the deceased- claimants have lost dependency to the extent of Rs. 2,000/- per month- multiplier of '15' is applicable in the present case and the claimants are entitled to Rs. 2,000/- x 12 = Rs. 24,000 x 15= Rs. 3,60,000/- with interest @ 9% per annum from the date of filing of the claim petition till realization. (Para-6 to 9)

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 Appellants :	Mr. Ajay Sharma, Advocate.
For the respondents:	Mr. J.R. Poswal, Advocate, for respondents No. 1 & 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 award dated 26th May, 2010, passed by the Motor Accident Claims Tribunal, Una, H.P. (hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 35 of 2007, whereby compensation to the tune of Rs.2,25,000/- with interest @ 9% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimants-appellants herein and the insurer-respondent No. 3 herein was saddled with liability (hereinafter referred to as 'the impugned award').

2. The insurer, owner-insured 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. While examining paras 23 & 25 of the impugned award, one come to an inescapable conclusion that the award amount is too meager.

5. The Tribunal has awarded compensation to the tune of Rs.2,25,000/-, as per the details given in para-15 of the impugned award, is non-speaking. The award amount is required to be enhanced for the following reasons.

6. Admittedly, deceased Vijay Kumar was 22 years of age at the time of accident, was working as a helper with M/s Hermkunt Earth Movers Private Limited and was earning Rs.3,000/- per month and Rs.30/- pay day as daily allowance, approximately Rs.4500/- per month.

7. Keeping in view the ratio laid down by the Apex Court in **Sarla Verma (Smt.) and others** versus **Delhi Transport Corporation and another**, reported in **AIR 2009 SC 3104,** upheld by a larger Bench of the Apex Court in a case titled as **Reshma Kumari & others** versus **Madan Mohan and another,** reported in **2013 AIR (SCW) 3120** 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,** 1/2th was to be deducted towards the personal expenses of the deceased. Accordingly, it is held that the claimants have lost source of dependency to the tune of Rs.2,000/- per month.

8. The multiplier of '15' is applicable in this case, in view of the 2nd Schedule appended to the Motor Vehicles Act read with the ratio laid down by the Apex Court in the cases, *supra.*

9. Thus, the claimants are held entitled to the compensation to the tune of Rs.2,000/- x 12 = Rs.24,000 x 15= Rs.3,60,000/- with interest @ 9% per annum from the date of filing of the claim petition till realization.

10. The amount of compensation is enhanced and the impugned award is modified, as indicated above.

11. 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 the same in their accounts.

12. The appeal is accordingly disposed of.

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

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

Smt. Meera Devi .....Appellant.

Versus

Sh. J.D. Verma and another .....Respondents

FAO (MVA) No. 245 of 2010

Date of decision: 29th April,2016

Motor Vehicles Act, 1988- Section 166- Deceased was a student, aged 14 years- by guess work, it can be said that he would have been earning at least Rs. 4500/- per month- multiplier of '14' is applicable- one half of the amount is to be deducted towards personal expenses- claimants have lost source of dependency to the extent of Rs.2250/- per month- claimants are entitled to Rs.2250x12x14= Rs.3,78,000/- from the date of the claim petition till its realization. (Para- 4 and 5)

Cases referred:

Sarla Verma and others versus Delhi Transport Corporation and another, AIR 2009 SC 3104

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

For the appellant: Mr. V.S. Chauhan, Advocate.

For the respondents: Nemo for respondent No.1.

Mr. Jagdish Thakur, 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 15.12.2009, made by the Motor Accident Claims Tribunal, Fast Track Court Solan, H.P. in Case No. 40 FTC/2 of 2007, titled *Smt. Meera Devi and others versus Sh. J.D. Verma and another*, for short "the Tribunal", whereby compensation to the tune of Rs.1,54,500/- alongwith interest

@ 6% per annum was awarded in favour of the claimants, hereinafter referred to as "the impugned award", for short.

2. Insurer, driver and owner have not questioned the impugned award on any ground. Thus, it has attained finality so far as it relates to them.

3. The appellant has questioned the impugned award on the ground of adequacy of compensation.

4. Admittedly, deceased Master Ketan was a student of 14 years, became victim of a vehicular accident who was hope and help for his parents and grand parents. His life was taken away in the mid. By a guess work, it can be held that after obtaining graduation degree he would have been earning Rs.4500/- per month if appointed a class-IV employee. Multiplier of "15" was applied by the Tribunal whereas multiplier of "14" is applicable as per 2nd Schedule attached to 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***.

5. One half was to be deducted towards personal expenses of the deceased, being a bachelor. Thus, it can be said that the claimants have lost source of dependency to the tune of Rs.2250/- per month. The claimants are entitled to compensation to the tune of Rs.2250x12x14= Rs.3,78,000/- from the date of the claim petition till its realization.

6. The insurer is directed to deposit the enhanced amount in the Registry within eight weeks from today. On deposit, the Registry is directed to release the same in favour of the claimants through payee's chqeque account, or by depositing the same in their bank accounts, strictly as per the terms and conditions contained in the impugned award.

7. Having said so, the impugned award is modified as indicated hereinabove.

8. Send down the record forthwith, after placing a copy of this judgment.

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

Shri Nande Lal Yadav & others ...Appellants

Versus

Shri Manjeet Singh & others ...Respondents

FAO No. 325 of 2010
Decided on : 29.04.2016

Motor Vehicles Act, 1988- Section 166- Age of the deceased was 30 years- multiplier of 15 was to be applied- Tribunal had erred in applying the multiplier of '11'- claimants are entitled to Rs. 1500/- x 12 = Rs.18,000 x 15 = Rs.2,70,000/- under the head 'loss of dependency'- claimants are also entitled to Rs.10,000/- each, under the heads 'loss of estate' and 'funeral expenses- thus, claimants are entitled to total compensation of Rs .2,70,000/- + Rs.20,000= Rs. 2,90,000/- along with interest @ 7.5% per annum from the date of filing of the claim petition till realization. (Para-4 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 Appellants :	Mr. J.R. Poswal, Advocate.
For the respondents:	Mr. Y.P. Sood, Advocate, for respondents No. 1 & 2. Mr. Ashwani Sharma, Senior Advocate, with Mr. Nishant Kumar, Advocate, for respondent No. 3. Mr. Yashvardhan Chauhan, Advocate, for respondent No. 4. Mr. Kush Sharma, Deputy Advocate General, 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 award dated 18th May, 2010, passed by the Motor Accident Claims Tribunal, Bilaspur, District Bilaspur (hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 17 of 2007, whereby compensation to the tune of Rs.2,18,000 with interest @ 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimants-appellants herein and against the owner-respondent No. 1, herein (hereinafter referred to as 'the impugned award').

2. The insurer, owner-insured 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. While examining paras 23 & 25 of the impugned award, one come to an inescapable conclusion that the award amount is too meager.

5. The Tribunal has fallen in an error in applying the multiplier of '11'. Admittedly, the age of the deceased was 30 years at the time of accident. The multiplier of '15' was to be applied in this case, keeping in view 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. In view of the ratio laid down by the apex Court in the cases, *supra,* the claimants are held entitled to the tune of Rs.1500/- x 12 = Rs.18,000 x 15 = Rs.2,70,000/- under the head 'loss of dependency'.

7. The Tribunal has rightly awarded compensation to the tune of Rs.10,000/- each, under the heads 'loss of estate' and 'funeral expenses, is accordingly upheld.

8. Having said so, it is held that the claimants are entitled to compensation to the tune of Rs.2,70,000/- + Rs.20,000/- total amounting to Rs.2,90,000/- with interest @ 7.5% per annum from the date of filing of the claim petition till realization.

9. The amount of compensation is enhanced and the impugned award is modified, as indicated above.

10. The owner 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 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 their accounts.

11. The appeal is accordingly disposed of.

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

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

Narkali Soni and others ...Appellants.

Versus

Mohd. Raffi and others ...Respondents.

FAO No. 348 of 2010
Decided on: 29.04.2016

Motor Vehicles Act, 1988- Section 166- Deceased was aged 36 years at the time of accident- it was pleaded that he was earning Rs. 10,000/- per month- Tribunal had taken monthly income of the deceased as Rs. 3,000/- - even if deceased was a daily wager, he would not have been earning less than ₹ 150/- per day and his monthly income would not have been less than ₹ 4,500/- per month- 1/3rd amount is to be deducted towards the personal expenses of the deceased - claimants are entitled to Rs. 3,000/- per month towards loss of dependency- Tribunal had rightly applied multiplier of '16'- hence, claimants are entitled to Rs. 3,000/- x 12 x 16 = Rs. 5,76,000/-- they are also entitled to Rs. 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'- thus, they are entitled to Rs. 5,76,000/-+ 10,000/- + 10,000/- + 10,000/-= Rs. 6,16,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization. (Para-6 to 11)

For the appellants: Mr K.C. Sankhyan, Advocate, vice Mr. Tek Chand Sharma, Advocate.

For the respondents: Mr. J.L. Bhardwaj, Advocate, for respondent No. 1.
Mr. Naveen K. Bhardwaj, Advocate, for respondent No. 2.
Mr. Lalit K. 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 judgment and award, dated 31st March, 2010, made by the Motor Accident Claims Tribunal, Kullu, H.P. (for short "the Tribunal") in Claim Petition No. 27/2007, titled as Narkali Soni and others versus Mohd. Rafi and others, whereby compensation to the tune of ₹ 3,99,000/- with interest @ 7% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and against the respondents (for short "the impugned award").

2. The insurer, owner-insured 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.

3. The claimants have questioned the impugned award only on the ground of adequacy of compensation.

4. Thus, the only question to be determined in this appeal is – whether the amount awarded by the Tribunal is adequate or inadequate?

5. It appears that the amount awarded is inadequate for the following reasons:

6. Deceased-Vikas Soni was 36 years of age at the time of the accident and was earning ₹ 10,000/- per month, as pleaded in the claim petition, who was running a tea stall-cum-restaurant at that point of time. The claimants have examined the witnesses, which do support the plea taken by the claimants. However, the Tribunal has fallen in an error in holding that the monthly income of the deceased was ₹ 3,000/- while treating him as a daily wager.

7. It is apt to record herein that even if we treat the deceased as a daily wager, he would not have been earning less than ₹ 150/- per day and his monthly income would not have been less than ₹ 4,500/- per month. Accordingly, it is held that the monthly income of the deceased was ₹ 4,500/- per month at the time of the accident.

8. After deducting one third towards his personal expenses, the claimants are held entitled to loss of dependency/income to the tune of ₹ 3,000/- per month. The Tribunal has rightly applied the multiplier of '16'.

9. Having said so, the claimants are held entitled to compensation under the head 'loss of dependency' to the tune of ₹ 3,000/- x 12 x 16 = ₹ 5,76,000/-. They are also held entitled to ₹ 10,000/- each under the heads 'loss of consortium', 'loss of estate', 'loss of love and affection' and 'funeral expenses'.

10. Viewed thus, it is held that the claimants are entitled to total compensation to the tune of ₹ 5,76,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- + ₹ 10,000/- = ₹ 6,16,000/- with interest @ 7.5% per annum from the date of the claim petition till its finalization.

11. Having glance of the above discussions, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of.

12. The enhanced awarded amount be deposited before the Registry of this Court within eight weeks. On deposition, the awarded amount 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 depositing the same in their respective bank accounts.

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

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

National Insurance Company Limited .....Appellant

Versus

Shri Anupam Sharma & others .....Respondents

FAO No. 332 of 2010
Decided on : 29.04.2016

Motor Vehicles Act, 1988- Section 149- Insurer contended that driver did not have a valid and effective driving licence at the time of accident- driver was driving maxi cab, the gross weight of which is 2710 kilograms - it falls within definition of 'Light Motor Vehicle' - endorsement of PSV was not required in this case- breach of the terms and conditions were not proved- insurer was rightly held liable to pay compensation. (Para-5 to 10)

Case referred:
Oriental Insurance Company Ltd. versus Sh. Khem Chand & others, I L R 2015 (I) HP 467

For the Appellant :	Mr. Suneet Goel, Advocate.
For the respondents:	Mr. Sandeep Chauhan, Advocate vice Mr. Ashok Chaudhary, Advocate, for respondent No. 1. Mr. Rajesh Verma, Advocate, for respondents No. 2 & 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 April, 2010, passed by the Motor Accident Claims Tribunal, (I), Kangra at Dharamshala (hereinafter referred to as 'the Tribunal'), in M.A.C. Petition No. 61-N/II-2006, whereby compensation to the tune of Rs.3,75,278/- and cost quantified at Rs.2,000/-, with interest @ 9% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimant and the insurer was saddled with liability (hereinafter referred to as 'the impugned award').

2. The claimant, owner-insured 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 that the owner has committed breach and the driver was not having a valid and effective driving licence, at the time of accident.

4. Learned Counsel for the appellant-insurer argued that the driver was having a driving licence at the relevant time, but there was no endorsement.

5. Admittedly, the driver was driving Maxi Cab Taxi bearing registration No. HP-01D-2758, the gross weight of which is 2710 kilograms, as per the Registration Certificate, Ext. RW-4/B, 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 is having licence to drive "light motor vehicle", requires no "PSV" endorsement.

10. Viewed thus, the Tribunal has rightly saddled the insurer with liability and directed it to satisfy the award.

11. Having glance of the above discussions, the impugned award is to be upheld and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

12. The Registry is directed to release the entire amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing it in his account.

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

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

National Insurance Company Limited ....Appellant
Versus
Vineet Kumar & others ....Respondents

FAO No. 318 of 2010
Decided on : 29.04.2016

Insurance Act, 1938- Section 64-VB- Cheque issued for the payment of premium was dishonoured- it was contended that insurer is not liable- held, that insurer has to intimate the owner about the cancellation of insurance policy, in absence of which, he is liable- there

is no evidence that any notice was issued to the insured - hence, insurer was rightly held liable to pay the compensation. (Para-9 to 14)

Cases referred:
S. Iyyappan Versus United India Insurance Company Limited and another, (2013) 7 Supreme Court Cases 62
New India Assurance Co. Ltd. versus Rula and others, AIR 2000 Supreme Court 1082
Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd., 2007 AIR SCW 7948
United India Insurance Co. Ltd. versus Laxmamma & Ors., 2012 AIR SCW 2657
M/s New Prem Bus Service versus Laxman Singh & another, Latest HLJ 2014 (HP) 579
United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others, Latest HLJ 2014 (HP) 1140

For the Appellant : Ms. Devyani Sharma, Advocate.
For the respondents: Mr. Varun Rana, Advocate, for respondent No. 1.
Nemo for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice *(oral)*

This appeal is directed against the award dated 25th March, 2010, passed by the Motor Accident Claims Tribunal, Mandi, H.P. (hereinafter referred to as 'the Tribunal'), in Claim Petition No. 107/2005, whereby compensation to the tune of Rs.3,82,380/- with interest @ 7.5% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimant and against the respondents (hereinafter referred to as 'the impugned award').

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

3. Learned Counsel for the appellant-insurer argued that the Tribunal has fallen in an error in fastening it with liability and directing it to satisfy the award.

4. The argument of the learned Counsel is not tenable for the following reason.

5. The aim and object of granting compensation, is social one**,** is to be granted, as early as possible, in order to save claimants from social evils. The claimant is the third party, the rights of the third party cannot be defeated and they cannot be made to suffer.

6. The mandate of Sections 146, 147 and 149 of the MV Act is to protect the rights of third parties and that is why, compulsory duty has been imposed on the owners to get the vehicles insured and claim of third parties is to be protected.

7. The Apex Court has discussed the said principle in a case titled as **S. Iyyappan Versus United India Insurance Company Limited and another,** reported in **(2013) 7 Supreme Court Cases 62.** It is apt to reproduce para 16 of the aforesaid judgment herein:

> *"16. The heading "Insurance of Motor Vehicles against Third Party Risks" given in Chapter XI of the Motor Vehicles Act, 1988 (Chapter VIII of 1939 Act) itself shows the intention of the legislature to make third party insurance*

compulsory and to ensure that the victims of accident arising out of use of motor vehicles would be able to get compensation for the death or injuries suffered. The provision has been inserted in order to protect the persons travelling in vehicles or using the road from the risk attendant upon the user of the motor vehicles on the road. To overcome this ugly situation, the legislature has made it obligatory that no motor vehicle shall be used unless a third party insurance is in force."

8. It is admitted that the vehicle was insured, but the cheque has bounced.

9. In terms of the provisions of Section 64-VB of the Insurance Act, 1938 (hereinafter referred to as "the Insurance Act') read with the provisions of Section 147 to 149 of the MV Act, hereinafter referred to as "the MV Act", which provide that the insurer has to intimate the insured about the cancellation of the insurance policy or the cover note and if the accident happens till the intimation is given, it is the insurer, who is liable.

10. The Apex Court in a case titled as **New India Assurance Co. Ltd. versus Rula and others,** reported in **AIR 2000 Supreme Court 1082,** has held that the insurer has to mandatorily intimate the owner by way of notice about the cancellation of insurance policy and if the accident occurs between the period till the cancellation is conveyed, it is the insurer, who is liable. It is apt to reproduce para 11 of the judgment herein:

"11. This decision, which is a 3-Judge Bench decision, squarely covers the present case also. The subsequent cancellation of the Insurance Policy in the instant case on the ground that the cheque *through which premium was paid was dishonoured, would not affect the rights of the third party which had accrued on the issuance of the Policy on the date on which the accident took place. If, on the date of accident, there was a Policy of Insurance in respect of the vehicle in question, the third party would have a claim against the Insurance Company and the owner of the vehicle would have to be indemnified in respect of the claim of that party. Subsequent cancellation of Insurance Policy on the ground of non-payment of premium would not affect the rights already accrued in favour of the third party."*

11. The matter again came up for consideration before the Apex Court in **Deddappa & Ors. versus The Branch Manager, National Insurance Co. Ltd.,** reported in **2007 AIR SCW 7948,** and the same principle has been laid down. It is apt to reproduce paras 26 to 28 of the judgment herein:

"26. We are not oblivious of the distinction between the statutory liability of the Insurance Company vis-a-vis a third party in the context of Sections 147 and 149 of the Act and its liabilities in other cases. But the same liabilities arising under a contract of insurance would have to be met if the contract is valid. If the contract of insurance has been cancelled and all concerned have been intimated thereabout, we are of the opinion, the insurance company would not be liable to satisfy the claim.

27. A beneficial legislation as is well known should not be construed in such a manner so as to bring within its ambit a benefit which was not contemplated by the legislature to be given to the party. In Regional Director, Employees' State Insurance Corporation, Trichur v. Ramanuja Match Industries [AIR 1985 SC 278], this Court held :

"We do not doubt that beneficial legislations should have liberal construction with a view to implementing the legislative intent but where such beneficial .legislation has a scheme of its own there is

no warrant for the Court to travel beyond the scheme and extend the scope of the statute on the pretext of extending the statutory benefit to those who are not covered by the scheme."

We, therefore, agree with the opinion of the High Court.

28. However, as the appellant hails from the lowest strata of society, we are of the opinion that in a case of this nature, we should, in exercise of our extra-ordinary jurisdiction under Article 142 of the Constitution of India, direct the Respondent No.1 to pay the amount of claim to the appellants herein and recover the same from the owner of the vehicle viz., Respondent No.2, particularly in view of the fact that no appeal was preferred by him. We direct accordingly."

12. In the case titled as **United India Insurance Co. Ltd. versus Laxmamma & Ors.,** reported in **2012 AIR SCW 2657,** the Apex Court has discussed the law developed on the issue and ultimately held that if cancellation order is not made or if the accident occurs till the cancellation is made and conveyed, the insurer is liable. It is profitable to reproduce para 19 of the judgment herein:

"19. In our view, the legal position is this : where the policy of insurance is issued by an authorized insurer on receipt of cheque towards payment of premium and such cheque is returned dishonoured, the liability of authorized insurer to indemnify third parties in respect of the liability which that policy covered subsists and it has to satisfy award of compensation by reason of the provisions of Sections 147(5) and 149(1) of the M.V. Act unless the policy of insurance is cancelled by the authorized insurer and intimation of such cancellation has reached the insured before the accident. In other words, where the policy of insurance is issued by an authorized insurer to cover a vehicle on receipt of the cheque paid towards premium and the cheque gets dishonored and before the accident of the vehicle occurs, such insurance company cancels the policy of insurance and sends intimation thereof to the owner, the insurance company's liability to indemnify the third parties which that policy covered ceases and the insurance company is not liable to satisfy awards of compensation in respect thereof."

13. The same view has been taken by this Court in the cases titled as **M/s New Prem Bus Service versus Laxman Singh & another,** reported in **Latest HLJ 2014 (HP) 579,** and **United India Insurance Company Ltd. Versus Smt. Sanjana Kumari & others,** reported in **Latest HLJ 2014 (HP) 1140.**

14. Viewed thus, the Tribunal has rightly saddled the insurer with liability and directed it to satisfy the award with right of recovery.

15. Having glance of the above discussions, the impugned award is to be upheld and the appeal merits to be dismissed. Accordingly, the impugned award is upheld and the appeal is dismissed.

16. The Registry is directed to release the entire amount in favour of the claimant, strictly in terms of conditions contained in the impugned award, through payees account cheque or by depositing it in his account.

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

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

Oriental Insurance Co. Ltd. ..... Petitioner.

Versus

Jai Chand and others .....Respondents

Review Petition No. 32 of 2016.
Date of decision: 29th April, 2016.

Code of Civil Procedure, 1908- Order 47 Rule 1- Section 114- No error apparent on the face of the record was shown in the review petition- hence, no case for review is made out- petition dismissed. (Para-2 to 4)

Case referred:
Union of India & others versus Paras Ram, I L R 2015 (III) HP 1397 D.B.

For the petitioner: Mr.Lalit K. Sharma, Advocate.
For the respondents: Nemo.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice, *(Oral)*

Petitioner has not taken steps for the service of respondents No. 1 to 3.

2. I have gone through the Review Petition. Review petitioner, by the medium of this Review petition, has sought review of the judgment dated 27.11.2015 passed in FAO No. 439 of 2008 a/w FAO No. 438 of 2008, titled *Oriental Insurance Co. Ltd. versus Jai Chand and others*, on the grounds which are already covered by the judgment under Review. No such error apparent on the face of record has been pointed out by the learned counsel for the Review petitioner. However, the Review Petition is not in tune with the law laid down by this Court and the apex Court. The learned counsel for the Review Petitioner is not able to carve out a case for review in terms of Section 114 read with Order 47 of the Code of Civil Procedure.

3. It is apt to record herein that this Court has already laid down the parameters in the judgments rendered in **Review Petition No. 56 of 2014**, titled as **Ranjeet Khanna versus Chiragu Deen and another**, decided on 8th August, 2014 and **Review Petition No. 65 of 2015**, titled as **Union of India & others versus Paras Ram**, decided on 25th June, 2015.

4. No case for review is made out. The Review petition is accordingly dismissed, alongwith pending applications, if any.

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

Oriental Insurance Company Ltd. .....Appellant

Versus

Smt. Mathara Devi & others ...Respondents

FAO No. 306 of 2010
Decided on : 29.04.2016

Motor Vehicles Act, 1988- Section 149- Owner and driver had filed a reply stating that deceased had hired the vehicle for selling the garlic and for bringing the other items from Solan- thus, vehicle was hired for transporting the goods- insurer had not led any evidence to prove the breach of terms and conditions on the part of the owner- thus, insurer is liable- Tribunal had awarded interest @ 9% per annum which is on the higher side- rate of interest reduced to 7.5% per annum from the date of filing of the claim petition till realization.

(Para-7 to 17)

Cases referred:

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

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

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. Ashwani Kumar Sharma, Senior Advocate with Mr. Nishant Kumar, Advocate.
For the respondents:	Mr. Rajesh Kumar, Advocate, for respondent No. 1. Ms. Leena Guleria, Advocate vice Mr. G.R. Palsra, Advocate, for respondents No. 2 & 3.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice (oral)

This appeal is directed against the award dated 19th May, 2010, passed by the Motor Accident Claims Tribunal, Fast Track Court, Mandi, H.P. (hereinafter referred to as 'the Tribunal'), in Claim Petition No. 92 of 2002/133 of 2005, whereby compensation to the tune of Rs.3,05,000/- with interest @ 9% per annum from the date of filing of the claim petition, came to be awarded in favour of the claimant-respondent No. 1 herein and the insurer-appellant herein was saddled with liability (hereinafter referred to as 'the impugned award').

2. The claimant, owner-insured 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. The only question to be determined in this appeal is-*whether the Tribunal has rightly saddled the insurer with liability?* The answer is in the affirmative for the following reasons.

5. Claimant Mathara Devi had filed claim petition before the Tribunal, for grant of compensation to the tune of Rs.5,00,000/-, as per the break-ups given therein, on the ground that her son, namely, Jitender Kumar was traveling in vehicle-Tempo Maxi Cab bearing registration No. HP-32-5935, alongwith goods, which met with an accident, and Jitender Kumar had lost his life in the said accident.

6. During the pendency of the claim petition, the same was amended. The amended claim petition was filed on 22nd February, 2003.

7. The owner and driver have filed reply. They have admitted paras 10 & 24 (i) of the claim petition. It is apt to reproduce paras 10 & 24(i) of the reply filed on behalf of the driver and owner:

> *"10. In reply to this para it is submitted that the deceased had hired the vehicle of respondent No. 2 from Dhaban to Solan for selling the garlic and for bringing the other items from Solan and were coming from Solan.*
>
> *11 to 23.....*
>
> *24(i) Sub para No. 1 of Para No. 24 of the claim petition is admitted to the extent that deceased was coming back to his home from Solan after selling some garlic and was in custodian of remaining unsold garlic and reached Badour Ghati near Spathu towards Kunihar side and two van came from Kunihar towards Spathu. Rests of the para is wrong, incorrect, hence denied. It is submitted that accident has not taken place due to the rash and negligent manner, the respondent No. 1 tried to save them form colling with jeep to which respondent No. 1 was driving and while the respondent No. 1 applied brakes the Jeep skid and fell down."*

8. Thus, it is admitted that the offending vehicle was hired and the goods were loaded thereon for the purpose of sale.

9. The insurer has evasively taken plea that the claimants and the owner are in collusion. It has not led any evidence, has failed to discharge the onus.

10. It was for the insurer to plead and prove that the owner has committed willful breach in terms of the mandate of Sections 147 & 149 of the Moror Vehicles Act, for short 'the Act' read with the terms and conditions contained in the insurance policy, as held by the Apex Court in **National Insurance Co. Ltd. versus Swaran Singh & others,** reported in **AIR 2004 Supreme Court 1531.** It is apt to reproduce relevant portion of para 105 of the judgment herein below:

> *"105. .....*
>
> *(i) .....*
>
> *(ii) .....*
>
> *(iii) The breach of policy condition e.g. disqualification of driver or invalid driving licence of the driver, as contained in subsection (2) (a) (ii) of Section 149, have to be proved to have been committed by the insured for avoiding liability by the insurer. Mere absence, fake or invalid driving licence or disqualification of the driver for driving at the relevant time, are not in themselves defences available to the insurer against either the insured or the third parties. To avoid its liability towards insured, the insurer has to prove that the insured was guilty of negligence and failed to exercise reasonable*

care in the matter of fulfilling the condition of the policy regarding use of vehicles by duly licensed driver or one who was not disqualified to drive at the relevant time.

(iv) The insurance companies are, however, with a view to avoid their liability, must not only establish the available defence(s) raised in the said proceedings but must also establish 'breach' on the part of the owner of the vehicle; the burden of proof wherefore would be on them.

(v).....

(vi) Even where the insurer is able to prove breach on the part of the insured concerning the policy condition regarding holding of a valid licence by the driver or his qualification to drive during the relevant period, the insurer would not be allowed to avoid its liability towards insured unless the said breach or breaches on the condition of driving licence is/are so fundamental as are found to have contributed to the cause of the accident. The Tribunals in interpreting the policy conditions would apply "the rule of main purpose" and the concept of "fundamental breach" to allow defences available to the insured under Section 149 (2) of available the Act."

11. It is also profitable to reproduce para 10 of the latest judgment of the Apex Court in the case of **Pepsu Road Transport Corporation versus National Insurance Company,** reported in **(2013) 10 Supreme Court Cases 217,** hereinbelow:

"10. In a claim for compensation, it is certainly open to the insurer under Section 149(2)(a)(ii) to take a defence that the driver of the vehicle involved in the accident was not duly licensed. Once such a defence is taken, the onus is on the insurer. But even after it is proved that the licence possessed by the driver was a fake one, whether there is liability on the insurer is the moot question. As far as the owner of the vehicle is concerned, when he hires a driver, he has to check whether the driver has a valid driving licence. Thereafter he has to satisfy himself as to the competence of the driver. If satisfied in that regard also, it can be said that the owner had taken reasonable care in employing a person who is qualified and competent to drive the vehicle. The owner cannot be expected to go beyond that, to the extent of verifying the genuineness of the driving licence with the licensing authority before hiring the services of the driver. However, the situation would be different if at the time of insurance of the vehicle or thereafter the insurance company requires the owner of the vehicle to have the licence duly verified from the licensing authority or if the attention of the owner of the vehicle is otherwise invited to the allegation that the licence issued to the driver employed by him is a fake one and yet the owner does not take appropriate action for verification of the matter regarding the genuineness of the licence from the licensing authority. That is what is explained in Swaran 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. This Court in **FAO No. 322 of 2011**, titled as **IFFCO-TOKIO Gen. Insurance Company Limited versus Smt. Joginder Kaur and others**, decided on 29.08.2014 and **FAO No. 523 of 2007,** titled as **Oriental Insurance Company Ltd.** versus **Smt. Rikta alias Kritka & others,** decided on 19.12.2014, has laid down the same principle.

13. At this stage, learned Counsel for the appellant argued that the award amount is excessive.

14. I have gone through the entire record. The award amount is not excessive, rather, inadequate. But the claimants have not questioned the same.

15. The Tribunal has awarded interest @ 9% per annum from the date of filing of the claim petition, is on the higher side.

16. 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.

17. 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.

18. Accordingly, the impugned award is modified, as indicated above.

19. 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.

20. The appeal is accordingly disposed of.

21. Send down the records after placing a copy of the judgment on the Tribunal's file.

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

Rajesh Kumar Dhiman ...Appellant.

Versus

Krishan Dutt Verma and others ...Respondents.

FAO No. 336 of 2010
Decided on: 29.04.2016

Motor Vehicles Act, 1988- Section 149- Vehicle was transferred by the registered owner but the insurance policy was still in his name- insurer contended that after the expiry of the insurance policy, the new insurance policy was also renewed in favour of the registered owner- however, facts show that vehicle was not transferred at the time of renewal of the insurance policy- it was still registered in the name of the registered owner- transfer of vehicle cannot defeat the claim of the person- insurer was liable to satisfy the award- appeal dismissed. (Para-4 to 9)

Case referred:
Ashok Kumar and another versus Smt. Kamla Devi and others, 2014 (3) Shim. LC 1302

For the appellant:	Mr. Dibender Ghosh, Advocate.
For the respondents:	Mr. B.C. Verma, Advocate, for respondents No. 1 and 2.
	Mr. Deepak Bhasin, Advocate, for respondent No. 3.
	Nemo for respondent No. 4.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Challenge in this appeal is to judgment and award, dated 31st May, 2010, made by the Motor Accident Claims Tribunal, Kinnaur at Rampur Bushahr, H.P. (for short "the Tribunal") in M.A.C. Petition No. 76 of 2006, titled as Sh. Krishan Dutt Verma and another versus Sh. Sainj Ram and others, whereby compensation to the tune of ₹ 5,03,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimants and the owner-insured and the driver of the offending vehicle were saddled with liability (for short "the impugned award").

2. The claimants, the driver of the offending vehicle and the insurer have not questioned the impugned award on any count, thus, has attained finality so far it relates to them.

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

4. The only question to be determined in this appeal is – whether the Tribunal has rightly discharged the insurer from its liability and directed the appellant-owner-insured to satisfy the award? The answer is in the negative for the following reasons:

5. Admittedly, the offending vehicle was transferred by the registered owner but the insurance policy was still in his name at the relevant point of time.

6. The only ground taken by the insurer is that even after the expiry of the insurance policy, the new insurance policy was also renewed in favour of the registered owner, is not correct for the following reasons:

7. The offending vehicle was not transferred at the time of renewal of the insurance policy, it was still registered in the name of the previous owner/registered owner. Thus, the question of renewal of the insurance policy in the name of the new owner of the offending vehicle does not arise.

8. This Court in the case titled as **Ashok Kumar and another versus Smt. Kamla Devi and others, reported in 2014 (3) Shim. LC 1302,** held that transfer of vehicle cannot be a ground to defeat the rights of the third party. It is apt to reproduce paras 16 to 23 of the judgment herein:

> *"16. Admittedly, on the date of accident, i.e. 05.06.2000, the offending vehicle was not transferred in the name of appellant-Ashok Kumar. It was transferred in his name w.e.f. 17.06.2000. Thereafter, the appellantrespondent No. 1 Ashok Kumar was supposed to give information regarding transfer of the vehicle to the insurer- Insurance Company. The vehicle was not transferred on the date of accident,*

thus the question of informing the insurer about the transfer of the vehicle does not arise, at all. If the offending vehicle would have been transferred on the date of accident, i.e. 5th June, 2000, that can not be a ground to defeat the rights of the third party. As per the mandate of the Section , the insurance policy shall be deemed to have been issued in favour of the transferee.

17. My this view is fortified by the Apex Court Judgment in case titled as G. Govindan versus New India Assurance Company Ltd. and others, 1999 AIR(SC) 1398. It is apt to reproduce paras-10, 13 & 15 of the aforesaid judgment herein:

> *"10. This Court in the said judgment held that the provisions under the new Act and the old Act are substantially the same in relation to liability in regard to third party. This Court also recognised the view taken in the separate judgment in Kondaiah's case that the transferee-insured could not be said to be a third party qua the vehicle in question. In other words, a victim or the legal representatives of the victim cannot be denied the compensation by the insurer on the ground that the policy was not transferred in the name of the transferee.*
>
> *11. .....*
>
> *12. .....*
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> *13. In our opinion that both under the old Act and under the new Act the Legislature was anxious to protect the third party (victim) interest. It appears that what was implicit in the provisions of the old Act is now made explicit, presumably in view of the conflicting decisions on this aspect among the various High Courts.*
>
> *14. .....*
>
> *15. As between the two conflicting views of the Full Bench judgments noticed above, we prefer to approve the ratio laid down by the Andhra Pradesh High Court in Kondaiah s case, 1986 AIR(AP) 62 as it advances the object of the Legislature to protect the third party interest. We hasten to add that the third party here will not include a transferee whose transferor has not followed procedure for transfer of policy. In other words in accord with the well-settled rule of interpretation of statutes we are inclined to hold that the view taken by the Andhra Pradesh High Court in Kondaiah's case is preferable to the contrary views taken by the Karnataka and Delhi High Courts even assuming that two views are possible on the interpretation of relevant sections as it promotes the object of the Legislature in protecting the third party (victim) interest. The ratio laid down in the judgment of Karnataka and Delhi High Courts (AIR 1990 Kant 166 (FB) and AIR 1989 Delhi 88) (FB) (supra) differing from Andhra Pradesh High Court is not the correct one."*

18. The Apex Court in case titled as Rikhi Ram and another versus Smt. Sukhrania and others, 2003 AIR(SC) 1446held that in absence of intimation of transfer to Insurance Company, the liability of Insurance Company does not cease. It is apt to reproduce paras 5, 6 and 7 of the judgment, supra, herein:-

"5. The aforesaid provision shows that it was intended to cover two legal objectives. Firstly, that no one who was not a party to a contract would bring an action on a contract; and secondly, that a person who has no interest in the subject matter of an insurance can claim the benefit of an insurance. Thus, once the vehicle is insured, the owner as well as any other person can use the vehicle with the consent of the owner. Section 94 does not provide that any person who will use the vehicle shall insure the vehicle in respect of his separate use.

6. On an analysis of Ss. 94 and 95, we further find that there are two third parties when a vehicle is transferred by the owner to a purchaser. The purchaser is one of the third parties to the contract and other third party is for whose benefit the vehicle was insured. So far, the transferee who is the third party in the contract, cannot get any personal benefit under the policy unless there is a compliance of the provisions of the Act. However, so far as third party injured or victim is concerned, he can enforce liability undertaken by the insurer.

7. For the aforesaid reasons, we hold that whenever a vehicle which is covered by the insurance policy is transferred to a transferee, the liability of insurer does not ceases so far as the third party/victim is concerned, even if the owner or purchaser does not give any intimation as required under the provisions of the Act."

19. The Apex Court in latest judgment titled as United India Insurance Co. Ltd., Shimla versus Tilak Singh and others, 2006 4 SCC 404has held the same principle. It is apt to reproduce paras- 12 and 13 of the said judgment herein:

"12. In Rikhi Ram v. Sukhrania, 2003 3 SCC 97a Bench of three learned Judges of this Court had occasion to consider Section 103-A of the 1939 Act. This Court reaffirmed the decision in G. Govindan case and added that the liability of an insurer does not cease even if the owner or purchaser fails to give intimation of transfer to the Insurance Company, as the purpose of the legislation was to protect the rights and interests of the third party.

13. Thus, in our view, the situation in law which arises from the failure of the transferor to notify the insurer of the fact of transfer of ownership of the insured vehicle is no different, whether under Section 103-A of the 1939 Act or under Section 157 of the 1988 Act insofar as the liability towards a third party is concerned. Thus, whether the old Act applies to the facts before us, or the new Act applies, as far as the deceased third party was concerned, the result would not be different. Hence, the contention of the appellant on the second issue must fail, either way, making a decision on the first contention unnecessary, for deciding the second issue. However, it may be necessary to decide which Act applies for deciding the third contention. In our view, it is not the transfer of the vehicle but the accident which furnishes the cause of action for the application before the Tribunal. Undoubtedly, the

accident took place after the 1988 Act had come into force. Hence it is the 1988 Act which would govern the situation."

20. Having said so, the Tribunal has fallen in error in exonerating the insurer-Insurance Company from liability and saddling owner Ashok Kumar and driver Kalyan Chand with liability.

21. The Tribunal has discussed the Apex Court judgment titled as United India Insurance Company Limited Shimla versus Tilak Singh & others, 2006 3 SCR 758, but has wrongly applied it. The Tribunal has also not taken note of the fact that on the date of accident, the vehicle was in the name of registered owner- Anupam Hardware Store and was not transferred to Ashok Kumar, son of Shri Kishori Lal.

22. Having said so, it is held that the insurer- Insurance Company has to indemnify. Accordingly, issues No. 1, 3, 4, 5 & 6 are decided against the insurer and in favour of the claimants."

9. Having said so, it is held that the insurer has to be saddled with liability and has to satisfy the impugned award.

10. Accordingly, the impugned award is modified, the insurer is saddled with liability and is directed to deposit the awarded amount before the Registry within eight weeks.

11. On deposition of the awarded 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 depositing the same in their respective bank accounts. The statutory amount deposited by the appellant-owner-insured be paid to the claimants in addition to the amount awarded.

12. The appeal is disposed of accordingly.

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

****

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

Rattan Singh and another ...Appellants.

Versus

Surto Devi and another ...Respondents.

FAO No. 352 of 2010
Decided on: 29.04.2016

Motor Vehicles Act, 1988- Section 149- Claimants had specifically pleaded that deceased was travelling in the goods vehicle with goods- this fact was admitted in the reply- insurer had taken a plea that deceased was gratuitous passenger but had not led any evidence to prove this fact- driver was driving Pick-up Van gross weight of which is 2750 kilograms- it falls within the definition of LMV- driver possessed a licence to drive light motor vehicle and endorsement of PSV was not required- Tribunal had wrongly saddled the owner with liability- Insurer directed to satisfy the award. (Para-4 to 34)

Cases referred:
Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another, (2013) 10 Supreme Court Cases 646
Bimla Devi & Ors. versus Himcahal Road Transport Corpn. & Ors., 2009 AIR SCW 4298
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
Chairman, Rajasthan State Road Transport Corporation & ors. versus Smt. Santosh & Ors., 2013 AIR SCW 2791
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

For the appellants:	Mr. Bipin C. Negi, Senior Advocate, with Mr. Narender Singh Thakur, Advocate.
For the respondents:	Mr. Ashok Tyagi, Advocate, for respondent No. 1 Mr. Ratish Sharma, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice. *(Oral)*

Subject matter of this appeal is judgment and award, dated 23rd April, 2010, made by the Motor Accident Claims Tribunal-I, Sirmaur District at Nahan, H.P. (for short "the Tribunal") in MAC Petition No. 104-MAC/2 of 2006, titled as Surto Devi versus Rattan Singh and others, whereby compensation to the tune of ₹ 2,21,000/- with interest @ 7.5% per annum from the date of the petition till its realization came to be awarded in favour of the claimant and the owner-insured and the driver of the offending vehicle were saddled with liability (for short "the impugned award").

2. The claimant 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 only question to be determined in this appeal is – whether the Tribunal has rightly discharged the insurer from its liability and saddled the owner-insured and driver of the offending vehicle with liability? The answer is in the negative for the following reasons:

4. The claimant in para 11 of the claim petition has specifically pleaded that the deceased was travelling in the goods vehicle-offending vehicle with goods. It is apt to reproduce para 11 of the claim petition herein:

> *"11. Yes. The deceased was travelling in the Pick-up with his goods."*

5. The owner-insured and the driver of the offending vehicle have filed joint reply and have admitted para 11 of the claim petition. It is apt to reproduce para 9 of the reply filed to the claim petition by the owner-insured and the driver of the offending vehicle herein:

> *"9. That the paras No. 9 to 11 of the petition under reply are correct hence admitted."*

6. Thus, there is no dispute viz-a-viz the said fact.

7. It is beaten law of land that in terms of the mandate of Order XIV of the Code of Civil Procedure (for short "CPC") issues are to be framed when a material proposition of fact or law is raised by one party and denied by the other. That can be made basis for framing issues for trial. When there is no denial, no issue can be framed.

8. It was for the insurer to take the said plea. Though, it has taken a specific plea in the preliminary objections that the deceased was a gratuitous passenger, but has not been able to prove the same for the following reasons:

9. The admission on the part of the owner-insured and the driver of the offending vehicle is a proof in favour of the claimant and the claimant was not supposed to lead evidence, though, she has led evidence and proved that the deceased was travelling in the offending vehicle with goods.

10. The offending vehicle was a goods vehicle and was duly insured at the relevant point of time. In terms of the insurance policy, Ext. RW-2/C, the risk of '2+1' was covered. Thus, the liability was also covered.

11. Learned counsel for the insurer argued that the Investigating Officer has appeared in the witness box and stated that no goods were found on the spot. It appears that the learned counsel for the insurer is trying to project a case as if he is arguing a civil case.

12. The Apex Court in a case titled as **Dulcina Fernandes and others vs. Joaquim Xavier Cruz and another,** reported in **(2013) 10 Supreme Court Cases 646,** has laid down the principle and held that strict proof and strict links are not required.

13. The same principle has been laid down by this Court in a series of cases.

14. 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 Himcahal 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."

15. Applying the test to the case in hand, there is no need to prove the fact that the deceased was travelling with the goods at the relevant point of time as it has been admitted by the owner-insured and the driver of the offending vehicle.

16. It was the duty of the insurer to plead and prove the said factum to avoid its liability, has failed to do so.

17. 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."

18. 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."

19. The Tribunal has also held that the driver of the offending vehicle was not having a valid and effective driving licence to drive the offending vehicle, which is not factually and legally correct.

20. Admittedly, the driver was driving the offending vehicle, i.e. Pick-up Van, bearing registration No. HP-64-0135, at the relevant point of time, the gross vehicle weight of which is 2750 kilograms, as per the Certificate of Registration, Ext. RW-2/B, is a light motor vehicle.

21. 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."

22. 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.

23. 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.

24. In this backdrop, we have to go through Section 3 and Section 10 of the MV Act. It is apt to reproduce Section 3 of the Act herein:

> ***"3. Necessity for driving licence.*** *- (1) No person shall drive a motor vehicle in any public place unless he holds an effective driving licence issued to him authorising him to drive the vehicle; and no person shall so drive a transport vehicle [other than a motor cab or motor cycle hired for his own use or rented under any scheme made under sub-section (2) of section 75] unless his driving licence specifically entitles him so to do.*
>
> *(2) The conditions subject to which sub-section (1) shall not apply to a person receiving instructions in driving a motor vehicle shall be such as may be prescribed by the Central Government."*

25. It mandates that the driver should have the licence to drive a particular kind of vehicle and it must contain endorsement for driving a transport vehicle. In this section, the words "light motor vehicle" are not recorded. Meaning thereby, this section is to be read with the definition of other vehicles including the definition given in Section 2 (47) of the MV Act except the definition given in Section 2 (21) of the MV Act for the reason that Section 2 (21) of the MV Act provides, as discussed hereinabove, that it includes transport vehicle also.

26. My this view is supported by Section 10 of the MV Act, which reads as under:

> *"**10. Form and contents of licences to drive.** - (1) Every learner's licence and driving licence, except a driving licence issued under section 18, shall be in such form and shall contain such information as may be prescribed by the Central Government.*
>
> *(2) A learner's licence or, as the case may be, driving licence shall also be expressed as entitling the holder to drive a motor vehicle of one or more of the following cases, namely:-*
>
> *(a) motor cycle without gear;*
>
> *(b) motor cycle with gear;*
>
> *(c) invalid carriage;*
>
> *(d) light motor vehicle;*
>
> *(e) transport vehicle;*
>
> *(i) road-roller;*
>
> *(j) motor vehicle of a specified description."*

27. Section 10 (2) (d) of the MV Act contains "light motor vehicle" and Section 10 (2) (e) of the MV Act, was substituted in terms of amendment of 1994, class of the vehicles

specified in clauses (e) to (h) before amendment stands deleted and the definition of the "transport vehicle" stands inserted. So, the words "transport vehicle" used in Section 3 of the MV Act are to be read viz-a-viz other vehicles, definitions of which are given and discussed hereinabove.

28. 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."*

29. The mandate of Sections 2 and 3 of the MV Act came up for consideration before the Apex Court in a case titled as **Chairman, Rajasthan State Road Transport**

Corporation & ors. versus Smt. Santosh & Ors., reported in **2013 AIR SCW 2791,** and after examining the various provisions of the MV Act held that Section 3 of the Act casts an obligation on the driver to hold an effective driving licence for the type of vehicle, which he intends to drive. It is apt to reproduce paras 19 and 23 of the judgment herein:

> *"19. Section 2(2) of the Act defines articulated vehicle which means a motor vehicle to which a semi-trailer is attached; Section 2(34) defines public place; Section 2(44) defines 'tractor' as a motor vehicle which is not itself constructed to carry any load; Section 2(46) defines `trailer' which means any vehicle, other than a semi- trailer and a side-car, drawn or intended to be drawn by a motor vehicle. Section 3 of the Act provides for necessity for driving license; Section 5 provides for responsibility of owners of the vehicle for contravention of Sections 3 and 4; Section 6 provides for restrictions on the holding of driving license; Section 56 provides for compulsion for having certificate of fitness for transport vehicles; Section 59 empowers the State to fix the age limit of the vehicles; Section 66 provides for necessity for permits to ply any vehicle for any commercial purpose; Section 67 empowers the State to control road transport; Section 112 provides for limits of speed; Sections 133 and 134 imposes a duty on the owners and the drivers of the vehicles in case of accident and injury to a person; Section 146 provides that no person shall use any vehicle at a public place unless the vehicle is insured. In addition thereto, the Motor Vehicle Taxation Act provides for imposition of passenger tax and road tax etc.*
>
> *20. .....*
>
> *21. .....*
>
> *22. .....*
>
> *23. Section 3 of the Act casts an obligation on a driver to hold an effective driving license for the type of vehicle which he intends to drive. Section 10 of the Act enables the Central Government to prescribe forms of driving licenses for various categories of vehicles mentioned in sub-section (2) of the said Section. The definition clause in Section 2 of the Act defines various categories of vehicles which are covered in broad types mentioned in sub-section (2) of Section 10. They are 'goods carriage', 'heavy goods vehicle', 'heavy passenger motor vehicle', 'invalid carriage', 'light motor vehicle', 'maxi-cab', 'medium goods vehicle', 'medium passenger motor vehicle', 'motor-cab', 'motorcycle', 'omnibus', 'private service vehicle', 'semi- trailer', 'tourist vehicle', 'tractor', 'trailer' and 'transport vehicle'."*

30. The Apex Court in another case titled as **National Insurance Company Ltd. versus Annappa Irappa Nesaria & Ors.,** reported in **2008 AIR SCW 906,** has also discussed the purpose of amendments, which were made in the year 1994 and the definitions of 'light motor vehicle', 'medium goods vehicle' and the necessity of having a driving licence. It is apt to reproduce paras 8, 14 and 16 of the judgment herein:

> *"8. Mr. S.N. Bhat, learned counsel appearing on behalf of the respondents, on the other hand, submitted that the contention raised herein by the appellant has neither been raised before the Tribunal nor before the High Court. In any event, it was urged, that keeping in view the definition of the 'light motor vehicle' as contained in Section*

2(21) of the Motor vehicles Act, 1988 ('Act' for short), a light goods carriage would come within the purview thereof.

A 'light goods carriage' having not been defined in the Act, the definition of the 'light motor vehicle' clearly indicates that it takes within its umbrage, both a transport vehicle and a non-transport vehicle.

Strong reliance has been placed in this behalf by the learned counsel in Ashok Gangadhar Maratha vs. Oriental Insurance Company Ltd., [1999 (6) SCC 620].

9. .....

10. .....

11. .....

12. .....

13. .....

14. Rule 14 prescribes for filing of an application in Form 4, for a licence to drive a motor vehicle, categorizing the same in nine types of vehicles.

Clause (e) provides for 'Transport vehicle' which has been substituted by G.S.R. 221(E) with effect from 28.3.2001. Before the amendment in 2001, the entries medium goods vehicle and heavy goods vehicle existed which have been substituted by transport vehicle. As noticed hereinbefore, Light Motor Vehicles also found place therein.

15. .....

16. From what has been noticed hereinbefore, it is evident that 'transport vehicle' has now been substituted for 'medium goods vehicle' and 'heavy goods vehicle'. The light motor vehicle continued, at the relevant point of time, to cover both, 'light passenger carriage vehicle' and 'light goods carriage vehicle'.

A driver who had a valid licence to drive a light motor vehicle, therefore, was authorised to drive a light goods vehicle as well."

31. 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.

32. The same principle has been laid down by this Court in a series of cases.

33. The driver was having a driving licence to drive 'LMV' (Ext. RW-1/A), thus, was having a valid and effective driving licence to drive the offending vehicle.

34. Having said so, the Tribunal has fallen in an error in saddling the appellants with liability and discharging the insurer from its liability. Accordingly, it is held that the insurer has to satisfy the impugned award.

35. Viewed thus, the impugned award is modified, as indicated hereinabove, and the appeal is disposed of.

36. The statutory amount deposited by the appellants is awarded as costs in favour of the claimant.

37. The insurer is directed to deposit the awarded amount before the Registry of this Court within eight weeks. On deposition, the same alongwith costs be released in favour of the claimant strictly as per the terms and conditions contained in the impugned award through payee's account cheque or by depositing the same in her bank account.

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

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

FAOs No. 193 & 194 of 2010
Reserved on: 08.04.2016
Decided on: 29.04.2016

FAO No. 193 of 2010

Sandeep Mahajan ...Appellant.

Versus

Sh. Surjeet Singh and another ...Respondents.

FAO No. 194 of 2010

Sandeep Mahajan ...Appellant.

Versus

Sh. Balwan Singh and others ...Respondents.

Motor Vehicles Act, 1988- Section 149- Offending vehicle was a Maruti van which was insured only for private purposes- the person who had hired the vehicle specifically stated that vehicle was hired for Rs. 300/-- vehicle was not insured for carrying the passengers and could not have been hired- owner had committed willful breach and insurer cannot be held liable- appeal dismissed. (Para-7 to 14)

For the appellant: Mr. Adarsh K. Vashista, Advocate.

For the respondents: Ms. Devyani Sharma, Advocate, for respondent No. 1 in FAO No. 193 of 2010 and for respondents No. 1 & 2 in FAO No. 194 of 2010.

Mr. B.M. Chauhan, Advocate, for respondent No. 2 in FAO No. 193 of 2010 and for respondent No. 3 in FAO No. 194 of 2010.

The following judgment of the Court was delivered:

Mansoor Ahmad Mir, Chief Justice.

FAO No. 193 of 2010 is directed against the judgment and award, dated 29th April, 2010, made by the Motor Accident Claims Tribunal (2), Kangra at Dharamshala, H.P. (for short "the Tribunal") in MACP No. 36-J/2006, titled as Shri Surjeet Singh versus Shri Sandeep Mahajan and another, whereby compensation to the tune of ₹ 5,09,280/- with interest @ 7% per annum from the date of the petition till its deposition came to be awarded in favour of the claimant-injured and against the insured/owner-cum-driver (for short "the impugned award-I").

2. Subject matter of **FAO No. 194 of 2010** is the judgment and award, dated 29th April, 2010, made by the Tribunal in MACP No. 80-J/2006, titled as Shri Balwan Singh and another versus Shri Sandeep Mahajan and others, whereby compensation to the tune of ₹ 58,000/- with interest @ 7% per annum from the date of the petition till its deposition came to be awarded in favour of the claimants and against the insured/owner-cum-driver (for short "the impugned award-II").

3. Both the appeals are outcome of a vehicular accident, which was allegedly caused by the insured/owner-cum-driver, namely Shri Sandeep Mahajan, while driving the Maruti Van No. HP-38 A-4895, rashly and negligently, on 11th May, 2005, at Timber Depot, Village Khushi Nagar, in which Shri Surjeet Singh and Laxmi Devi sustained injuries and Laxmi Devi succumbed to the injuries.

4. Injured-Surjeet Singh and the legal representatives of deceased-Laxmi Devi filed separate claim petitions for grant of compensation, as per the break-ups given in the respective claim petitions, on the grounds taken in the respective memo of the claim petitions.

5. Both the claim petitions were tried separately and after concluding the trial, the Tribunal made the impugned awards and the insured/owner-cum-driver of the offending vehicle came to be saddled with liability.

6. The claimants and the insurer have not questioned the impugned awards on any count, thus, have attained finality so far these awards relate to them.

7. The appellant-insured/owner-cum-driver of the offending vehicle has questioned the impugned awards by the medium of these appeals on the ground that the Tribunal has fallen in an error in saddling him with liability.

8. Thus, the only question to be determined in these appeals is – whether the Tribunal has rightly discharged the insurer from its liability and directed the insured/owner-cum-driver to satisfy the impugned awards? The answer is in the affirmative for the following reasons:

9. The offending vehicle was a Maruti Van, a private vehicle and was insured only for the private purposes. As per the terms and conditions contained in the insurance policy read with the mandate of Chapter XI of the Motor Vehicles Act, 1988 (for short "MV Act"), which consists of Sections 145 to 164, particularly Sections 146, 147 and 149, the insurer can be saddled with liability provided the risk is covered and in case the owner-insured commits any willful breach, the insurer is to be discharged.

10. In both the claim petitions, Shri Balwan Singh, who had hired the offending vehicle, has appeared in the witness box as a witness. He has specifically stated that he had hired the offending vehicle and paid ₹ 300/- to the insured/owner-cum-driver of the offending vehicle.

11. The said vehicle was not insured for carrying the passengers and could not have been hired. The claimants have themselves admitted that they have hired the offending vehicle.

12. Learned counsel for the appellant argued that the appellant/insured/owner-cum-driver of the offending vehicle has examined Dr. Dev Raj Kaundal as RW-2, who has deposed that the deceased and the injured had not hired the offending vehicle.

13. This argument is not tenable for the reason that the person, who had hired the offending vehicle, has himself appeared in the witness box, who is also one of the claimants in one claim petition, has deposed that he had hired the offending vehicle at the relevant point of time. Then, how can it be said that he has made a false statement.

14. In the given circumstances, the appellant/insured/ owner-cum-driver has committed a willful breach and thus, the insurer cannot be held liable.

15. Having said so, the Tribunal has rightly made the discussions while deciding issue No. 2, are accordingly upheld.

16. Viewed thus, the impugned awards are well reasoned, need no interference.

17. Having glance of the above discussions, the impugned awards are upheld and both the appeals are dismissed.

18. Send down the records after placing copy of the judgment on Tribunal's file.

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

State of Himachal Pradesh .....Appellant.
Versus
Bishan Dutt .....Respondent.

Cr. Appeal No. 437 of 2011.
Reserved on: April 28, 2016.
Decided on: April 29, 2016.

N.D.P.S. Act, 1985- Section 20- Accused was found in possession of 1.2 kg. of charas- he was tried and acquitted by the trial Court- held, in appeal that independent witnesses were not associated nor efforts were made for associating them- accused was told that he had right to be searched before Police Officials, Magistrate or Gazetted Officer, which is not permissible –prosecution case was not proved beyond reasonable doubt- appeal dismissed. (Para-12 to 15)

Case referred:
State of Rajasthan v. Parmanand, (2014) 5 SCC 345

For the appellant: Mr. P.M.Negi, Dy. AG
For the respondent: Mr. Ramesh Sharma, Advocate.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, J.

This appeal is instituted at the instance of the State against the judgment dated 30.6.2011, rendered by the learned Special Judge (FTC), Chamba, H.P., in Sessions trial No. 13/2011, whereby the respondent-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 acquitted.

2. The case of the prosecution, in a nut shell, is that on 28.2.2011, at about 5:00 AM, HC Bhagwan Chand along with ASI Jeet Singh, Const. Anuj and Const. Subhash proceeded from Police post Banikhet to lay Nakka at place called Golli, pursuant to daily dairy rapat No. 14 vide Ext. PW-10/A. They reached at a distance of 200 meters ahead from Golli at 5:30 AM on Sundla Chohra road and a Nakka was laid. In the meantime, ASI Jeet Singh received telephonic call at 7:30 AM at the spot and departed to the Police Post from the spot. HC Bhagwan Chand along with two police officials remained at the spot. At about 9:30 AM, accused was seen coming from Sundla side carrying a brown coloured bag on his right hand but he tried to run away on seeing the police. He was nabbed. The identity of the accused was also ascertained. The accused was apprised that search of the bag was required and that he may opt for search before a Magistrate or Gazetted Officer. The accused consented to be searched by the police present at the spot, qua which consent memo Ext. PW-1/A was prepared. No independent witness was available, therefore, search of the bag of the accused was carried out in the presence of Const. Anuj Kumar and Const. Subhash Chand. A white coloured plastic packet was recovered from the bag of the accused which was containing black coloured hard substance in the shape of candles and balls. It was found to be charas. It weighed 1 kg. 200 grams. The charas so recovered was put in the same plastic packet which was put in the same bag and wrapped and parceled in a piece of cloth and sealed with three seals of seal "P". Sample seal Ext. PW-1/C was separately drawn on a piece of cloth. NCB form in triplicate was filled in on the spot. Thereafter, rukka Ext. PW-8/A was scribed and sent to the Police Station for registration of case through Const. Anuj at 11:30 AM, on the basis of which FIR Ext. PW-6/A was registered. The case property was produced for re-sealing before SHO Biswas Kumar. He resealed the same in the presence of witness Hem Raj by affixing two seals of seal 'N" and drew two specimen seals of seal "N" for sample on Ext. PW-1/C. He prepared reseal memo Ext. PW-4/A and deposited the parcel along with sample seal and NCB forms with MHC Arun Kumar. The entry of the case property was made at Sr. No. 79 in the malkhana register. The case property was sent to FSL, Junga for chemical analysis. The report of the Chemical Analyst is Ext. PX. The investigation was completed and the challan was put up before the Court after completing all the codal formalities.

3. The prosecution, in order to prove its case, has examined as many as nine witnesses. The accused was also examined under Section 313 Cr.P.C. According to him, he was falsely implicated. The learned trial Court acquitted the accused, as noticed hereinabove. Hence, this appeal.

4. Mr. P.M.Negi, learned Dy. Advocate General for the State has vehemently argued that the prosecution has proved its case against the accused. On the other hand, Mr. Ramesh Sharma, Advocate for the accused has supported the judgment of the learned trial Court dated 30.6.2011.

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

6. PW-1 Const. Anuj Kumar deposed that at about 9:30 AM, one person was seen coming on foot from Sundla side. He was carrying a bag on his right hand. He got frightened and turned back. He tried to flee. He was overpowered. He was apprised of his legal right to be searched either before a Magistrate or a Gazetted Officer but the accused consented to be searched by the police at the spot. He was carrying a bag. It was searched. The bag contained charas. It weighed 1 kg 200 grams. Sealing proceedings were completed

on the spot. Rukka was prepared. It was handed over to him at 11:30 AM to be taken to PS Dalhousie for registration of the case. The case property was produced while examining PW-1 Const. Anuj Kumar. In his cross-examination, he admitted that they proceeded from Police Post at 5:00 AM in a private vehicle by taking lift. He did not remember the number of the said private vehicle. They did not stop in between Police Post and the spot. He denied the suggestion that a rain shelter was situated near the spot. Volunteered that the rain shelter was at a distance of 200 meters from the spot on the bifurcation of Sundla Chohda road from the main road. He admitted that a tea stall (rehri) was situated adjacent to the rain shelter. Volunteered that no one was present at that time in the tea stall. He admitted that people wait for buses during morning time for their destination in the rain shelter. He denied that there were 15-20 dhabas and houses at Golli. Volunteered that there were 2-3 dhabas whereas village was across the Nalla. He did not remember as to how many vehicles were stopped and checked by them so long he remained present at the spot but they had stopped and checked some vehicles.

7. PW-2 Const. Subhash Chand deposed the manner in which the accused was apprehended at 9:30 AM, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he denied the suggestion that rain shelter was situated at the spot. Volunteered that rain shelter was at a distance of 200 meters from the spot. The owner of the tea stall remains present there. They had checked many vehicles so long he remained present at the spot. He signed consent memo and personal search memo. Copy of rukka was handed over to him at 11:30 AM. After the accused was nabbed, many vehicles crossed from the spot. Those vehicles were not stopped by them. HC Bhagwan Chand had asked him to stop two-three vehicles but the vehicles did not stop. No intimation was given to the Police Station Dalhousie or to any Police Station that the vehicles sped away despite being signaled to stop. He was not sent by the IO to rain shelter to bring tea stall owner to the spot. The nearest village from the spot was at a distance of two kms. There were two three Dhabas at Golli. Neither he nor Anuj was sent to the Dhabas to bring their owners to the spot.

8. PW-3 Const. Rajinder Kumar deposed that on 1.3.2011, MHC Arun handed over to him the case property duly sealed with three seals of “P” and two seals of “N” along with NCB forms, sample seals and docket vide RC No. 23/11 for being delivered at FSL, Junga, which he delivered on 4.3.2011 in safe condition under receipt.

9. PW-4 Const. Hem Raj testified that HC Bhagwan Chand handed over one sealed parcel duly sealed with three seals of seal “P” along with sample seal, NCB forms in triplicate for resealing purpose to SHO Biswas Kumar. He resealed the parcel by affixing two seals of seal “N” and took specimen of seal on piece of cloth vide Ext. PW-1/C in his presence.

10. PW-6 HC Arun Kumar deposed that on 28.2.2011, rukka was received from HC Bhagwan Chand through Const. Anuj Kumar at about 12:30 PM. He entered the FIR Ext. PW-6/A on the basis of rukka. On the same day, at about 4:40 PM, SHO Biswas Kumar handed over to him duly sealed parcel with three seals of seal “P” and two seals of seal “N” along with sample seal, NCB forms in triplicate and articles of jamatalashi. On 1.3.2011, he handed over the case property to Const. Rajinder Kumar vide RC No. 23/11 for being deposited at FSL, Junga.

11. PW-8 HC Bhagwan Chand also deposed the manner in which the accused was apprehended at 9:30 AM, search, seizure and sealing proceedings were completed on the spot. In his cross-examination, he admitted that rain shelter was situated at a distance of about 200-250 meters from the spot. He admitted that a tea stall was also situated near

the rain shelter. Volunteered that the tea stall was in the shape of Rehari but no one was present on that day at the tea stall. He did not know that the people wait for buses in the rain shelter. There were three-four dhabas at a distance of one km. from the place of nakka. He had checked 4-5 vehicles in between 5:30 AM to 9:30 PM. One of the vehicles was bus, but he did not remember the number of the bus. He had deputed Const. Anuj Kumar in search of some independent witnesses but he came back as no independent witnesses were available.

12. It has come in the statement of PW-1 Const. Anuj Kumar that there was rain shelter at a distance of 200 meters from the spot. He admitted that people wait for buses during morning time for their destination in the rain shelter. He admitted that there were 2-3 dhabas whereas village was across the Nalla. He did not remember as to how many vehicles were stopped and checked by them so long he remained present at the spot but they had stopped and checked some vehicles. PW-2 Const. Subhash Chand also deposed that rain shelter was at a distance of 200 meters from the spot. They had checked many vehicles so long he remained present at the spot. He also deposed during his cross-examination that the nearest village from the spot was at a distance of two kms. There were two three Dhabas at Golli. Neither he nor Anuj was sent to the Dhabas to bring the Dhaba owners to the spot. After the accused was nabbed, many vehicles crossed from the spot. These vehicles were not stopped by them. No intimation was given to the Police Station Dalhousie or to any other Police Station that the vehicles sped away despite being signaled to stop. However, surprisingly enough, PW-8 HC Bhagwan Chand deposed that he had deputed Const. Anuj Kumar in search of some independent witnesses but he came back as no independent witness was available. PW-2 Const. Subhash Chand has categorically deposed in his cross-examination that neither he nor Anuj was sent to the Dhabas to bring their owners to the spot. The police should have associated local/independent witnesses in order to inspire confidence in search, seizure and sealing proceedings on the spot as the rain shelter was just at a distance of 200 meters from the spot and the incident is of a broad day light. Moreover, the nearest village was also across the Golli nallah.

13. It has come on record that many vehicles had also crossed from the spot. The occupants of those vehicles were not tried to be associated as witnesses. According to PW-2 Const. Subhash Chand, HC Bhagwan Chand had asked him to stop two-three vehicles but the vehicles did not stop. If that was so, the action under the Code of Criminal Procedure ought to have been taken against the drivers of the vehicles which did not stop.

14. The case of the prosecution is that the accused was apprehended at 9:30 AM. He was apprised of his legal right to be searched either before a Magistrate or a Gazetted Officer. The consent memo Ext. PW-1/A was prepared to this effect. We have perused consent memo Ext. PW-1/A. The accused was told that he has right to be searched before the police, a Magistrate or a Gazetted Officer. It was signed by PW-1 Const. Anuj Kumar as well as PW-2 Const. Subhash Chand. The accused is to be apprised about his legal right to be searched either before a nearest Magistrate or a Gazetted Officer. The police could not give him third option to be searched before the police. Since the charas was recovered from the bag, the personal search of the accused was not required. However, the fact of the matter is that the same was undertaken in breach of Section 50 of the ND & PS Act. Section 50 of the N.D & P.S. Act is mandatory.

15. 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.
>
> 17. In our opinion, a joint communication of the right available under Section 50(1) of the NDPS Act to the accused would frustrate the very purport of Section 50. Communication of the said right to the person who is about to be searched is not an empty formality. It has a purpose. Most of the offences under the NDPS Act carry stringent punishment and, therefore, the prescribed procedure has to be meticulously followed. These are minimum safeguards available to an accused against the possibility of false involvement. The communication of this right has to be clear, unambiguous and individual. The accused must be made aware of the existence of such a right. This right would be of little significance if the beneficiary thereof is not able to exercise it for want of knowledge about its existence. A joint communication of the right may not be clear or unequivocal. It may create confusion. It may result in diluting the right. We are, therefore, of the view that the accused must be individually informed that under Section 50(1) of the NDPS Act, he has a right to be searched before a nearest gazetted officer or before a nearest Magistrate. Similar view taken by the Punjab & Haryana High Court in Paramjit Singh and the Bombay High Court in Dharamveer Lekhram Sharma meets with our approval.
>
> 18. It bears repetition to state that on the written communication of the right available under Section 50(1) of the NDPS Act, respondent No.2 Surajmal has signed for himself and for respondent No.1 Parmanand. Respondent No.1 Parmanand has not signed on it at all. He did not give his independent consent. It is only to be presumed that he had authorized respondent No.2 Surajmal to sign on his behalf and convey his consent. Therefore, in our opinion, the right has not been properly communicated to the respondents. The search of the bag of respondent No.1 Parnanand and search of person of the respondents is, therefore, vitiated and resultantly their conviction is also vitiated.

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."

16. The police has neither associated independent witnesses during search, seizure and sealing proceedings on the spot nor consent memo is in conformity with Section 50 of the ND & PS Act. Section 50 of the ND & PS Act is mandatory. Thus, the prosecution has failed to prove the case against the accused under Sections 20 of the ND & PS Act that the charas was recovered from the conscious and exclusive possession of the accused. This Court has no occasion to interfere with the well reasoned judgment of the learned trial Court dated 30.6.2011.

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

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

State of Himachal Pradesh ...Appellant

Versus

Jasmer Singh and another ...Respondents

Criminal Appeal No. 479 of 2008
Judgment reserved on: 21.04.2016
Date of Decision: 29.04.2016

N.D.P.S. Act, 1985- Section 20- Vehicle was intercepted by the police- 10kg. of charas was recovered from the vehicle- accused were tried and acquitted by the trial Court- held, in

appeal that independent witnesses had not supported the prosecution versions- testimonies of official witnesses were contradictory- police official stated that vehicle, accused and contraband were photographed on the spot but photographs produced on record are not the spot photographs- it was nowhere shown that investigation was conducted with the help of search light- no efforts were made to associate independent witnesses- there was no entry regarding the dispatch of NCB forms- testimonies of official witnesses were not reliable- conviction could not have been based on the same- learned Trial Court had rightly appreciated the evidence and had rightly acquitted the accused- appeal dismissed.

(Para-4 to 30)

Cases referred:

Paulmeli and Another versus State of Tamil Nadu (2014) 13 Supreme Court Cases 90
Selvaraj Alias Chinnapaiyan v. State (2015) 2 Supreme Court Cases 662
Kulwinder Singh and another v. State of Punjab, (2015) 6 Supreme Court Cases 674
Mohammed Ankoos and others Versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94

For the appellant	:	Mr. P.M. Negi, Deputy Advocate General.
For the respondents	:	Mr. Manoj Pathak, Advocate.

The following judgment of the Court was delivered:

Vivek Singh Thakur

The respondents have been acquitted by the learned Additional Sessions Judge, Solan, Camp at Nalagarh vide judgment dated 09.04.2008 passed in Sessions Trial No. 13-S/7 of 2007 in case FIR No. 151/2006, Police Station, Parwanoo, District Solan H.P. who were charged sheeted under Section of 20 of Narcotic Drugs and Psychotropic Substances Act, 1985 having found in possession of 10 Kgs. charas.

2. Being aggrieved by acquittal of the respondents, the State has preferred the present appeal.

3. We have heard Mr. P.M. Negi, Deputy Advocate General for the appellant-State on behalf of the State as also Mr. Manoj Pathak, Advocate, learned counsel for the accused.

4. It is the case of prosecution that on 13.12.2006, respondent No. 2 had been driving a white Maruti Car with different/incomplete number plates on front and rear sides which was signalled to be stopped on Solan-Parwanoo road by PW-13 SHO, K.D. Khan, Police Station, Parwanoo during his patrolling duty alongwith PW-11 SI Hoshiar Singh, PW-10 Prem Singh and Constable Gurbax Singh and at that time, respondent No.1 was sitting on co-driver seat in the said car. The respondent-accused had not stopped the car and PW-13 K.D. Khan, SHO had relayed the message, Highway patrol for stopping the said car going towards Parwanoo from Solan Side. On the basis of said message PW-3 HC Sat Pal and PW-4 Constable Dalel Singh who were on Motor Cycle had signalled the car to stop near the Chaki Mour for which the respondents have not responded. Therefore, PW-3 HC Sat Pal and PW-4 Constable Dalel Singh had intercepted the vehicle on their Motor Cycle by parking Motor Cycle in front of the car after chasing it near Tambu Mour. It has been further alleged that beneath the rear seat of the car 10 Kgs. charas had been recovered lying in white sheet(Khesi) in 20 packets of polythene. As per the prosecution story, two independent

witnesses PW-1 Sunder Lal and PW-2 Ram Swarup had also stopped on the spot and after completing paper work of the investigation, the vehicle and accused were taken to the Police Station, Parwanoo.

5. In the present case PW-1 Sunder Lal and PW-2, Ram Swarup are independent witnesses who had not supported the prosecution case and also turned hostile and were cross examined. PW-3 HC Sat Pal, PW-4 Constable Dalel Singh, PW-5 ASI Prem Singh, PW-11 ASI Hoshiar Singh, PW-13 SHO K.D. Khan are the official witnesses, who have been examined as spot witnesses in support of prosecution case. PW-6 Shri Nasib Singh had been examined with respect to delivery of special Report Ex. PW-6/A submitted to the Superintendent of Police and handing over the copy of said report back after endorsement by Additional Superintendent of Police, Solan. PW-7 HHC Dharam Singh had taken the parcel with seal impression 'H' (Ex. P-2) alongwith NCB form, copy of FIR, the sample of seal and a forwarding letter to CFSL, Chandigarh vide RC No. 108/6. PW-8 ASI Yoginder Singh was the Reader to Superintendent of Police, on 14.12.2006 and he has been examined regarding receipt of Special Report, submission of the same to Additional Superintendent of Police as the Superintendent of Police was not present in the office at that time and perusal and signing of the said report Ex. PW-6/A by the Additional Superintendent of Police. PW-9 Sub Inspector Asha Ram has recorded the FIR Ex. PW-4/B after receiving Rukka Ex. PW-4/A from PW-4 Dalel Singh. PW-10 MHC Prem Singh was posted as MHC at Police Station Parwanoo at that time. He has produced copy of DD No. 33(A) Ex. PW-10/A, copy of station diary No. 44(A) Ex. PW-10/B, Copy of certificate Ext. PW-10/C, copy of RC Register Ex. PW-10/D and copies of Malkhana Register Ex PW-10/E and Ex. PW-10/F. He deposed that SHO had also deposited seal impression on cloth, parcels and NCB form. The vehicle which was taken into possession alongwith its key and other documents was also handed over to him. He has further deposed regarding sending of one parcel of contraband to CFSL, Chandigarh vide RC No. 108/2006 which was bearing three impressions of seal 'H' alongwith the NCB form, the sample of the seal, copy of the FIR, recovery memo and docket through PW-7 HHC Dharam Singh. PW-12 ASI Phool Singh has recorded statements of witnesses namely Yoginder, Ganga Ram, Dalel Singh and Constable Nasib Chand has recorded statement under Section 161 Cr.P.C.

6. It is settled law that the statements of hostile witnesses cannot be outrightly discarded but can be relied upon in favour of prosecution or defence after subjecting to close scrutiny.

7. Their Lordships of Hon'ble Supreme Court in **Paulmeli and Another versus State of Tamil Nadu (2014) 13 Supreme Court Cases 90** have held as under:-

> 22. *'In State of U.P. v. Ramesh Prasad Misra 10, this Court held that evidence of a hostile witness would not be totally rejected if spoken in favour of the prosecution or the accused but required to be subjected to close scrutiny and that portion of the evidence which is consistent with the cases of the prosecution or defence can be relied upon. A similar view has been reiterated by this Court in Sarvesh Narain Shukla v. Daroga Singh 11, Subbu Singh v. State 12, C Muniappan v. State of T.N. 13 and Himanshu v. State (NCT of Delhi) 14. Thus, the law can be summarized to the effect that the evidence of a hostile witness cannot be discarded as a whole, and the relevant parts thereof which are admissible in law, can be used by the prosecution or the defence'.*

8. Their Lordships of Hon'ble Supreme Court in **Selvaraj Alias Chinnapaiyan v. State (2015) 2 Supreme Court Cases 662** have held as under:-

19. *'It is settled principle of law that benefit or reasonable doubt is required to be given to the accused only if the reasonable doubt emerges out from the evidence on record. Merely for the reason that the witnesses have turned hostile in their cross-examination, the testimony in examination-in-chief cannot be outright discarded provided the same (statement in examination-in-chief supporting prosecution) is corroborated from the other evidence on record. In other words, if the court funds from the two different statements made by the same accused, only one of the two is believable, and what has been stated in the cross-examination is false, even if the witnesses have turned hostile, the conviction can be recorded believing the testimony given by such witnesses in the examination-in-chief. However, such evidence is required to be examined with great caution'.*

9. It is settled law that the prosecution case cannot be rejected on the ground that independent witnesses have not supported the prosecution case and conviction can be based on the basis of official witnesses, in case the said evidence is trustworthy, credible, unimpeachable and beyond reproach. However, relying upon official witnesses for conviction the said evidence of official witness is to be subjected to close scrutiny with more care and caution keeping in view the personal liberty of a person.

10. Their Lordships of Hon'ble Supreme Court in **Kulwinder Singh and another v. State of Punjab, (2015) 6 Supreme Court Cases 674** have held as under:-

23. *.....'When the evidence of the official witnesses is trustworthy and credible, there is no reason not to rest the conviction on the basis of their evidence'.*

11. It is also settled law that onus to prove the offence upon the prosecution increases with severeness of the punishment.

12. Their Lordships of Hon'ble Supreme Court in **Kulwinder Singh and Another v. State of Punjab, (2015) 6 Supreme Court Cases 674** has held as under:-

16. ... ... It is well-settled principle of criminal jurisprudence that more stringent the punishment, the more heavy is the burden upon the prosecution to prove the offence'.

When the independent witness, PW-1 and DW-2 have not supported the prosecution case and the recovery of the contraband has not been satisfactorily proved, the conviction of the appellant under Section 15 of the NDPSD Act cannot be sustained.

17. ....'Since in the case of NDPS Act the punishment is sever, therefore, strict proof is required for proving the search, seizure and the recovery'.

13. Therefore, strict scrutiny is required, especially, when independent witnesses are hostile and present case is to be tested only on testimony of official witnesses.

14. The evidence in the presence case is to be considered in the light of aforesaid principles laid down by the Hon'ble Apex Court.

15. PW-1 who is a Press Reporter has stated that on 13.12.2006, he was travelling alone whereas the case of the prosecution is that he was travelling alongwith PW-2 Shri Ram Swarup. He has stated that he did not know PW-2 Shri Ram Swarup but PW-2 Ram Swarup was introduced to him by the police. He has stated in examination-in-chief that he had not verified different number on plates of car on the spot, however, in cross examination he had admitted that number on front and rear number plates were found to be different. He has stated that the vehicle was not searched in his presence and the samples

were prepared in the Police Station on 3rd day. He has stated that he has seen car and both accused at the spot. However, in cross-examination, he has stated that no nakka was witnessed by him on the date of occurrence and he had not seen the accused and car on the spot on the said date. He has stated that 'charas' which was shown to him and which was smelt by him was in the shape of sticks. However, he has denied that 20 packets of polythene were recovered during the search. He has denied that seal after use was entrusted to him. He has admitted his signatures on Ex. PW-1/A regarding the identification of the contraband, receipt Ex. PW-1/B and facsimile of the seal Ex. PW-1/C, Memo. Ex. PW-1/D, Memo. PW-1/G and NCB form Ex.PW-1/H but has denied filling up of the same on the spot. However, he has stated that the signatures of accused had already been obtained on the Memo. He has admitted that Ram Swarup was present at the spot. He has stated that he had not signed the documents out of coercion, threat or inducement. In cross examination by the Public Prosecutor he has stated that the charas which was shown to him and which he had smelt was in the shape and sticks and the contraband and two accused were taken to Police Station, Parwanoo. In cross-examination by the learned counsel appearing on behalf of the respondents-accused, he has stated that the vehicle and accused were taken by the police to Police Station Parwanoo and search and recoveries were not effected on the spot and he was called in the Police Station on 3rd day by the police telephonically. He has stated that police had given him a statement being his statement and copy of such statement had also been produced by this witness in the Court. He has further stated that signatures on all documents were taken by the police on 3rd day at Police Station.

16. The PW-2, Ram Swarup has also been declared hostile. He has denied the prosecution story in toto except admitting his signatures on PW-1/A,PW-1/C PW-1/D, PW-1/F and PW-1/G. He has admitted the taking of samples of seal impression 'H' on cloth parcel Ex. PW-1/C in his presence. However, he has denied signing of Memo. Ex. PW-1/D by Mohd. Ahkam and Jasmer Singh in his presence. He has stated that he had gone to Parwanoo to meet his relatives where he was accompanied by PW-4 Constable Dalel Singh to the Police Station who was known to him as Constable Dalel Singh belongs to Nalagarh. He has denied search and recovery in his presence. He has stated that no proceedings had taken place in his presence. He has admitted that photographs of the vehicle were taken by the police in Police Station Parwanoo.

17. Scrutiny of statement of PW-1 Sunder Lal and PW-2 Ram Swarup indicates that no portion of their statements can be relied in favour of the prosecution, rather the statements of these witnesses as a whole cast serious doubt with respect to the recovery of contraband near Tambu More from the vehicle in question being driven by the respondent no.1 in the company of respondent No. 2.

18. In view of declaring independent witnesses hostile, the statements of official witnesses require to be scrutinized carefully, cautiously and minutely. Though, PW-3, PW-4, PW-5, PW-9, PW-11 and PW-13 have supported the prosecution case in examination-in-chief, however, there are material contradictions in the statements which go to the root of the prosecution story.

19. PW-3 HC Sat Pal, PW-4 Constable Dalel Singh, PW-11 ASI Hoshiar Singh and PW-13, K.D. Khan in certain terms stated that the vehicle, accused and contraband were photographed on the spot. Whereas, there are no such photographs on record. There are only four photographs Ex. PW-2/A to PW-2/D on record but the said photographs are not the spot photographs as it is clearly visible in these photographs that the vehicle in question at the time of snapping these photographs has been parked in some parking compound besides the road. There are no photographs of the accused or the contraband on record. Though, PW-13 SHO K.D. Khan had tried to justify non-production of spot

photographs by stating that remaining photographs had been washed but in the cross-examination, he has admitted that nothing has been mentioned in the challan that few photographs, taken on the spot, had been washed. PW-11 has stated that photographs of 'charas' were also taken inside the car. He has further stated that the photographs of the accused were also taken alongwith car whereas, PW-13 has stated that the photographs were not taken alongwith the car on the spot. However, he has claimed that photographs were taken separately at the Police Station. In cross- examination, PW-13 had claimed that photographs Ex. PW-2/A to Ex. PW-2/D were taken on the spot whereas Ex. PW-2/A to Ex. PW-2/D are of a place which cannot be said to be a highway from any angle.

20. In Ruka Ex.PW-4/A, it has been mentioned that photographs were taken with personal camera whereas, PW-11, Hoshiar Singh had stated that photographs were taken with official camera.

21. The day of occurrence is 13.12.2006 and in the month of December, it gets dark after 6.00 PM. The alleged recovery on spot is stated to be at about 6.00 PM. As per PW-3, Sat Pal the police was on the spot for 2-3 hours. It has also been claimed by PW-13 that at the spot search was conducted with the help of search light and with the help of head lights of the vehicle. However, it is admitted that he had nowhere reflected in the investigation and challan that help of search light or other light was taken for conducting the proceedings on the spot.

22. PW-3 Sat Pal, PW-4 Dalel Singh and PW-5, Prem Raj are silent about the efforts made by the police party to join the independent witnesses available near the spot. Whereas, PW-11 has stated that he was directed by the SHO PW-13 by way of Hukamnama to summon independent witnesses from Khokha and Ganghut which was about 2-4 metres away from the spot. As per him, none was found in the said two places and he had reported the same to the PW-13 K.D. Khan. However, after examining the documents on record, this witness had failed to show any Hukamnama or any endorsement on any such Hukamnama on his report or any report submitted by him.

23. PW-13 has stated about issuance of Hukamnama to summon Chowkidar of Ganghut or a person from tea stall through PW-11, in examination-in-chief, however, no such Hukamnama was placed on record. In cross examination, he had stated that he had not verified about attendance of the Chowkidar of PWD store. Absence of Hukamnama and report on record shakes credibility of prosecution story

24. Further, PW-4 constable Dalel Singh was sent to fetch weight and scale from Chaki Mour from one Shri Ganga Ram but interestingly, the said Ganga Ram had not been asked to join the investigation as independent witness. PW-4 has stated that he did not know that shop of Ganga Ram is juice bar. He has further stated that he had not read the board of the Shop but stated that Ganga Ram was vegetable vender.

25. PW-10 had claimed sending forwarding letter to CFSL and keeping copy of the same letter but he had failed to show in record the forwarding letter issued to CFSL, Chandigarh. In cross examination he had admitted that in entry No. 473 of the Malkhana Register pertaining to the FIR, there was no reference of NCB form having been tendered. He had admitted that six more FIRs had been registered in the month of December, 2006 after 13.12.2006 but the entry made in the Malkhana register pertaining to this FIR is the last entry of the Malkhana register for the year, 2006. He had admitted that 50 blank pages were available after last entry. However, the entries related to the subsequent FIRs were not in the register. This witness has tried to give explanation that new Malkhana Register was started in the year, 2007. However, there is no explanation that why entries pertaining

to case property of six FIRs lodged subsequent to FIR in the present case in the year 2006, were not made in the register in running use since 1998 and under which circumstances entries related to the FIRs of 2006 were made in the Register started for the year, 2007. It renders act of police suspicious and probability of fictitious entry cannot be ruled out. PW-10 has also admitted that the signatures of the persons who had deposited articles in Malkhana have not been shown in the column of Malkhana Register. PW-10 has also admitted that all entries No. 473, 474 and 475 were made at the same time which are entries related to case property and personal search of the accused persons.

26. It is evident from the aforesaid discussion that the statements of official witnesses cannot be treated as cogent, reliable, and credible and evidence of the official witnesses suffers from serious infirmity. Therefore, the prosecution has failed to prove the guilt of the accused-respondent beyond reasonable doubt.

27. It is a settled principle of law that acquittal leads to presumption of innocence in favour of an accused. To dislodge the same, onus heavily lies upon the prosecution. Having considered the material on record, we are of the considered view that prosecution has failed to establish essential ingredients so required to constitute the charged offence.

28. For the reasons stated hereinabove, it would be evident that in the present case the evidence of the official witnesses is not trustworthy, credible and sufficient to prove the guilt of the respondent-accused and sufficient to convict the respondents-accused.

29. Their Lordships of Hon'ble Supreme Court in **Mohammed Ankoos and others Versus Public Prosecutor, High Court of Andhra Pradesh, Hyderabad (2010) 1 SCC 94** have held as under:-

> 15. This Court has, time and again, dealt with the scope of exercise of power by the Appellate Court against judgment of acquittal under Sections 378 and 386, Cr.P.C. It has been repeatedly held that if two views are possible, the Appellate Court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that Appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State Of Uttar Pradesh1 shall suffice wherein this Court considered a long line of cases and held thus :
>
> "69. The following principles emerge from the cases above:
>
> 1. The appellate court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its power of reviewing evidence is wide and the appellate court can reappreciate the entire evidence on record. It can review the trial court's conclusion with respect to both facts and law.
>
> 2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when (2008) 10 SCC 450 he was before the trial court. The trial court's acquittal bolsters the presumption that he is innocent.
>
> 3. Due or proper weight and consideration must be given to the trial court's decision. This is especially true when a witness' credibility is at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial court was wrong.

70. In light of the above, the High Court and other appellate courts should follow the well-settled principles crystallised by number of judgments if it is going to overrule or otherwise disturb the trial court's acquittal:

1. The appellate court may only overrule or otherwise disturb the trial court's acquittal if it has "very substantial and compelling reasons" for doing so. A number of instances arise in which the appellate court would have "very substantial and compelling reasons" to discard the trial court's decision. "Very substantial and compelling reasons" exist when:

(i) The trial court's conclusion with regard to the facts is palpably wrong;

(ii) The trial court's decision was based on an erroneous view of law;

(iii) The trial court's judgment is likely to result in "grave miscarriage of justice";

(iv) The entire approach of the trial court in dealing with the evidence was patently illegal;

(v) The trial court's judgment was manifestly unjust and unreasonable;

(vi) The trial court has ignored the evidence or misread the material evidence or has ignored material documents like dying declarations/report of the ballistic expert, etc.

(vii) This list is intended to be illustrative, not exhaustive.

2. The appellate court must always give proper weight and consideration to the findings of the trial court.

3. If two reasonable views can be reached--one that leads to acquittal, the other to conviction--the High Courts/appellate courts must rule in favour of the accused."

30. The accused have been acquitted by the trial court. From perusal and scrutiny of evidence, it cannot be said that the learned trial court has not appreciated the evidence correctly and completely and acquittal of the accused has resulted into travesty of justice or has caused mis-carriage of justice. After considering arguments of respective counsel for the parties and minutely examining the testimonies of the witnesses and other documentary evidence placed on record, we are of the considered view that no case for interference is made out.

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

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

Sumeer Nath .....Petitioner

Versus

Hari Singh and another .....Respondents

CMPMO No. 463/2015
Reserved on: April 19, 2016
Decided on: April 26, 2016

Code of Civil Procedure, 1908- Section 114- Order 6 Rule 17- Application was moved by the defendant No. 2 for amendment of written statement which was allowed by the trial Court- it was pleaded in the application that defendant No. 2 came to know that neither K nor present plaintiff was the owner of the suit premises- they were falsely claiming themselves to be the owners- held in revision that issues were framed by the trial court on 4.6.2012- defendant No. 2 wants to change the entire character of written statement- he had recognized plaintiff as landlord- he was estopped from changing his stance – he cannot be permitted to deny the title of the plaintiff- application was wrongly allowed by the trial court- revision accepted- application dismissed. (Para-6 and 7)

For the petitioner : Mr. K.D. Sood, Senior Advocate with Mr. Sanjeev Sood, Advocate.

For the respondents : Mr. Neeraj Gupta, Advocate, for respondent No. 2.

The following judgment of the Court was delivered:

Rajiv Sharma, Judge (oral**)**

This petition is instituted against Order dated 5.8.2015 rendered by the learned Civil Judge (Junior Division) (5), Shimla in an application under Order 6 Rule 17 CPC in main Case No. 16/1 of 2010.

2. "Key facts" necessary for the adjudication of the present petition are that the petitioner-plaintiff (hereinafter referred to as 'plaintiff' for convenience sake) filed a suit for mandatory injunction against the respondents-defendants (hereinafter referred to as 'defendants' for convenience sake). As per averments made in the plaint, defendant No. 1, was working as part time caretaker of the plaintiff of the properties of Late Kedar Nath. He was licensee in the premises. His licence was revoked. Defendant No.1 had sublet and illegally inducted defendant No. 2 Shri Mool Raj in a portion of the premises. Suit was contested by defendant No. 2 by filing written statement on 21.11.2011. Replication was also filed.

3. Issues were framed by the learned trial Court on 4.6.2012. Plaintiff had led evidence and examined three witnesses. Defendant No. 2 moved an application under Order 6 Rule 17 CPC for amendment of the written statement on 25.6.2014. Application was contested by the plaintiff by filing reply. Rejoinder was also filed by defendant No. 2. Learned Civil Judge (Junior Division) (5), Shimla, allowed the application on 5.8.2015. Hence, this petition.

4. According to the averments made in the application under Order 6 Rule 17 CPC, defendant No. 2 came to know that neither Shri Kedar Nath nor the present plaintiff was the owner of the suit premises. Defendant No. 2 came to know that as per the order of Hon'ble High Court of Civil Judicature for the state of Punjab at Chandigarh on 20.7.1956 passed in Civil Miscellaneous Petition No. 873/C-56 in RFA No. 213 of 1953 'Dale View' including the suit premises was given to one Smt. Shiv Devi widow of Lala Dina Nath as right of her maintenance Mutation was also attested in favour of Shiv Devi. He supplied the copy of the judgment to his counsel. According to him, Shiv Devi was not given limited right of maintenance over the property in question. As a matter of fact, Shiv Devi was held as owner and Shri Kedar Nath himself was party to that RFA and compromised the matter with Smt. Shiv Devi before the Hon'ble High Court and admitted/accepted Smt. Shiv Devi as owner of 'Dale View'. Shiv Devi executed a Will in favour of Shri Ran Vikram Singh and on

the basis of said Will, Shri Ran Vikram Singh also obtained probate in the year 1996. He has pleaded in his written statement that he was in possession of the premises in the capacity of tenant, whereas after obtaining the Order dated 20.7.1956 of the Punjab & Haryana High Court, he came to know that neither Kedan Nath nor the plaintiff was owner of the suit premises. They were falsely claiming themselves to be the owners of the premises. They have no right over the suit property. He wanted to replace the words 'tenant' with the word 'independently'. He further wanted to substitute the phrase 'rent through money order' with the phase 'however, due to misrepresentation and concealment of facts by Kedan Nath". Reply was filed by the plaintiff. It was denied that the defendant No. 2 is not a sublettee or not in unauthorised possession of the premises. Application was moved to deposit rent by defendant No. 2. It was denied that the premises were not given to Shiv Devi towards maintenance. It was denied that neither Kedan Nath nor the plaintiff was owner of the suit property. Rejoinder was also filed by defendant No. 2.

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

6. Issues were framed by the learned trial Court on 4.6.2012. Plaintiff has led his evidence by examining three witnesses. Case of the plaintiff, precisely, is that defendant No. 2 was a sublettee and was in unauthorised occupation of the suit premises. However, fact of the matter is that now the defendant No. 2 by filing application under Order 6 Rule 17 CPC wants to change the entire character of the written statement. He is claiming himself now to be independently in possession of the suit property instead of being a tenant/sublettee. He has moved an application to deposit the rent. Thus, he recognized plaintiff as landlord. He was estopped from changing his stance as per Section 118 of the Indian Evidence Act. Application for amendment was filed belatedly. It can not be believed that he did not know about the Order dated 20.7.1956 rendered by the High Court of Punjab & Haryana and came to know about it in the second week of June, 2014. He can not be permitted to use expression 'tenancy' with 'possession'. Defendant No.2 can not be permitted to take stance that due to misrepresentation by the plaintiff, he agreed to pay rent. Defendant No.2 can not also be permitted to deny the title of the plaintiff. He ought to have pleaded that despite due diligence, he could not discover the alleged facts, necessitating the amendment of the written statement.

7. Accordingly, the petition is allowed. Order dated 5.8.2015 rendered by the learned Civil Judge (Junior Division) (5), Shimla in an application under Order 6 Rule 17 CPC in Case No. 16/1 of 2010 is set aside.

Pending applications, if any, are disposed of. No order as to costs.

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BEFORE HON'BLE MR. JUSTICE RAJIV SHARMA, J. AND HON'BLE MR. JUSTICE CHANDER BHUSAN BAROWALIA, J.

Anil Kumar ...Appellant

Versus

State of Himachal Pradesh ...Respondent

Cr. Appeal No. 275/2015
with Cr. Appeals No. 364/2015 and 394/2015
Reserved on: April 27, 2016
Decided on: April 29, 2016

Indian Penal Code, 1860- Section 302 and 201 read with Section 34- PW-2 had rented out a hotel along with three rooms to accused Sunita who was running a Dhaba- accused N, A and S were working in Dhaba as workers- accused B son of accused Sunita was residing with her- M was frequently visiting the Dhaba of accused Sunita- workers did not like it- M brought a gas cylinder to Dhaba – accused N, S and A assaulted M- M died at the spot- accused B, S and Sunita tried to remove the blood stains from the wall- body was taken from the Dhaba and was disposed of- subsequently dead body was recovered- FIR was registered- accused were tried and convicted by the trial Court- held, in appeal that the motive projected by the prosecution that accused did not like the visit of M is not believable as they were simply workers of accused Sunita- accused took up a defence that M had entered into a room of Sunita and had tried to outrage her modesty- she raised alarm on which other accused came and gave fist blows to the deceased M- PW-10 did not support the prosecution version but supported the version of the accused – deceased was found to be drunk having 111.52 mg% alcohol in his blood- recovery of gas cylinder was also not proved- call details records were not proved in accordance with the Section 65-B of Indian Evidence Act- room was not sealed immediately and possibility of other people entering into the room cannot be ruled out- accused had a right of private defence to protect the modesty of accused Sunita- prosecution case was not proved beyond reasonable doubt- appeal accepted- accused acquitted. (Para-34 to 51)

Cases referred:

Yeshwant Rao v. State of Madhya Pradesh AIR 1992 SC 1683
Raghavan Achari and Njoonjappan vs. State of Kerala AIR 1993 SC 203
State of Orissa v. Nirupama Panda, 1989 Crl. LJ 621
Badan Nath vs. State of Rajasthan 1999 Cr. LJ 2268
Bhadar Ram vs. State of Rajasthan 2000 Cr. LJ 1174

For the Appellant(s)	:	Mr. Y.P.S. Dhaulta, Mr. Virender Singh Rathore and Mr. Virbahadur Verma, Advocates, in the respective appeals.
For the Respondent	:	Mr. Parmod Thakur, Additional Advocate General, in all the appeals.

The following judgment of the Court was delivered:

Justice Rajiv Sharma, Judge.

Since all the three appeals have been instituted against one and the same judgment, and common questions of law and facts are involved in all these appeals, same were taken up together and are being disposed of vide this common judgment.

2. The present appeals have been instituted against Judgment/Order of conviction dated 22.12.2014/24.12.2014 rendered by the learned Additional Sessions Judge, Ghumarwin camp at Bilaspur in Sessions Trial No. 14/7 of 2012, whereby appellants-accused (hereinafter referred to as 'accused' for convenience sake) alongwith Sunita Chandel, Bhaskar Chandel and Sanju, who were charged with and tried for offences under Sections 302 and 201 read with Section 34 IPC, have been convicted and sentenced to life imprisonment and to pay a fine of Rs.5,000/- each, and in default of payment of fine, to further undergo simple imprisonment for two months, for commission of offence under Section 302 read with Section 34 IPC. They have also been sentenced to undergo rigorous imprisonment for four years and to pay a fine of Rs.2,000/- each, and in default of payment of fine, to further undergo simple imprisonment for one month. Accused Sunita Chandel was

sentenced to similar sentence. Accused Bhaskar Chandel was sentenced only under Section 201 read with Section 34 IPC to undergo rigorous imprisonment for a period of four years and to pay a fine of Rs.2,000/-, in default of payment of fine, to further undergo simple imprisonment, for one month. Accused Sanju was declared proclaimed offender.

3. Case of the prosecution, in a nutshell, is that one Ram Saran (PW-2) was the owner of a building situate at Kallar on National Highway-21 who had rented out the hotel alongwith three rooms to accused Sunita Chandel, who was running a *Dhaba* by the name of Ashok *Dhaba*. In three rooms, she had her residence. Accused Naresh Kumar, Suresh Kumar, Anil Kumar and Sanju were working in the Ashok *Dhaba* as workers of accused Sunita Chandel. Accused Bhaskar Chandel, son of accused Sunita Chandel, was residing with her. Manjeet Singh, who was working as an agent in the Life Insurance Corporation, had come in contact with accused Sunita Chandel. He had been frequently visiting her *Dhaba* at Kallar. Naresh Kumar @ Ashok Kumar, Anil Kumar and Suresh, who were working in the *Dhaba,* did not like it. They made a plan to teach lesson to Manjeet. Sunita asked Manjeet to bring a gas cylinder to her *Dhaba*. Manjeet Singh borrowed a gas cylinder from Ateh Mohd on 18.2.2012. He reached the *Dhaba* at Kallar at around 6/6.30 PM in his vehicle. Manjeet went to the *Dhaba* and had gone downwards through the stairs to the bed room of Sunita Chandel. At that time, Sunita was alone in her bed room. Seeing Manjeet Singh going into the bed room of accused Sunita Chandel, accused namely Naresh @ Ashok Kumar, Suresh Kumar and Anil Kumar also went into the room and they all assaulted Manjeet Singh with fist and kick blows. Manjeet Singh at that time was drunk so he was unable to defend himself. Due to the beatings of accused, Manjeet Singh died on the spot itself. Beatings were witnessed by PW-38 Raj Kumar. However, he fled from the spot. Due to the beatings, Manjeet Singh had died on the spot and blood had been splashed all around the room. Blood stains were tried to be removed by accused Bhaskar, Sanju and Sunita Chandel from the walls. However blood stains remained on the idol of goddess *Kali* kept at one side of room. Dead body after being wrapped in a mat and the legs being tied with a bed-sheet, was kept out in the verandah. Blood stains in the verandah were cleaned by accused. Accused Ashok Kumar, who was a driver by profession, brought the vehicle of Manjeet Singh, in front of the *Dhaba* and the remaining accused alongwith Bhaskar and Sanju put the dead body of Manjeet Singh in the vehicle. As per the directions of accused Sunita Chandel, dead body was taken by accused Ashok Kumar and Anil Kumar in the vehicle of deceased towards Dehar. A bag containing blood stained clothes and a shoe was also kept in the vehicle. The vehicle was taken to the cliff near river Sutlej. From there the vehicle was thrown by accused Anil Kumar into river Sutlej while accused Ashok Kumar had thrown the mobile phone of deceased Manjeet Singh into the river. It could not be recovered. After throwing the vehicle into the river alongwith the dead body of Manjeet Singh, accused Anil and Ashok Kumar through the mobile No. 86796-00117 of Suresh Kumar called taxi of Sanjay Kumar bearing No. HP-01B-0617 to Barmana. From Barmana, Sanjay Kumar had taken both the accused to Kallar and dropped them there. On the way at the petrol pump of M/s Ram Lal Anand and Sons, petrol of Rs.500/- was filled and money was paid by accused Ashok Kumar. On 19.2.2012, ASI Gulab Singh (PW-9) Incharge Police Post, Dehar had received information that tyres of small vehicle were visible in river Sutlej at Dehar. Report Ext. PW-9/A was entered in the Daily Station Diary and ASI Gulab Singh had gone to the spot for verification of the report. He found a white coloured vehicle lying in the river Sutlej. Information was given to Police Station, Sundernagar. Crane was called. Vehicle was taken out from the river. It was found to be an Alto Car bearing registration No. HP-69A-4444. A dead body was found inside it. Both the legs were tied with a bed sheet. Injuries were also present on the head and other parts of the body. On inquiry from Sahil, PW-18, the car was found to be of his father Manjeet Singh. On being informed, Sahil, Surjeet and Vikrant had gone to the spot. Sahil identified the dead body of his father. Statement of Sahil under

Section 154 CrPC was recorded by Inspector Jagdish Chand (PW-39) and forwarded to Police Station, Sundernagar. FIR Ext. PW-27/A was registered. Inspector Jagdish Chand clicked photographs of dead body and the spot vide Ext. PW-39/A-1 to Ext. PW-39/A-18. He prepared site plan Ext. PW-39/B. Post-mortem examination was got conducted. According to the final opinion, cause of death was opined to be head trauma and *Hypovolemic* shock. On 20.2.2012, Inspector Jagdish Chand took into possession the clothes of the deceased i.e. inner Ext. P6, shirt Ext. P7 and pullover Ext. P8 vide seizure memo Ext. PW-4/A. House of accused Sunita was searched by inspector Jagdish Chand in the presence of Ram Saran (PW-2) and Balak Ram (PW-30). On 25.2.2012, accused Anil Kumar and Naresh Kumar made disclosure statements Ext. PW-8/A and Ext. PW-8/B and got the spot identified at Dehar from where they had thrown down the vehicle alongwith dead body. Empty gas cylinder was produced by Sunita Chandel. It was seized vide seizure memo Ext. PW-11/A. It was identified by Ateh Mohd. Anil Kumar made a disclosure statement Ext. PW-11/B. In consequence thereof, he got recovered pants Ext. P19, which was seized vide seizure memo Ext. PW-11/C. On 27.2.2012 during interrogation accused Naresh Kumar disclosed that currency notes to the tune of Rs.3,000/- were found in the dash board of the vehicle bearing No. HP-69A-4444. Accused Bhaskar also produced his pants Ext. P9 and shirt Ext. P10, which were seized vide seizure memo Ext. PW-4/B. On 29.2.2012, accused Suresh Kumar made a disclosure statement Ext. PW-4/D, in consequence thereof he got recovered two vests Ext. P20 and Ext. P21 which were seized vide Ext. PW-11/E. Spot map was prepared. Demarcation of the room was also carried out. Statement of Raj Kumar under Section 164 CrPC was got recorded through Anish Garg, the then Judicial Magistrate 1st Class, Sundernagar. Case property was deposited in the Malkhana and same was sent to RFSL Gutkar. Matter was investigated and *Challan* was put up in the Court after completing all codal formalities.

4. Prosecution has examined as many as forty one witnesses to prove its case against the accused. Accused were also examined under Section 313 CrPC. Accused Sunita Chandel claimed that a well built man having beard came into her room during the night time and sat on her bed where she was resting alone and started molesting her voluntarily by pressing her breast and thereafter tried to pull the string of her Salwar with an intention to rape her and in order to rescue herself, she gave a slap on his face. She also raised alarm. On her shrieks, workmen who were working in the hotel and on the top floor also came downward alongwith numerous persons who were taking meals at that time. They rescued her from his clutches by giving him fist and kick blows and dragged him outside the room. Statements of other accused were also recorded under Section 313 CrPC. According to them, they heard cries of Sunita Chandel and went to her room where several other persons had also gathered, who were giving beatings to some unknown person. Accused were convicted and sentenced, as noticed by us above. Hence, these appeals.

5. Mr. Y.P.S. Dhaulta, Mr. Virender Singh Rathore and Mr. Virbahadur Verma, Advocates, for the respective accused, have vehemently argued that the prosecution has failed to prove its case against the accused.

6. Mr. Parmod Thakur, Additional Advocate General, has supported the Judgment/Order of learned trial Court dated 22.12.2014/24.12.2014.

7. We have heard the learned counsel for the parties and gone through the judgment and record very carefully.

8. PW-1 Surjit Singh testified that Manjeet was his real brother. He owned vehicle bearing registration No. HP-69A-4444. On 19.2.2012, his nephew Sahil disclosed to him that vehicle of his father had fallen into water at Dehar into river Sutlej. He went to

Dehar. He found vehicle in the water. Said vehicle was of his brother. Dead body of his brother was lying inside the said vehicle. Vehicle was taken into possession by the police. In his cross-examination, he has admitted that his statement was recorded on 19.2.2012. He had disclosed before the police that the vehicle was taken out of the water with the help of a crane. (Confronted with his statement, Mark D-1, wherein it is not so recorded). He disclosed to the police that dead body was taken out from the vehicle by breaking window pane. (Again confronted with his statement, Mark D-1, wherein it is not so recorded).

9. PW-3 Ankush Kumar deposed that he was running a welding shop at Dehar. On 21.2.2012, they were playing cricket. Cricket ball went into the water where the vehicle had fallen in the river. Vehicle was bearing No. HP-69A-4444. Police was also on the spot. Crane was called. Vehicle was taken out of the water. Dead body was taken out from the vehicle.

10. PW-4 ASI Ram Lal deposed that on 20.2.2012, he alongwith ASI Jasbir and Inspector Jagdish Chand was present at the Mortuary at Sundernagar. SHO Jagdish Chand removed clothes from the dead body of Manjeet Singh in his presence. Clothes were, one sweater, one shirt having checks and one cream coloured inner. Dead body was checked. Clothes were taken and parcelled. Post mortem examination was conducted. He deposited parcels as well as viscera with the MHC Anil Kumar. On 29.2.2012, accused Bhaskar Chandel, while in police custody, disclosed that the clothes which he was wearing were also worn by him at the time of occurrence. Clothes were taken into possession. On 29.2.2012, accused Suresh Kumar, while in police custody, made a disclosure statement in his presence as well as in the presence of HC Chaman Lal that he had concealed his *Banian* as well as that of Bhaskar Chandel at Kallar. Disclosure statement Ext. PW-4/D was recorded. In his cross-examination, he has admitted that no witnesses of the locality were called at the time of recording statement as well as making recovery.

11. PW-5 ASI Jasbir Singh deposed that on 21.2.2012, he visited the spot of occurrence at place Kallar with the team of Forensic Science, Gutkar. Key of the room was taken from Balak Ram. Room was opened. Team of Forensic Science visited the room. Case property was taken into possession. On 29.2.2012, Bhaskar disclosed that the clothes worn by him were also worn on the day of occurrence. Clothes worn by Bhaskar were taken into possession vide Ext. PW-4/B in his presence.

12. PW-6 HC Chaman Lal deposed that on 24.2.2012, SHO was conducting investigation in this case. Accused Sunita Chandel was in police custody. She disclosed that the clothes worn by her on that day were also worn at the time of occurrence. SHO asked accused Sunita Chandel to produce the clothes worn by her. LC Leela Devi was present who asked Sunita Chandel to change her clothes. She was taken to bath room by her. Sunita Chandel produced her clothes to the police i.e. *Salwar* and *Kameez*. These were taken into possession vide seizure memo Ext. PW-6/A. These were parcelled and sealed. On 29.2.2012, accused Suresh Kumar while in police custody disclosed that the *Banians* worn by him and Bhaskar on the day of occurrence, were hidden by him at Kallar and he was having exclusive knowledge about that and he could get the same recovered. Disclosure statement Ext. PW-4/D was recorded. He signed the same. In his cross-examination, he has admitted that Sunita Chandel had already produced her clothes. She was in police custody for the last three days. He could not say that Sunita Chandel was already informed to bring the clothes for changing. He denied that the clothes Exts. P16 to Ext. P17 were not the clothes which were worn by Sunita Chandel on the day of alleged occurrence.

13. PW-8 Om Parkash Modgil deposed that he was called by the police to Police Post Dehar. Two boys were in the police custody. One was Anil Kumar. He did not know the

other boy. He disclosed that they had firstly stopped the vehicle at *Satya Narain Mandir* Dehar and then brake was applied. Thereafter they had seen the site. Hand brake was removed and vehicle alongwith dead body was pushed down the river by them. They led him and police to the spot. Police prepared spot map. He signed the same. Thereafter, they came to the Police Station. Accused Anil Kumar disclosed that he had thrown mobile into river Sutlej from a place at a distance of 10 feet from the vehicle. He had also thrown blood stained clothes of deceased and other clothes into the river.

14. PW-9 ASI Gulab Singh testified that he proceeded to the spot alongwith other police officials. He also found a vehicle of white colour lying in the water. Its tyres were visible. He informed SHO Police Station, Sundernagar. He sent crane to the spot and also came at the spot. Vehicle was taken out from the water with the help of crane. Vehicle was bearing registration No. HP-69A-4444. Dead body was lying inside the vehicle. Both the legs of dead body were tied with bed sheet. Injury was on the head and other parts of the body. On inquiry, vehicle was found to be of Manjeet Singh. Dead body was identified by Sahil, son of deceased Manjeet Singh. SHO Police Station Sundernagar brought accused Anil Kumar and Naresh Kumar to Police Post Dehar. They were interrogated by SHO. They disclosed that they could lead them to the place from where vehicle bearing No. HP-69A-4444 alongwith dead body was thrown into river Sutlej.

15. PW-10 Kumari Indu is the daughter of accused Sunita Chandel. She was a student of 10+2. Sunita Chandel was her mother. She was running a *Dhaba* at Kallar. Her father was living separately since last five years. Accused Bhaskar was her brother. They were living with their mother. In February 2012, she did not see anybody visiting their room. She did not see anybody sitting in the room of her mother. She also did not see anybody going away from the room of her mother. She was declared hostile and cross-examined by the learned Public Prosecutor. She did not know whether on 18.2.2012, Manjeet Singh came to the room of her mother. Self stated that she saw some person in the room of her mother. She did not know the name of said person was Manjeet Singh. She did not know Manjeet Singh was working in LIC. She denied that Manjeet Singh used to visit earlier in connection with LIC work. She denied that on 18.2.2012, Manjeet Singh straightway went inside the room of her mother. She denied that room was bolted from inside by her mother. She also denied that the room was bolted from outside. She denied that it was opened by her mother. She denied that when she was going to bathroom, she saw Manjeet Singh sitting on the sofa and her mother was sitting on the bed. Volunteered that he was molesting her mother. Her mother slapped him. She denied that thereafter she straightway went to her room. She denied that she heard shrieks of Manjeet Singh. Volunteered that her mother was crying. On this she made hue and cry and workers came in the room of her mother. She did not remember the names of the persons. She did not know since when they were working in the hotel. In her cross-examination, she has admitted that a large number of people used to park their vehicles outside the *Dhaba* and used to take meals in the *Dhaba*. She admitted that when she came out of room, she found one person was outraging modesty of her mother. She admitted that said person was trying to pull the string of her mother. She admitted that her mother was resisting his attack and was raising alarm. Workers came down alongwith other persons and gathered there. They gave fist and kick blows to the person who was dragged out of the room. He was given beatings outside the room by these persons. Thereafter, she went to her room and bolted the door. After half an hour, when there was no noise, her mother came to her room and disclosed the incident to her and told that said person was trying to outrage her modesty.

16. PW-11 Satish Kumar deposed that he was running a mobile phone shop at Kallar. Adjoining to his shop, a *Dhaba* was situated. It belonged to Naresh Kumar. Sunita,

Bhaskar, Anil and Suresh were also there. He did not remember the number of the SIM. He could not recollect the ID. On 26.2.2012 accused Anil was produced by police at the hotel. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has admitted that he had given SIM No. 86796-94616 to Sunita Chandel. He denied that ID proof of Ashok Kumar was with respect to this SIM. He admitted that on 18.2.2012, accused Sunita Chandel, Ashok, Suresh, Sanju, Anil and Bhaskar were in the said *Dhaba*. He admitted that on 26.2.2012, accused Sunita Chandel produced one Gas Cylinder which was kept in the room, before the police. He admitted that accused Anil Kumar disclosed before the police that he could get recovered his own pants hidden by him. Ext. PW-11/B was prepared and signed by him. He admitted that accused Anil Kumar led them to bathroom in first floor and got recovered his pants out of other clothes kept in the said bathroom. Pants were sealed with six seals of 'Y' and recovery memo Ext. PW-11/C was prepared, which was signed by him. On 29.2.2012, accused Suresh was produced by the police at *Dhaba*. He led them to place situate downwards *Dhaba* near *Nalla*. He got recovered two vests (*Banian*s) hidden near check dam. Vests were parcelled and sealed. Recovery memo Ext. PW-11/E was prepared. Sant Ram was having key of the main gate of the Hotel. After opening the gate, Sunita Chandel led them to her room. She disclosed that Manjeet came to her room and a fight took place with him.

17. PW-12 Nand Lal deposed that accused Sunita produced a cylinder before the Police from the room. Memo was prepared. Accused Anil on 26.2.2012 disclosed that he had kept his pants in the bathroom. These pants were taken into possession.

18. PW-13 Sant Ram deposed that he was running a cloth shop at Kallar. On 29.2.2012 police came to the spot. Accused Sunita and Suresh were with them. Suresh was taken to a *Nalla* by the police. He did not go with them. He was again called by the police. Police took them to *Nalla*. Accused Suresh got recovered two vests from a place nearby check dam. Memo Ext. PW-11/E was prepared which was signed by him.

19. PW-14 Sher Ali deposed that on 18.2.2012, at abut 3 PM, Manjeet came to his shop. He asked whether he had a gas cylinder. He was having one gas cylinder. He remained sitting in his shop for some time.

20. PW-15 Ateh Mohd. deposed that Manjeet Singh made a telephone call to him. He required gas cylinder. He came in his car to his place. He demanded cylinder from him assuring that he would return the same to him next morning. He handed over one gas cylinder of Indane Company.

21. PW-16 Sanjay Kumar deposed that he was a taxi driver and plying taxi at Kandraur. He did not know accused Suresh Kumar. He was not related to him. Nothing had happened in his presence. He was declared hostile and cross-examined by the learned Public Prosecutor. He denied that he was called by the police at Sundernagar on 26.2.2012. He denied that in the intervening night of 18 and 19.2.2012, a call from Suresh came on his mobile from Mobile No. 86796-00117. His mobile number was 98168-25343. He denied that on that day Suresh did not speak to him but Ashok had talked to him. He denied that Ashok told him that they were on the road at Barmana and asked him to take them to Kallar. He denied that thereafter he went to Barmana where Anil and Suresh met him. He denied that they came to Bilaspur via Chandpur and filled petrol for Rs.500/- and bill was paid by Ashok Kumar who was sitting in front seat of the vehicle. He denied that he dropped them at Kallar.

22. PW-17 Pankaj Kumar deposed that on the intervening night of 18 and 19.2.2012, he alongwith Vinay Kumar was on duty at petrol pump. One vehicle bearing No.

HP-01B-0617 came at about 3/3.30 AM at petrol pump for filling fuel. Petrol worth Rs.500/- was filled and money was paid by driver. He did not know how many persons were sitting in the vehicle. He did not identify them. He did not even identify them in the court. He was declared hostile and cross-examined by the learned Public Prosecutor. In his cross-examination, he has admitted that he identified the person who had given money. He admitted that he identified the person because of the reason that in the night time, less number of persons visit petrol pump for filling petrol. No receipt was taken by them. He denied that he disclosed to the police that two other persons were sitting in the vehicle besides driver. He could not identify the accused Ashok Kumar in the court. He denied that Ashok Kumar was present in the Court. In the cross-examination by the learned defence counsel, he admitted that he did not know by whom payment of petrol was made and how much fuel was filled and in which vehicle. He admitted that bill is necessarily issued after filling the fuel. He also admitted that entry is made in the register about filling of fuel. He admitted that police came to him and asked him that he had to state about filling of petrol by the aforesaid vehicle. He did not know whether the said vehicle came to the petrol pump at night or not. He also admitted that he named the accused persons at the instance of the police.

23. PW-18 Sahil deposed that he was a student. Deceased Manjeet Singh was his father. On 18.2.2012 Manjeet Singh had come to Bilaspur. He had talked to him on his mobile phone at about 4/4.30 PM. He disclosed to him that he was with Sher Ali and would be going to attend a marriage so he could return back home late. Thereafter he could not contact his father over the phone. Next evening, two police officials had come to his house and asked whether car No. HP-69A-4444 belonged to them. He answered in the affirmative. It was informed that the vehicle had been found in river Sutlej at Dehar. When they reached the spot, vehicle had been taken out. Dead body was shown to him. He identified it to be of his father. Body was bearing a cut on the left side of forehead and both the legs had been tied with a bed sheet. His statement Ext. PW-18/A was recorded under Section 154 CrPC. In his cross-examination, he has admitted that the place was quite steep and goes downwards upto the river. He admitted that on the top there was a ground and many people parked their vehicles in that ground. It was possible that while reversing a vehicle it can fall into river. Volunteered that legs of his father were tied. He could not say in which areas, his father worked as LIC agent.

24. PW-19 Mohinder Singh deposed that he was going back home in the evening at about 8/8.30 PM on 18.2.2012. On the way he saw vehicle bearing No. HP-69A-4444 parked. In his cross-examination, he has admitted that he could not tell the registration numbers of other vehicles. He had written number of vehicle on his left hand. From his tea stall, vehicle had been parked at a distance of 40-50 metres.

25. PW-22 Tek Chand Assistant Director Biology has proved Exts. PW-22/B and PW-22/C.

26. PW-28 Navjeet Singh Sangwan deposed that he was requested by SP Mandi to issue Call Detail Report with respect to mobile number 86796-00117 which was Ext. PW-28/A. He also gave Call Detail Report of mobile No. 86797-70735 as Ext. PW-28/B. Mobile No. 86796-00117 belonged to Sandhya Devi. Mobile No. 86797-70735 belonged to Naresh Kumar. In his cross-examination, he has admitted that he has not brought any record with him. Volunteered that he was not asked to do so. He admitted that Ext. PW-28/C does not bear any stamp nor it was attested. Volunteered that it was computer generated print out. Alongwith Ext. PW-28/C, nothing was attached showing address proof of the persons holding these mobile numbers. He has not brought any proof showing that aforementioned SIM cards were issued to the persons mentioned above.

27. PW-29 Dr. Ranesh has conducted the post mortem examination. He observed that body was of an adult male of average stout built naked upto middle of legs, legs tied with Galicha with brown periphery and blue and black colour in middle and knot on the *Galicha* in front of right ankle joint. Probable duration between death and post mortem was 12-36 hours. Viscera was preserved. Death was a combined result of head trauma and *hypovolemic* shock. Report showed alcohol level of 111.52 mg%. Post-mortem report is Ext. PW-29/B.

28. PW-30 Balak Ram deposed that on 20.2.2012, police visited the spot. Room of the *Dhaba* owned by one lady was sealed in his presence. On the next day, a team of RFSL Gutkar visited the spot.

29. PW-35 Ganpat Ram deposed that he was an agriculturist by profession he owned truck bearing No. HP-24A-7873. He has engaged Raj Kumar as driver for the last 3 years. On 18.2.2012, he and Raj Kumar had gone to workshop of Sukh Ram at Kallar. They met Sukh Ram and he asked them to bring vehicle to the workshop. A phone call was received by Raj Kumar to bring vegetables. They purchased vegetable and went in truck towards Kallar. They stopped the vehicle. They had gone to nearby *Dhaba*. Raj Kumar and he slept in the truck. In his cross-examination, he has admitted that he did not show log book of the vehicle as well as register.

30. PW-36 Vikrant Sharma deposed that he and Dinesh Kumar accompanied Sahil to Dehar. They firstly went to Police Post. From there they went to river bed where Alto Car was taken out. Dead body had already been taken out by the side of the river.

31. PW-39 Raj Kumar testified that on 18.2.2012 he alongwith Ganpat was going towards Kallar for the repair of the vehicle No. HP-24A-7873 at the workshop of Sukh Ram. During evening at Bilaspur he had received a call from Ashok Kumar who had asked him to bring vegetables. Ashok had worked with him as a Cleaner for three months. They had firstly gone to workshop. They were told by the mechanic that the vehicle would be repaired the next day in the morning. He asked him to park the vehicle near his workshop. He and Ganpat then had gone to Ashok *Dhaba* to deliver the vegetables he delivered the vegetables to Ashok Kumar. Sunita Chandel was also present there. He sat in the *Dhaba* for about 5 minutes when Suresh asked him to come to his room down below. Suresh had disclosed to him that Sunita and Ashok had been harassing him and had been asking to take a separate room. Ashok and Sunita also came in the room. Sunita was talking to some one on telephone and was asking to come soon. Ashok had sent Anil to bring beer. He took beer. Ashok also took beer. Then they heard a noise coming from the room of Ashok. They all went to that room, he also followed them. He saw a quarrel taking place there with a man having beard. He could not make out who was beating whom. He left the spot and went to the workshop. Ganpat was already sitting in the vehicle. They both stayed in the vehicle during night. His statement was recorded on 12.3.2012 vide Ext. PW-38/A by the Judicial Magistrate at Sundernagar. He signed the same. In his cross-examination, he has admitted that he remained in the police station for one hour. He had told the police that he would disclose the facts only before the Magistrate. He was then taken to the Court. It took 10 to 15 minutes in the Court. The Magistrate was sitting in the Court and the Court work was going on. He did not know how many cases were called during that time. He remained standing in the Court. His statement was recorded under the dictation of the Magistrate. The workshop of Sukh Ram at Kallar is towards Bilaspur at a distance of half a kilometre. He made a statement that he alongwith Ganpat had gone to Ashok *Dhaba* (confronted with his statement Ext. PW-38/A, wherein name of Ganpat was not recorded). Only Suresh had taken him to his room. Ashok remained present in the *Dhaba* upstairs. Suresh also took beer. It took them 5 to 7 minutes to finish one bottle of beer. When they were taking beer,

Sunita was not in the room. She came afterwards. He advised Suresh Kumar to leave the room and make alternative arrangements. Sunita kept standing near the door of room. She did not enter inside the room. A man with beard was sitting in the room of Sunita (confronted with his statement Ext. PW-38/A, wherein it is not so recorded). He heard cries of Sunita. He admitted that on hearing cries of Sunita, he, Suresh and Ashok Kumar had gone to the room of Sunita. He also admitted that a number of drivers and cleaners were also present in the *Dhaba* to have meals. He admitted that Sunita was speaking loudly that the man with beard was molesting her. He also admitted that all the persons firstly had dragged the man out of room of Sunita and then assaulted him with fist and kick blows and shoes. He did not know where that man had gone thereafter. He fled from the spot. He has admitted the suggestion that he had given statement before the Magistrate at Sundernagar as desired by the police. He admitted that on 18.2.2012, he was not having mobile phone with him. He received phone call on the mobile of his uncle Ganpat to bring vegetables. He did not disclose this fact either to the police or to the Magistrate. He did not know how many workers were there at Ashok *Dhaba* on 18.2.2012. Except Ashok, he did not recognize any other worker. In his re-examination he admitted that he did not disclose before the Magistrate regarding hue and cry being raised by Sunita Chandel. Volunteered that he was never asked to. He had never disclosed to the Magistrate that Sunita Chandel was being molested by the man with a beard.

32. PW-39 Inspector Jagdish Chand deposed that on 19.2.2012, he received an information from Incharge Police Post Dehar that a car had been seen floating in Sutlej river. He visited the spot and found the car lying in the river. Car was dragged to the bank of the river. It was bearing registration No. HP-69A-4444. Car was found to be of Manjeet Singh. Family members were informed. Sahil, Surjeet and Vikrant had come on the spot. Inside the car, a dead body was found with legs tied with bed sheet. Sahil identified the body to be of his father Manjeet Singh. His statement under Section 154 CrPC was recorded vide Ext PW-18/A. Photographs Ext. PW-39/A-1 to Ext. PW-39/A-18 were clicked. Clothes of the deceased were taken into possession on the next day i.e. 20.2.2012. On 25.2.2012, accused Anil and Naresh had identified the spot at Dehar from where they had thrown the vehicle down alongwith the dead body of deceased. Memo Ext. PW-39/E in this regard was prepared. Both the accused made disclosure statements Ext. PW-8/A and Ext. PW-8/B. Disclosure statement of Anil Kumar was recorded, pursuant to which his pants were recovered. Sunita also produced gas cylinder Ext. P18. On 27.2.2012, during interrogation, accused Naresh Kumar disclosed that currency notes of Rs.3,000/- were found in the dash board of the vehicle No. HP-69A-4444. He disclosed that five currency notes of the denomination Rs.500/- each to the tune of Rs.2500/- and five currency notes of the denomination of Rs.100 to the tune of Rs.500/- each were there. Out of this amount, Rs.500/- were paid by accused Naresh Kumar at the petrol pump. On 29.2.2012 accused Bhaskar Chandel during investigation had produced his pants Ext. P-9 and shirt Ext. P-10 which were stated to have been worn by him on the day of occurrence. These were taken into possession vide Ext. PW-4/B. Statement of Raj Kumar was recorded under Section 164 CrPC vide Ext. PW-38/A on 7.3.2012. In his cross-examination, he has admitted that he did not know the time when he received information. Thereafter he deposed that he received information at 5.30 PM. He also admitted in the cross-examination that in the first storey of the *Dhaba*, accused Sunita and her family members resided. He also admitted that deceased Manjeet Singh was present alone in the room of Sunita. Volunteered that he was there for some time and had been called there. He did not carry out any investigation why deceased used to come there. He could not narrate since when the deceased was coming there and what was their relation. He admitted that it had come in the investigation that Sunita had given beatings to Manjeet Singh.

33. PW-41 Anish Garg deposed that on 7.3.2012, he recorded the statement of Raj Kumar under Section 164 CrPC. Raj Kumar was given time for reflection and his statement was recorded as per his version on 12.3.2012. It was read over to him. He, after admitting the same to be correct, appended his signatures on both the sheets, in red circle.

34. Case of the prosecution, precisely, is that the deceased Manjeet was a visitor to the *Dhaba* of Sunita Chandel. Accused Naresh Kumar @ Ashok Kumar, Anil Kumar and Suresh Kumar were the workers at *Dhaba* owned by Sunita. Sunita alongwith other accused made a plan to teach a lesson to Manjeet. Sunita called Manjeet to bring a gas cylinder to her *Dhaba*. Manjeet Singh borrowed a gas cylinder from Ateh Mohd. on 18.2.2012. He reached the *Dhaba* at Kallar at around 6/6.30 PM in his vehicle. Manjeet went to the *Dhaba* and had gone downwards through the stairs to the bed room of Sunita Chandel. At that time, Sunita was alone in her bed room. On seeing Manjeet Singh going into the bed room of accused Sunita Chandel, other accused namely Naresh @ Ashok Kumar, Suresh Kumar and Anil Kumar also went into the room and they all assaulted Manjeet Singh with fist and kick blows. Manjeet Singh at that time was drunk so he was unable to defend himself. Due to the beatings of accused, Manjeet Singh died on the spot itself. It is the further case of the prosecution that thereafter the deceased was taken in his car to Dehar and car alongwith body was pushed down the river. Car was recovered. It was identified by the son of the deceased namely Sahil (PW-18). Post-mortem examination was got conducted.

35. The motive attributed to the accused is that they did not like the visits of deceased Manjeet Singh to Ashok Dhaba owned by Sunita Chandel. According to the prosecution, Naresh Kumar @ Ashok, Anil Kumar and Suresh Kumar, who were working in the Dhaba did not like the visits of Manjeet. These persons, who were merely working in the Dhaba, owned by Sunita Chandel, could not be disturbed by the visits of Manjeet. Version of the prosecution, that the accused alongwith Sunita Chandel made a plan to invite Manjeet Singh under the pretext of bringing a gas cylinder to Ashok Dhaba to teach him a lesson, is not believable. The only person who could be disturbed by the presence of Manjeet Singh was the son of Sunita Chandel namely Bhaskar Chandel. However, it is not the case of the prosecution that he did not like the visits of Manjeet Singh. The defence put up by the accused is that the deceased entered the room of Sunita who was alone in the bed room and tried to outrage her modesty. She raised alarm and workmen came down and gave fist and kick blows to the deceased. Prosecution has not proved the case against the accused beyond reasonable shadow of doubt. The accused, on the other hand, have only to probablise their defence. According to the prosecution, there were two eye-witnesses to the incident viz. PW-10 Indu Chandel and PW-38 Raj Kumar. PW-10 Indu Chandel was a student of 10+2 class. She was declared hostile and was cross-examined by the learned Public Prosecutor. In her cross-examination by the learned Public Prosecutor, she stated that the person with beard molested her mother. Her mother slapped the said person. She also raised hue and cry. Workers came down. In her cross-examination by the defence counsel, she admitted that a large number of people used to park their vehicles outside the Dhaba and used to take meals in the Dhaba. She also admitted that on that day, she was sleeping in her room. She got up at 9.30 PM. She admitted that when she came out of her room she found one person was outraging the modesty of her mother. She admitted that said person was trying to pull the string of the *Salwar* of her mother. She also admitted that her mother was resisting the attack and raised alarm. Workers came down alongwith other persons and gathered there. They gave fist and kick blows to the person who was dragged out of the room. He was given beatings outside the room by these persons. Thereafter, she went to her room and bolted the door. After half an hour, when there was no noise, her mother came to her room and disclosed the incident to her and told that said person was trying to outrage her modesty. PW-38 Raj Kumar, in his examination-in-chief testified that he saw a quarrel taking place

there with a man having a beard. He could not make out who was giving beatings to whom. He had seen a shoe being used as a weapon. He fled from the spot. He then started the vehicle and took the vehicle to the workshop. Ganpat was already sitting in the vehicle. They both stayed in the vehicle during the night. Ashok thereafter contacted him. His statement was recorded on 12.3.2012. He has admitted specifically in the cross-examination that he had given statement before the Magistrate at Sundernagar as desired by the police. He ran away from the spot. Thus, the presence of PW-38 Raj Kumar on the spot is doubtful. According to prosecution, PW-35 Ganpat Ram, was the owner of truck whereas Raj Kumar was his driver. They wanted to get the truck repaired. Mechanic said that the same would be repaired on the next day. Thereafter, Ashok Kumar asked them to bring vegetables. PW-35 Ganpat Ram, stated that they went to Kallar. They had parked their vehicle at some distance from the Dhaba. Raj Kumar went inside the Dhaba. He kept sitting in the truck for about half an hour. He contacted Raj Kumar on phone. He then came to the vehicle after 5/7 minutes. If Raj Kumar and Ganpat Ram had gone together, both of them should have gone to the Dhaba to deliver the vegetables. There was no purpose for PW-35 Ganpat Ram to sit in the truck that too for half an hour alone. PW-35 Ganpat Ram deposed that he has deployed Raj Kumar as his driver. He has not produced any record that Raj Kumar was engaged by him as a driver. He has admitted in his cross-examination that they keep records qua payments made to the drivers and cleaners. He has not shown any log book and record of wages of the driver and cleaner. He could not produce the bills qua the repair of the truck on 19.2.2012.

36. PW-38 Raj Kumar, in his cross-examination, has admitted that Sunita was standing near the door of the room. She did not enter the room. The man with a beard was sitting in the room of Sunita (confronted with his statement Ext. PW-38/A, wherein it is not so recorded). He heard the cries of Sunita. He admitted that on hearing cries of Sunita, he, Suresh and Ashok Kumar had gone towards her room. He also admitted that a number of drivers and cleaners were also present there. He admitted that the people had come down towards the room of Sunita. He admitted that Sunita was speaking loudly that the man with the beard was molesting her. He admitted that the persons present there dragged the person out of room and then assaulted him with fist and kick blows.

37. PW-29 Dr. Ranesh has conducted post mortem. According to him, probable duration between death and post mortem examination was 12-36 hours. Deceased died due to head trauma and *hypovolemic* shock. Chemical report showed alcohol level of 111.52 mg% in the blood sample of the deceased. It is also probable that the deceased under the influence of liquor had gone to the *Dhaba* of Sunita Chandel and has tried to outrage her modesty finding her all alone in the room. Sunita Chandel raised alarm. Workers of the *Dhaba* came down and gave beatings to the deceased. Prosecution case is also that the accused put dead body of deceased Manjeet in his own car and car was rolled down the river Sutlej. Thereafter, Suresh Kumar contacted PW-16 Sanjay Kumar to bring his taxi. He, Suresh Kumar and Anil Kumar thereafter in the taxi went back to Kallar. However, PW-16 Sanjay Kumar deposed that he did not know accused Suresh Kumar. He is not related to him. Nothing has happened in his presence. In his cross-examination, he had denied the suggestion that on the intervening night of 18 and 19.2.2012 a call came on his mobile from mobile No. 86796-00117 of Suresh. He denied that Ashok had talked to him. He denied that they told that they were on road near Barmana and asked him to take them to Kallar. He denied that thereafter, he went to Barmana and Anil and Suresh met him. He denied that they came to Bilaspur via Chandpur and filled petrol of Rs.500/- and bill was paid by Ashok Kumar who was sitting in front seat of the vehicle. PW-17 Pankaj Kumar was examined to prove that accused had paid Rs.500/- at the petrol pump. He deposed that one vehicle bearing registration No. HP-01B-0617 came at about 3/3.30 AM at the petrol pump

for filling petrol. Petrol for an amount of Rs.500/- was filled and money was paid by the driver. He did not know how many persons were sitting in the vehicle. He did not identity them. He could not even identify them in the Court. In his cross-examination, he denied the suggestion that he has disclosed to the police that two other persons were sitting in the vehicle besides driver. He could not identify the accused Ashok Kumar. In the cross-examination by the learned defence counsel, he admitted that he did not know by whom payment of petrol was made and how much fuel was filled and in which vehicle. He admitted that bill is necessarily issued after filling the fuel. He also admitted that entry is made in the register about filling of fuel. He admitted that police came to him and asked him that he had to state about filling of petrol by the aforesaid vehicle. He did not know in fact if the said vehicle came to the petrol pump at night or not. He also admitted that he named the accused persons at the instance of the police.

38. Now, as far as the recovery of gas cylinder is concerned, PW-14 Sher Ali deposed that the deceased contacted him to supply one gas cylinder. He stated that he was having only one cylinder. PW-15 Ateh Mohd. deposed that the deceased came to him in his car and he demanded cylinder from him. He handed over to him one gas cylinder. In his cross-examination, he admitted that whenever gas cylinder is supplied, entry of the same is made in the consumer copy by the gas agency. According to him, he has handed over gas cylinder in good faith. He also admitted that Sher Ali was his good friend. Manjeet was his customer. He did not remember the date on which he got the gas cylinder refilled. He did not know the gas cylinder used to be numbered. He was unable to read the number of gas cylinder due to weak eye sight. He admitted that customer number is recorded in the record. PW-39 Inspector Jagdish Chand in his cross-examination admitted that he has not made verification qua cylinder Ext. P18 as to whom it was issued by the gas agency. No recovery of Rs.3,000/- alleged to have been found in the dash board of the vehicle, was made.

39. The Call Detail Report, Exts. PW-28/A, PW-28/B and PW-28/C have not been proved in accordance with Section 65B of the Indian Evidence Act. A certificate is required to be issued under Sub-section 4 of Section 65B identifying the electronic record containing the statement and describing the manner in which it was produced, giving such particulars of any device involved in the production of that electronic record as may be appropriate for the propose of showing that the electronic record was produced by a computer, dealing with any of the mattes to which the conditions mentioned in sub-section (2) relate. Certificate is required to be signed by a person occupying responsible official position in relation to the operation of the relevant device on the management of the relevant activities. Exts. PW-28/A, PW-28/B and PW-28/C have not been proved in accordance with Section 65B of the Indian Evidence Act. There is no certificate given by the competent authority that the computer from which these Call Detail Reports were obtained, was working in order.

40. The prosecution has also failed to prove its case against the accused that they tried to destroy the evidence on the spot. Room from where case property was recovered, was not sealed immediately and it was sealed only on 20.2.2012. Thus, the possibility of other people entering the room in a milieu can not be ruled out. It is also not believable that the accused were wearing same clothes which they wore at the time of incident and at the time of recovery. Common sense view is that they were supposed to change the clothes. Now, so far as plea of the prosecution that accused have tried to throw dead body alongwith vehicle in Sutlej is concerned, said version has not been supported by Sanjay Kumar (PW-16) and Pankaj Kumar (PW-17).

41. PW-39 Jagdish deposed that legs were tied with bed sheet. PW-9 ASI Gulab deposed that the legs of dead body were tied with a bed sheet. PW-18 Sahil also deposed

that the legs were tied with bed sheet. However, PW-29 Dr. Ranesh Kumar deposed that legs were tied with Galicha, with brown periphery and blue and black colour in the middle.

42. Statement of accused Sunita was recorded under Section 313 CrPC. She stated in an answer to question No. 99 that a person of well built having beard came into her room during the night time and sat on her bed where she was resting alone and started molesting her by pressing her breast and thereafter tried to pull the string of her Salwar with an intention to rape her and in order to rescue herself, she gave a slap on his face. She also raised alarm. On her shrieks, workmen who were working in the hotel and on the top floor also came downward alongwith numerous persons who were taking meals at that time. Accused in their statements under Section 313 CrPC, have stated that they heard crises of Sunita Chandel and went to her room where people were giving beatings to some unknown person. They rescued her from his clutches by giving him fist and kick blows and dragged him outside the room. After some time, she also came out of room, no person was there except her daughter. PW-39 Jagdish in his cross-examination admitted that deceased Manjeet was alone in the room of Sunita. Volunteered that he was there for some time and had been called. He also admitted that during the course of investigation, it transpired that Indu Chandel was present in the adjoining room. It has come on record, in his statement that during the investigation, Sunita had given beatings to Manjeet Singh.

43. Learned Advocates appearing for the accused have vehemently argued that the deceased was beaten up by the accused to protect the honour of Sunita Chandel. Accused have not denied their presence in the *Dhaba*. We have already discussed that the deceased has entered the room of Sunita Chandel when she was all alone and tried to outrage her modesty. This act was seen by PW-10 Indu. Sunita Chandel raised alarm, accused came down and gave beatings to the deceased to save her from the clutches of deceased, who was trying to rape Sunita Chandel. Accused has entered the room of Sunita Chandel under the influence of liquor. The alcohol content in the blood of the deceased was found 111.52 mg%.

44. In this case, accused have not acceded their right to private defence while saving Sunita Chandel from the deceased, who entered her room, fondled with her breasts and tried to open the string of her *Salwar*. According to plain reading of Section 100 IPC, the right of private defence of body extends, under the restrictions mentioned under Section 99 of the Indian Penal Code to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions enumerated there under, including assault with the intention to commit rape.

45. Their Lordships of the Hon'ble Supreme Court in **Yeshwant Rao v. State of Madhya Pradesh** reported in AIR 1992 SC 1683 have held that in a case where accused assaulted victim on seeing his minor daughter being sexually molested by victim right of private defence is extendable to such case. Fact whether sexual intercourse was with or without consent of daughter was not material. Fact whether the cause of subsequent death of victim was internal injury due to fall or result of blow by accused is also not material. Their lordships have held as under:

> 9. It will be noticed that before the Sessions Judge the appellant had pleaded the right of private defence also but the Sessions Judge after noticing that the assault was an act of sudden and grave provocation did not pursue the matter further. It appears to us that it is a case where the right of private defence arises and the case is fully covered by Sections 96, 97 read with Section 100 of the Indian Penal Code. Whether it was a case of sexual intercourse with consent or without consent the fact remains that according to the case of the prosecution Chhaya was of 15 years of age

and, therefore, the act of Lakhan Singh, deceased, would amount to rape within the meaning of Section 375 Clause (6) of the Indian Penal Code. The Panchanama Ext. P-4 shows that the attempt of rape or actual sexual intercourse was not fully complete and it is in that state of affairs that the appellant is alleged to have assaulted the deceased with spade on his head. As per the medical evidence the cause of death is not by spade but it was due to the rupture of the liver which could be either by fall on hard object, as the appellant stated that the deceased tried to run away but hit against the wall and fell on the ground or it could be as a result of blow given by the appellant. The fact remains that the right of private defence is extendable to the facts of the present case when the daughter of the appellant was being sexually molested. It appears that this part of the case of the appellant was not brought to the notice of the High Court. The judgment of the High Court mainly deals with the prosecution case only. The right of private defence is fully applicable to the facts of the present case. We thus find that the appellant is entitled to acquittal. We would accordingly hold the appellant not guilty of the offence Under Section 325, I.P.C. as well. The result is that the appeal is allowed and the conviction and sentence of the appellant is set aside.

46. Their Lordships of the Hon'ble Supreme Court in **Raghavan Achari and Njoonjappan vs. State of Kerala** reported in AIR 1993 SC 203 have held that when accused found deceased in compromising position with his wife and deceased causing multiple injuries including grievous injury to accused, accused thereafter using chopper and causing death of deceased, accused thus cannot be said to have exceeded his right of private defence and thus was entitled to acquittal. Their Lordships have held as under:

> 8. We have already noticed the injuries received by the appellant vide Ext. P. 7 as well as those confirmed at the time of discharge, Ext. P. 13. There can be no doubt also that the compromising position in which the appellant found the deceased with his wife it gave the appellant the grave and sudden provocation. This provocation was further aggravated when the appellant found the deceased taking further offence of causing grievous injury of the nature referred earlier to him and in the circumstances the right as envisaged under Section 100 became available to the appellant. No court expects the citizens not to defend themselves particularly when they have already suffered grievous injuries. It is clear that though the appellant has a chopper in his hand he did not initially use it against the deceased and it was only when the deceased succeeded in using the oil lamp, which is described as dangerous weapon by the High Court, which caused multiple injuries including grievous injury, that the appellant's provocation got further aggravated and it cannot be said on the facts and circumstances of the case that the appellant has exceeded his right of private defence.
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> 9. The result is that the appeal is allowed and the conviction and sentence of the appellant are set aside and he is acquitted.

47. A Division Bench of the Orissa High Court in **State of Orissa v. Nirupama Panda**, reported in 1989 Crl. LJ 621 has held that when accused stabbed deceased person as he outraged her modesty, she was entitled to acquittal. The Division Bench has held as under:

> 8. Along with the evidence of dying declaration it is necessary to consider the statements made by the respondent before P.W. 10, For this purpose, it is necessary to make a further reference to his evidence where he stated that after hearing from the deceased about the cause of the chest wound, the witness found the respondent standing on the verandah of Bansidhar Das and enquired from her. The respondent

told him that she stabbed the deceased, because he outraged her modesty (Atyachar). The above statement of the respondent was inculpatory in part and exclupatory in the other part. But considered as a whole, it did not tantamount to an extrajudicial confession for the reason that she had justified her action of stabbing the deceased in exercise of her right of private defence. Even if the statement is received as a piece of extrajudicial confession because of its inculpatory part, yet on the basis thereof and on consideration of the exculpatory part, it cannot be used as an incriminating piece of evidence against her, because she had every right to save her honour even by causing the death of the person who either committed rape on her or attempted to commit the same. The above being the position, the statement made by the respondent on the query of P. W. 10 instead of supporting the prosecution actually worked as a defence which was quite acceptable.

10. The evidence of P. W. 4 discloses that the respondent was married, but after her widowhood she led an immoral life by living as a mistres of Bansidhar Das. Even though for the sake of argument it is accepted that she was the mistress of Bansidhar Das, yet she was within her rights to save her honour from a rapist. Even a whore is entitled under law to protect herself from attacks of an intending rapist. Therefore, immoral character of the respondent, even if it is true, is of little consequence.

48. A Division Bench of the Rajasthan High Court in **Badan Nath vs. State of Rajasthan** reported in 1999 Cr. LJ 2268 has held that the deceased is alleged to have taken opportunity of absence of mother of prosecutrix and after alluring the accused/appellant to consume liquor made an attempt to commit rape upon daughter of accused, who was pregnant. Accused in anger stabbed deceased with sword lying in the room. Accused was entitled to benefit of right of private defence of person of his daughter. The Division Bench has held as under:

13. The circumstances of the instant case do indicate that during the night of occurrence, deceased Arjun Singh's wife namely Nand Kanwar (PW 3) was not in his house. She along with her mother-in-law had gone to Kumadu Kura and returned to home on the next day after getting information from a messenger. It is noticed from the statement of DW 1 Smt. Kusum that during the night of occurrence her mother was also not present in accused appellant Badan Nath's house. Only DW 1 Smt. Kusum, accused appellant Badan Nath, her younger brother and sister were present. From the aforesaid circumstantial evidence it can be inferred that deceased, taking the opportunity of absence of her mother, after alluring accused-appellant Badan Nath to consume liquor, made an attempt to commit rape upon DW 1 Smt. Kusum who was pregnant. It is established from the statement of PW 4 Smt. Guddi that DW 1 was in advance pregnancy and she gave birth to a child after one or one month and a half following the date of occurrence. It is admitted by PW 4 Smt. Guddi that on the date of occurrence DW 1 was sleeping in the first floor of her home along with her sister who was about 9 or 10 years old. It is highly probable that as she was in advance pregnancy, she resisted the sexual intercourse with deceased and this resistance caused reasonable apprehension in the mind of accused appellant Badan Nath who reached on the spot and found deceased Arjun Nath, under the influence of liquor, was making attempt to commit rape upon his daughter and so he, in anger, stabbed to the deceased from the sword lying in the room.

14. There is yet another reason to arrive at the aforesaid conclusion. We are of the opinion that it is not necessary that every part of the evidence of the victim Smt. Kusum (DW 1) should be confirmed in the minutest details by independent evidence. Such corroboration can be sought either from direct evidence or from circumstantial

evidence or from both. The circumstantial evidence on record leads towards an irresistible conclusion that blood was found on the bed where DW 1 Smt. Kusum was sleeping at the night of occurrence. The Investigating Officer has taken pieces of plastic niwar of the bed in his possession which are proved to be soaked with blood on which victim Smt. Kusum (DW 1) was sleeping at the night of occurrence. The trail of blood stains were found on the upstairs and on the wall leading to the room where Smt. Kusum (DW 1) was sleeping. However, no blood was found on the boundary wall of accused appellant embedded with glasses and in the Courtyard where the deceased is alleged to have jumped in the house of accused appellant. The aforesaid fact is fully established from the statement of PW 12 Madan Nath Son of Kishore Nath who, soon after the incident, saw the place of occurrence and found blood on the plastic niwar of bed of DW 1, he also found blood stains on the upstairs of the wall leading to the room of DW 1 where she was sleeping but found absence of blood on the wall of accused appellant embedded with glasses and in the Courtyard. The statement of PW 12 inspires our confidence and it is held that deceased Arjun Singh did go to the room of DW 1 Smt. Kusum on the first floor of house of accused appellant where she was sleeping. The existence of blood on the plastic niwar of the bed where DW 1 was sleeping and blood stains on the upstairs and on the wall leading to the room leads towards a strong inference that DW l is a truthful witness and deceased Arjun Singh did make attempt to commit rape with DW 1 against her will. In such a situation within the meaning of Section 100, IPC the right of private defence of accused appellant extends to causing death of deceased Arjun Singh.

15. Another strong reason attributable to arrive at the aforesaid conclusion is that in the Indian Society refusal to act by the Courts on the testimonial value of a victim of sexual assault in absence of any corroboration as a rule tantamounts adding insult to injury. We are of the opinion that woman in tradition-bound, impermissible Indian Society would be extremely reluctant even to admit that any incident which is likely to reflect on her chastity has been committed by anyone. In the case on hand we are of the view that DW 1 must be deemed to be conscious of the danger being ostracized by the Society including by her husband, her own family members, relatives and neighbours. The statement of DW 1 Smt. Kusum who alleged herself to be victim of sex offence deserves to be given a great weight in the facts and circumstances of the present case as discussed here in above. To our mind the probabilities factor taken into account by the learned Sessions Judge does not render the sworn testimony of DW 1 unworthy of credence. DW 1 Smt. Kusum is put to a searching cross-examination by Public Prosecutor but nothing has been brought to our notice which may lead to discredit her sworn testimony.

16. Looking into the facts and circumstances of the present case we are of the view that the accused appellant deserves to be given benefit of right of private defence of person of his daughter Smt. Kusum (DW 1) as envisaged under Section 100, IPC wherein it is provided that the right of private defence of body extends, under the restrictions mentioned under Section 99 of the Indian Penal Code to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions enumerated there under. The case on hand squarely falls under Clause (3) of Section 100 which clearly provides that an assault with the intention of committing rape gives right of private defence which extends up to causing of death. In the present case, deceased Arjun Singh gave an assault with intention to commit rape with DW 1 Smt. Kusum who is daughter of accused appellant Badan Nath, therefore, in such a situation he is entitled to be given benefit of right of private defence of person of his daughter Smt.

Kusum (DW 1) as envisaged under Clause (3) of Section 100, IPC and an argument contrary to it advanced by learned Public Prosecutor is not acceptable to us.

49. In the instant case also, the plea taken by the defence is that deceased tried to outrage modesty of Sunita Chandel. She raised alarm. Accused came down and gave beatings to the deceased. In this case, accused can be said to have exercised their right of private defence by giving beatings to the deceased person to save the modesty of Sunita Chandel.

50. A learned Single Judge of the Rajasthan High Court in **Bhadar Ram vs. State of Rajasthan** reported in 2000 Cr. LJ 1174 has held that the accused on hearing his widowed sister-in-law's cry for help rushed to her house with *Gandasa*, her house was found open by accused and injured was found grappling with her and trying to outrage her modesty, accused saved his sister-in-law from clutches of injured and inflicted *Gandasa* blow while injured was running away. Act of accused can be said to be in exercise of right of private defence and accused was entitled to acquittal. The learned Single Judge has held as under:

> 15. Accused appellant admitted even under Section 313, Cr.P.C. thatatabout 10-11 P.M. his sister-in-law Mohra cried to save her. He rushed to her house and found that the door of her house was opened and appellant was grappling with her. The appellant assaulted on Nand Ram and inflicted gandasi blow which he had taken when going to the house of Mohra. Then Nand Ram ran away from where. Smt. Mohra was examined in defence by the appellant. She stated that she was asleep in the courtyard of her house. It has small boundary wall. At about 10-11 P.M. Nand Ram grappled her body, she woke up and started crying. Then Bhadar Ram, whose house is adjacent, came armed with a gandasi, Nand Ram left her. He was chased by Bhadar Ram and two injuries were inflicted by Bhadar Ram on Nand Ram infront of her. She admitted that Nand Ram was a married person and it was submitted by the prosecution that Nand Ram, being a married man, could not have indulged in this activity. He is not right. Nand Ram as told by him as PW-4 is aged about 40 years. Mohra is a widow aged about 30-35 years and it was possible that Nand Ram could have gone there in order to outrage her modesty for attempt to commit rape. It is not always correct to say that a married man could not indulge in such activity. She stated that blood was found outside her house when police came in the morning. She stated that her father-in-law is a blind man and she told the story of her woe to the Sarpanch named as Girdhari. No report could be lodged because her father-in-law was a blind man and the Sarpanch did not help her. Ordinarily Mohra who is a widow lady would not involve her honour in order to save appellant in case defence was not true. The learned Sessions Judge did consider the defence but was of the view that since right of defence was a right subject to restrictions indicated in Section 99 of IPC and one of the conditions is that harm indicated in self defence must be no more than is legitimately necessary for the purpose of defence and since the appellant exceeded his right, he was punished. Learned Sessions Judge relied on AIR 1974 SC 1550 : 1974 Cri LJ 1015, On karnathSingh v. The State of U.P., the facts of which were completely different than the facts of the present case. In that case on the day of occurrence when Deep Narain returned home Girja Singh complained to him how Onkarnath had beaten him without any rhyme and reason. Deep Narain Singh assured him that he would censure and correct Onkarnath. When Jagdish Narain reached home Deep Narain told him how Onkamaih had beaten Girja Singh at about noon. Thereafter the two brothers Narain and Deep Narain proceeded together to their cotton field. When they were coming back from the field, they met Onkarnath and Chhabi Nath. Deep Narain asked Onkarnath as to

why he had beaten Girja Singh. Onkarnath insolently replied that he had done so that he would repeat the feat and would see what Deep Narain could do. A scuffle ensued. Both the parties then proceeded to their respective houses. The deceased and his brother had hardly gone 70-80 paces and reached near the Darwza of Hanuman Prasad, when all the five appellants and Amar Nath Singh came there in a body and surrounded them. Chhabi Nath attempted gandasa blows on the head of Jagdish Narain which the latter warded off on his hands. Vijai Bahadur Singh snatched away the gandasa from Chhabi Nath. The assailants then ran away leaving Deep Narain and Jagdish Narain injured at the spot. The facts in the citation relied by the learned Sessions Judge were quite different. But the principle laid down is that the harm indicated in self defence must be no more than is legitimately necessary for the purpose of defence and the right is conterminous with the commencement and existence of a reasonable apprehension of danger to body from an attempt or a threat to commit the offence. It avails only against a danger, real, present and imminent.

16. Applying this principle itself in this case, I find that there was a real danger to the body of Mohra who at the dead hour of night was grappled by Nand Ram in order to outrage her modesty for committing rape. She is a widow lady, nobody to help as her father-in-law was a blind man. She came later on, made complaints to Sarpanch about the incident who did not pay any heed. It was appellant who after hearing her noise and whose duty as her deceased husband's younger brother was to save her, came after hearing her hue and cry. He was a young boy of 23-24 years of age. He saved her from the clutches of Nand Ram and assaulted him with gandasi when he was running. It cannot be said that it was done in excess of right as a right of reprisal for punishment. Appellant saw Nand Ram grappling with his widow sister-in-law, was enraged because of grave and sudden provocation. He came prepared having a gandasi in his hand when he heard hue and cry of his sister-in-law at the time of dead hour of night on his part. Had he a firearm with himself he could have come with a firearm and could have shot at Nand Ram seeing that Nand Ram was grappling with his widow sister-in-law at that dead hour of night. To say that it was not in a right exercised in defence then what else could be. Section 100 of IPC gives a right of private defence of the body to the extent of causing death when an assault is made with an intention of committing rape. Accused appellant had seen Nand Ram grappling with his sister-in-law and he has probabilised the defence. I am of the view that he had a right of private defence in assaulting Nand Ram. Reference may be made to Salikram v. State, (1990) 1 Crimes 630 (Madh Pra). In this case accused was entitled to right of private defence under Section 100 (thirdly) IPC and consequently entitled for acquittal.

9. It will be noticed that before the Sessions Judge the appellant had pleaded the right of private defence also but the Sessions Judge after noticing that the assault was an act of sudden and grave provocation

51. Accordingly, all the appeals are allowed. Judgment/Order of conviction dated 22.12.2014/24.12.2014 rendered by the learned Additional Sessions Judge, Ghumarwin camp at Bilaspur in Sessions Trial No. 14/7 of 2012 is set aside. Accused are acquitted of the offence under Sections 302 and 201 read with Section 34 IPC. They are ordered to be released forthwith, if not required in any other case. Fine amount, if any paid by them, be also refunded to them.

52. The Registry is directed to prepare and send the release warrants of all the three accused to the Superintendent of Jail concerned, forthwith.

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

Tilak Raj son of Sh. Zamna Dass ....Revisionist

Versus

Surinder Kumar Minhas S/o Sh. Lachhi Ram Minhas ....Non-revisionist.

Civil Revision No. 70 of 2008
Date of Order 29.4.2016

Code of Civil Procedure, 1908- Order 23 Rule 1- Learned Counsel submitted that parties have entered into compromise and have no objection if orders of the trial Court and First Appellate Court are set aside – in view of this statement, judgment of the trial Court and Appellate Court are set aside.

For revisionist: Mr. Aman Sood, Advocate.
For Non-revisionist: Mr. B.R. Verma, Advocate.

The following order of the Court was delivered:

P.S. Rana, Judge.

Compromise Order: Learned Advocates appearing on behalf of the parties submitted before the Court that compromise has been executed inter-se the parties. Learned Advocate appearing on behalf of the non-revisionist submitted that he has no objection if the order of learned Trial Court and learned First Appellate Court are set aside and application filed under Order 39 Rule 2A CPC is dismissed. Separate statements of learned Advocates recorded and placed on record. In view of the above stated facts order of learned Trial Court announced in CMP No. 110/6 of 2002 dated 19.12.2006 title Surinder Kumar vs. Tilak Raj and order of learned First Appellate Court announced in CMA No. 5-S/14 of 2007 dated 27.3.2008 title Tilak Raj vs. Surinder Kumar Minahas are set aside and application filed under Order 39 rule 2A CPC is dismissed. Statements of learned Advocates recorded today will form part and parcel of the order. Civil Revision No. 70 of 2008 is disposed of. Pending applications if any also disposed of. No order as to costs. File of learned Trial Court and learned First Appellate Court be sent back forthwith along with certified copy of order.

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BEFORE HON'BLE MR. JUSTICE AJAY MOHAN GOEL, J.

Vishwa Nath .....Plaintiff/appellant.

Vs.

State of H.P. and another .....Defendants/respondents.

RSA No.: 177 of 2006
Reserved on : 27.04.2016
Date of Decision: 29.04.2016

Code of Civil Procedure, 1908- Order 6 Rule 17- Plaint was amended during the pendency of suit- however, Appellate Court relied upon the pleadings mentioned in the original plaint rather than those made in the amended plaint- held, that once plaint has been allowed to be amended, unamended portion cannot be taken into consideration and decision can not be made on the basis of unamended pleadings - direction issued to adjudicate the matter on the basis of amended plaint. (Para-17 and 18)

Code of Civil Procedure, 1908- Order 26 Rule 9- A civil suit was filed pleading that plaintiff was owner in possession of the suit land, defendant No. 2 had destroyed the boundary marks and was bent upon to demolish and damage the building of the plaintiff- a local commissioner was appointed during the pendency of the suit- suit was decreed by the trial court- in appeal report was set aside and the suit was dismissed- held, in second appeal that once the report of local commissioner was set aside, it was obligatory to appoint a fresh local commissioner- boundary dispute was raised before the court- once the Court entertained doubt about the correctness of the demarcation given by the Naib Tehsildar, fresh Local Commissioner should have been appointed to demarcate the disputed area- case remanded with the direction to appoint a fresh Local Commissioner. (Para-9 to 11)

Cases referred:

Braham Datt Vs. Prem Chand and others 2000 (1) SLJ 431

Udai Ram and another Vs. Ram Lal, Latest HLJ 2008 (HP) 296

Haryana Waqf Board Vs. Shanti Sarup and Ors. (2008) 8 SCC 671

Jagnarain and others Vs. Radhey Shyam Singh and another AIR 2004 Allahabad 215,

For the appellant : Mr. K.D. Sood, Senior Advocate, with Mr. Rajnish K. Lall, Advocate.

For the respondents : Mr. V.S. Chauhan, Additional Advocate General.

The following judgment of the Court was delivered:

Ajay Mohan Goel, J. :

This appeal has been filed against judgment and decree, dated 01.03.2006, passed by the learned District Judge, Hamirpur in Civil Appeal No. 100 of 2004, titled The State of Himachal Pradesh and another Vs. Vishwa Nath, vide which learned Appellate Court has reversed the judgment and decree, dated 17.04.2004, passed by learned Civil Judge (Senior Division), Hamirpur in Civil Suit No. 438 of 1996, titled as Vishwa Nath Vs. State of H.P. and another.

2. This appeal was admitted on 26.03.2007 on the following substantial question of law:

> *"Whether the first Appellate Court having found that the demarcation was not carried out, as per the instructions, ought not to have decided the appeal on merits, without appointing a fresh Local Commissioner and obtaining his report?"*

3. Facts, in brief, necessary for the adjudication of the case, are that the appellant herein had filed a suit for permanent prohibitory injunction against the respondent/defendant qua the suit land comprising Khata No. 244, Khatoni No. 246, Khasra No. 666, measuring 0.7 Marlas, as per Jamabandi for the year 1995-96 of Tika Bohni, Tappa Ugialta, Tehsil and District Hamirpur, H.P. on the ground that the appellant/plaintiff was the owner in possession of the suit land, on which there was a shop

as well as residential house, construction of which was 80-90 years old. Case of the appellant/plaintiff was that the adjoining land was owned by HP PWD department and the respondent/defendant No. 2 had destroyed the boundary marks and was bent upon to demolish and damage the building. Hence, the suit was filed for permanent prohibitory injunction for restraining the defendants from demolishing the building of the plaintiff or interfering in the suit land and the plaintiff had also prayed for mandatory injunction directing the respondents/defendants to restore the structure if any demolished by them.

4. During the pendency of the suit before the learned lower Court, an application was filed by the plaintiff for amendment of the plaint, which was allowed vide order, dated 16.03.1999. The amendment permitted to be incorporated was with regard to the description of the suit property, i.e. in the original plaint, the plaintiff had stated that he was owner in possession of the land measuring 0.2. Marlas as per Jamabandi for the year 1990-91, which was subsequently amended to the effect that he was owner in possession of the land measuring 0.7 Marlas as per Jamabandi for the year 1995-96.

5. The suit was decreed by the Court of learned Civil Judge (Senior Division), Hamirpur on 17.04.2004 in following terms:

> *"The suit of the plaintiff for permanent prohibitory injunction is hereby decreed to the effect that defendants are hereby restrained from interfering in any manner whatsoever or causing any damage or demolishing the structure i.e. house-cum-shop of plaintiff situated in suit land bearing Khata No. 244, Khatoni No. 246, Khasra No. 666, measuring 0-7 marlas, as per Jamabandi 1995-96, situated in Tika Bohni, Tappa Ugialta, Tehsil and District Hamirpur (H.P.) Parties shall bear their own costs."*

6. Feeling aggrieved, the present respondents filed an appeal, which was allowed by the learned Appellate Court vide judgment, dated 01.03.2006.

7. During the pendency of the case before the learned lower Court, a Local Commissioner was appointed and his report is Ex.-P4. As per the report of the Local Commissioner, the appellant/plaintiff had not encroached upon any land of Public Works Department. This report was relied upon by the learned lower Court in passing the decree in favour of the plaintiff. Objections filed to the said report were also dismissed by the learned lower Court. Ex.-P4 is the report submitted by Naib Tehsildar, Hamirpur. In appeal, learned Appellate Court has observed that the boundary of the suit land with Khasra No. 1112 was required to be determined by the Collector/Assistant Collector under the provisions of the H.P. Land Revenue Act. The learned Appellate Court has further observed that the learned lower Court had proceeded to pass the decree of permanent injunction on the strength of the report of Naib Tehsildar, who had demarcated the suit land under the orders of the lower Court. The learned Appellate Court has held that learned lower Court was wrong in treating the report of Local Commissioner as correct. The learned Appellate Court has further held that the learned lower Court has erred in rejecting the objections filed by the defendants to the said report of the Local Commissioner. Accordingly, the learned Appellate Court came to the conclusion that the plaintiff was found to have encroached upon the highway and the learned lower Court has not rightly appreciated the oral and documentary evidence placed on record and had erred in answering issue No. 1 in favour of the plaintiff. It further came to the conclusion that the suit of the plaintiff was not maintainable and the plaintiff had no cause of action. Accordingly, the appeal was allowed.

8. Feeling aggrieved, the appellant has preferred the present appeal against judgment and decree passed by the learned Appellate Court. As already mentioned above, the appeal has been admitted on the substantial question of law whether the first Appellate

Court having found that the demarcation was not carried out, as per the instructions, ought not to have decided the appeal on merits, without appointing a fresh Local Commissioner and obtaining his report?

9. Mr. K.D. Sood, learned senior counsel representing the appellant has strenuously argued that there was no good and sufficient ground available with the learned Appellate Court to set aside the report of the Local Commissioner when the said report was not challenged by way of an appeal or revision. He has further argued that even if it is assumed for the same of argument that there was any defect in the report of Local Commissioner, then the learned Appellate Court should have had appointed a fresh Local Commissioner to demarcate the property as per the instructions of the Government, since the dispute was boundary dispute and the appellant/plaintiff ought to have been given liberty to have the land demarcated afresh, which aspect has been completely ignored by the Court below. Mr. K.D. Sood, learned senior counsel has further argued that even otherwise the judgment and decree passed by the learned Appellate Court were not sustainable in law as Appellate Court has adjudicated upon the matter by placing reliance on the pleadings as were incorporated in the original plaint, which was unjustified because once the plaint was allowed to be amended, then the pleadings of the amended plaint ought to have been taken into consideration while deciding the appeal.

10. On the other hand, learned Additional Advocate General has argued that there is no infirmity or perversity with the judgment passed by the learned Appellate Court and the said Court has rightly come to the conclusion that the plaintiff was an encroacher and the report of the Local Commissioner was incorrect and could not have been made basis for deciding the case by the learned lower Court.

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

12. In my view, the learned Appellate Court erred in not ordering fresh demarcation of the property by appointing a new Local Commissioner to carry out the necessary demarcation, after coming to the conclusion that the report of the Local Commissioner, Ex.-P4 was incorrect. Appointment of a fresh Local Commissioner would have had advanced the cause of justice.

13. There is no dispute that the issue involved was a boundary dispute. Once the learned Appellate Court entertained doubts about the correctness of the demarcation given by the Naib Tehsildar, then the course that ought to have been adopted by it was to have had appointed a Local Commissioner to demarcate the disputed area, which would have had facilitated the adjudication of the dispute involved. Fresh demarcation would have had facilitated the learned Appellate Court in finding out as to whether there was any encroachment and, if so, what was the extent of the said encroachment. However, rather than adopting this course, the learned Appellate Court proceeded to allow the appeal filed by the present respondents and dismissed the suit. This approach of the learned Appellate Court, in my view, is not only incorrect, but is also not in consonance with the law laid down in this regard by this Court.

14. This Court has held in **Braham Datt** Vs. **Prem Chand and others** 2000 (1) SLJ 431 that once the learned District Judge had entertained doubt about the correctness of the demarcation given by the Tehsildar, he ought to have appointed a Local Commissioner to demarcate the disputed area to find out whether there was any encroachment and if so, to what extent, instead of proceeding to dismiss the suit.

15. This Court has further held in **Udai Ram and another** Vs. **Ram Lal,** Latest HLJ 2008 (HP) 296 that having come to the conclusion that the dispute inter-se between the parties was a boundary dispute, the court ought to have appointed a Local Commissioner to ascertain the dispute.

16. At this stage, it is pertinent to refer to the judgment of the Hon'ble Supreme Court in **Haryana Waqf Board** Vs. **Shanti Sarup and Ors**. (2008) 8 SCC 671, in which case, the Hon'ble Supreme Court has held as under:

> *"4. Admittedly, in this case, an application was filed under Order 26 Rule 9 of the Code of Civil Procedure which was rejected by the trial court but in view of the fact that it was a case of demarcation of the disputed land, it was appropriate for the court to direct the investigation by appointing a Local Commissioner under Order 26 Rule 9 of the CPC.*
>
> *5. The appellate court found that the trial court did not take into consideration the pleadings of the parties when there was no specific denial on the part of the respondents regarding the allegations of unauthorized possession in respect of the suit land by them as per paragraph 3 of the plaint. But the only controversy between the parties was regarding demarcation of the suit land because land of the respondents was adjacent to the suit land and the application for demarcation filed before the trial court was wrongly rejected.*
>
> *6. It is also not in dispute that even before the appellate court, the appellant-Board had filed an application for appointment of a Local Commissioner for demarcation of the suit land. In our view, this aspect of the matter was not at all gone into by the High Court while dismissing the second appeal summarily. The High Court ought to have considered whether in view of the nature of dispute and in the facts of the present case, whether the Local Commissioner should be appointed for the purpose of demarcation in respect of the suit land."*

17. The second contention raised by Mr. K.D. Sood, learned Senior Advocate that the judgment passed by the learned Appellate Court is not sustainable because the learned Appellate Court has relied upon the pleadings made in the original plaint rather than those made in the amended plaint, is also well founded. He has relied upon a judgment passed by the High Court of Allahabad in **Jagnarain and others** Vs. **Radhey Shyam Singh and another** AIR 2004 Allahabad 215, in which it has been held that once plaint has been allowed to be amended, unamended portion cannot be taken into consideration.

18. In my considered view, once the amendment of the plaint was allowed, then for the purpose of adjudication of the case, learned Appellate Court had to rely upon the amended plaint and the adjudication could not have been done on the basis of the unamended plaint. This is for the reason that in case even after amendment having been permitted, a Court adjudicates on the basis of the un-amended pleadings, then the very purpose of allowing the amendment of pleadings is defeated. In my view, once pleadings are amended, then that which stood before amendment, was no longer material.

19. Therefore, in view of the reasonings given above, the present appeal is allowed. Judgment and decree, dated 01.03.2006, passed by the learned Appellate Court, which are under challenge, are set aside and the case is remanded back to the learned Appellate Court to decide the appeal on merits afresh after appointing a Local Commissioner for demarcation of the suit land. The learned Appellate Court is further directed to adjudicate the matter on the basis of amended pleadings. As the Civil Suit was instituted in

the year 1996, this Court hopes and trusts that learned Appellate Court shall decide the case as expeditiously as possible, preferably on or before ***31st October, 2016.*** The parties are directed to put in appearance before the learned Appellate Court through their counsel on ***16th May, 2016***. No order as to costs.

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